Criminal Justice Committee

1st Meeting, 2024 (Session 6), Wednesday 10 January 2024

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

Evidence from the Lord Justice Clerk

4. At today's meeting, as a precursor to taking evidence on the Bill, the Committee will begin by hearing from—

    - **The Right Honourable Lady Dorrian**, Lord Justice Clerk, Senator of the College of Justice

5. A review group, chaired by Lady Dorrian, was established in 2019 to develop proposals for improving the way in which serious sexual offence cases are dealt with. Its report was published in March 2021 – Improving the Management of Sexual Offence Cases.

6. Lady Dorrian's report included various recommendations relevant to provisions in Parts 5 and 6 of the Bill.

7. Lady Dorrian will be giving evidence on the review which she chaired and is not appearing on behalf of the judiciary to answers questions about the Bill. Her session will be focussed on the report of the review group which she chaired. Details of future evidence-taking sessions on the Bill with other witnesses will be announced shortly.

Today's evidence on the Bill

8. Following the evidence session with the Lord Justice Clerk, the Committee will begin taking evidence as part of the third phase of its scrutiny of the Bill itself. This will cover the following provisions in Parts 5 and 6, namely—

9. The Committee's scrutiny of Part 5 and 6 of the Bill will continue until February. Further details of the Committee's phased approach can be found online.

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

- **The Right Honourable Dorothy Bain KC**, Lord Advocate

  and then from—

- **David Fraser**, Executive Director Court Operations, Scottish Courts and Tribunals Service

11. The Crown Office and Procurator Fiscal Service and the Scottish Courts and Tribunals Services both provided submissions to the Committee.

    - Crown Office and Procurator Fiscal Service
    - Scottish Courts and Tribunals Services

12. The relevant sections of their submission covering Parts 5 and 6 of the Bill are reproduced at the Annex.

Further reading

13. A SPICe briefing on the Bill can be found online.

14. The responses to the Committee's call for views on the Bill can be found online.

15. A SPICe analysis of the call for views, covering Parts 5 and 6, is circulated with the committee papers for this week's meeting.

Previous evidence sessions

16. At previous meetings the Committee has taken evidence from a range of witnesses on Parts 1-4 of the Bill.

17. The Official Reports of these meetings can be found online.

Clerks to the Committee
January 2024

ANNEX

Extract from Submission from the Crown Office and Procurator Fiscal Service

Part 5 – Specialist Sexual Offences Court.

46.COPFS is committed to making improvements to our services which will benefit and empower women, improving their experience of the justice system. We are also committed to ensuring that the needs of children in the justice system as victims, witnesses, family members or those accused of crime are fully recognised and met.

47.COPFS is fully supportive of the need to transform the way in which sexual crime is prosecuted in Scotland and note that it will require a determined effort by all of those within the criminal justice system to accept there is a need for change and to engage in a radical re-think of what the rule of law requires. The introduction of the proposed Specialist Sexual Offences Court would play a critically important part in the development of the type of change that is required.

48.Sexual violence against women and girls is now well recognised as a world-wide endemic problem. In October 2022, research from the World Health Organisation and the United Nations correctly identified violence against women as a global problem of pandemic proportions. Statistics published in 2021 estimated that 1 in 3 women worldwide have experienced either physical and/or sexual intimate partner violence or non-partner sexual violence in their lifetime.

49.It is also recognised that the effective prosecution of sexual crimes requires specialisation, and the needs of complainers require the most careful consideration and provision of effective support.

50.COPFS submit that the proposed court offers the opportunity for a complete rethink and redesign of the court process in order for the court to deliver for both complainers and accused who appear in it. The creation of a new court with new procedures and practices presents an opportunity for positive radical change in the way the criminal justice system approaches sexual offending.

51.Whilst supportive of the need for modernisation of the system COPFS has some significant concerns, however, in relation to a number of the provisions within the Bill relating to the creation and operation of the specialist court as they are currently proposed.

52.It is submitted that as currently drafted the proposed section 39 of the Bill which relates to the jurisdiction of the court to try non-sexual offences creates a significant and potentially fatal issue in relation to the effective operation of the court.

53.Section 39 (2) of the Bill makes the jurisdiction of the court to deal with non-sexual offences conditional on the indictment containing at least one sexual offence when the trial diet commences, and subsection (3) allows for continuation of that jurisdiction should the sexual offence be removed from the indictment following the commencement of the trial diet.

54.As currently drafted, the court would have no jurisdiction over non-sexual offences prior to the commencement of a trial, and a sexual offence would require to be libelled on the indictment at the time of any trial starting. The consequence of this is that, should matters resolve by way of a plea prior to the trial commencing, the specialist court would have no jurisdiction to sentence the accused in relation to the non-sexual charges. Further, should the sexual offence be discontinued prior to the commencement of the "trial diet", either through desertion or a plea of not guilty being accepted, the court would have no continuing jurisdiction to hear the indictment in relation to the remaining non-sexual charges.

55.The situation is further complicated by the use of the term "trial diet" which is not defined in the Bill but is understood to be distinct from the provisions in section 65(9)(c) of the 1995 Act relating to the commencement of a "trial", (which in solemn cases refers to when the Indictment is read to the jury).

56.It is submitted by COPFS that the "qualifying point" for jurisdiction for the court should be the point of the service of the Indictment and that if the indictment has a qualifying sexual offence on it at that stage, the specialist court should have, and should retain, jurisdiction to try all other charges on the indictment.

57.COPFS have a further concern in relation to the provisions in section 59 of the Bill that the court "***must enable all of a vulnerable complainer's evidence to be given in advance of a hearing at which the complainer would otherwise be required to give evidence***"

58.It is submitted that the proposed provisions place a restriction on the Crown in relation to the independence of prosecutorial decision making in the conduct of the trial and the manner in which evidence is led.

59.Prosecutors are best placed to determine trial strategy, which includes the presentation of evidence. In considering the trial strategy, prosecutors determine the most appropriate means by which the best evidence of a witness can be presented to the court and in doing so they will always be mindful of the impact that giving evidence would have on complainers. This includes early and proper engagement with the victim which provides the opportunity for the victim to discuss and understand the court process. This provision, as it stands, restricts the independence of prosecutors to present cases in the most appropriate manner, having regard to the circumstances of each individual case and the public interest.

60.The proposed provisions would have the effect of restricting prosecutorial decision-making. It is submitted that the Bill should be amended to include a further exception to those contained in sections 59 (3) and (4) to enable

prosecutors to lead evidence from a witness using alternative special measures where "the Crown determines that that is more appropriate", to ensure that the provisions are workable.

61.Recent experience of prosecutors has shown that some complainers do not wish to give evidence out with the trial setting. It is essential to ensure that, in such a situation, a complainer is able to exercise choice in how they give evidence, which is not unduly restricted by statutory requirements.

62. Whilst the exceptions at Section 59(4) (b) and (c) of the bill allows the prosecutor to move the court to allow a complainer to give evidence at trial when (b) ***the complainer expresses a wish to give evidence at the hearing and*** (c) ***it would be in the complainer's best interests to give evidence at the hearing***, it is considered there are at least two further examples where it may be in the interests of justice for the complainer to give evidence at trial. These relate to:

a. Cases in which there are concerns about the quality of the prerecorded evidence; and

b. Public interest in cases in which there are multiple complainers.

63.The provisions on the requirement for pre-recording of evidence within the Bill have been taken from the existing provisions relating to requirements for children in certain High Court prosecutions to have their evidence pre-recorded. Prosecutors are aware of examples in which the Court appeared to misunderstand the legislative framework and took the view that the Crown no longer has any discretion in how evidence is led and is bound to lead the pre-recorded evidence of witnesses, notwithstanding that this may not be the most appropriate method of presenting their evidence having regard to the circumstances of the individual case and the public interest.

64.It is submitted that the provisions require amendment to make clear that the independence of the Lord Advocate and prosecutors acting under her authority is protected by ensuring that there is an exception to the requirement for evidence to be pre-recorded where the Crown determines that that another special measure is more appropriate, as outlined above.

Part 6 – Additional Reforms

Anonymity for Complainers

65.COPFS consider the proposed statutory protection of the identity of victims of sexual offences is a welcome development but wish to draw one concern to the attention of the committee.

66.The provisions at section 63 provide protection to a "victim of an offence" and defines this as "**a person against or in respect of whom an offence has been, or is suspected to have been, committed**."

67.The Bill is not clear if the application of the prohibition on identification would apply to the complainer in a sexual offence where there has been an acquittal after trial. Where there has been an acquittal following a trial, it is arguable that the individual would not be "**a person against or in respect of whom an offence has been, or is suspected to have been, committed**", as in these circumstances there has been a formal determination following court proceedings that the accused did not commit the offence.

68.If the protection of anonymity does not apply in relation to individuals where there has been an acquittal, the statutory protection created will be substantially diminished. This may result in victims electing not to report offences out of fear of not being protected from identification should no conviction be achieved.

69.It is submitted that the provisions should be amended to ensure that the protection available to individuals is not conditional on the outcome of court proceedings.

Independent Legal Representation (ILR) for Complainers in s275 Applications

70.COPFS welcome the proposed introduction of ILR in accordance with the recommendations in Lady Dorrian's review but it is submitted that the operational requirements of the provisions as currently framed will lead to practical difficulties which may have an adverse effect on the policy aims of the provisions by limiting complainers' ability to fully exercise their right to ILR.

71.The provisions at section 64 outline the duties on COPFS following a section 275 application being lodged. Thereafter, should ILR be instructed the Crown have additional obligations in relation to the provision of certain information to the ILR and the identification of relevant disclosure that will form part of an application to the court for authorisation to disclose that evidence to the ILR.

72.In solemn cases the Indictment requires to be served 28 days before the Preliminary Hearing in the High Court or the First Diet in the Sheriff Court and thereafter there is a seven-day window in which a section 275 application is required to be lodged in order to meet the revised statutory timescales created by the Bill that require a section 275 application to be lodged 21 days prior to a Preliminary Hearing in the High Court, First Diet in Sheriff and Jury provisions proceedings.

73.Therefore, the processes to be undertaken by the Crown will require to be completed within that 21-day period to ensure that the section 275 application can be considered by the court at the Preliminary Hearing or the First Diet without the need for a continued hearing.

74.Additionally, intimation to a complainer of a section 275 application and discussion of the issues raised therein is likely to involve discussion of highly sensitive and personal matters and it is essential that care is taken to ensure that this is done in a trauma-informed manner. This may involve ensuring that effective support is put in place for the complainer in advance of any

discussion, or arranging for the discussions to be held in person face to face, which will further limit the time available to the complainer to consider instruction of an ILR and, consequently, the time available to COPFS to prepare disclosure.

75.Because of the very short timescales involved, in practical terms, COPFS staff may have to start to consider what evidence is relevant and disclosable as soon as a section 275 application is lodged with the court and before it is confirmed that the complainer has instructed an ILR. This would be time and resource intensive and would give rise to unnecessary work but may be required in order to ensure that the complainer's rights are fulfilled if they are not able to find or instruct an ILR until a late stage in the 21-day period.

76.It is submitted that the requirement that in every case where ILR is instructed, the Crown must consider and review all of the evidence, in its entirety, to identify what evidence is relevant to the section 275 application and thereafter apply to the court for a hearing where the court can authorise disclosure, is unduly burdensome and resource intensive. It may also be difficult to identify what evidence the ILR would consider relevant and, conversely, may lead to the identification and disclosure of a large amount of evidence which is irrelevant to the advice to be provided by the ILR or the legal position that they intend to put forward to the court.

77.COPFS consider that it would not be appropriate, and in many cases will not be necessary for the proper exercise of their function, for the ILR to receive disclosure of all the evidence in a case. As a result, the proposed safeguard of the court being responsible for authorising disclosure of only what it has determined to be relevant evidence to the representative of the complainer is necessary to avoid any risk of inappropriate disclosure or challenges at a future trial.

78.It is submitted that there may be situations where upon receipt of the s275 application, in which the applicant is required to specify the relevant grounds and evidence on which the application is based, and the relevant sections of the Indictment or complaint, the instructed ILR determines that no additional disclosure is required. The Crown will still be required in these cases to identify relevant disclosure and make an application to the court for authorisation to disclose. The court will then have to fix a hearing to consider the appropriateness of disclosure in a situation where no disclosure is considered necessary by the ILR. This is a significant resource commitment for the Crown and the Court that could be avoided by amendment to the legislation.

79.COPFS submit that it would be more efficient for the ILR, on receipt of the application, to apply to the court for any evidence that they have identified as required to enable them to properly advise the complainer and prepare relevant arguments. As the legislation is currently drafted, the complainer has no power to request evidence that they consider appropriate and is reliant on prosecutors determining what evidence should be disclosed with the authority of the court. There may be situations where the ILR believes that they require

disclosure of evidence that prosecutors have not assessed as relevant; under the proposed provisions the ILR would have no means of applying for or obtaining disclosure of that information.

80.Changing the processes set out in the legislation to reflect that the ILR should apply to the court for disclosure of evidence which is relevant to representation of the complainer's interests, as distinct from this being proactively identified by prosecutors in every case, would ensure that the complainer was properly advised without any concerns over required information not being provided and consequently the risk of a complainer not being able to fully exercise their rights.

81.A change to the process would also reduce the necessity for additional court hearings as, under the existing proposals, a disclosure hearing will require to fixed in every case where ILR is instructed. If a hearing was only required when the ILR considered disclosure necessary, this would reduce the number of hearings required as there will be circumstances when the ILR is content that appropriate advice can be provided on the basis of the information provided within the initial intimation.

82.COPFS would also wish to highlight that as the provisions are currently drafted there is no requirement on an ILR to lodge with the court and intimate to the Crown a notification of engagement, such as is required to be done by the solicitor representing the accused. This inclusion of a requirement to formally intimate engagement would ensure that both the court, the crown and the accused were aware of the existence of the ILR.

83.A further identified issue is the application of the Law Society of Scotland's "***Code of Conduct for Criminal Work***" which contains at Article 11 guidance on the correct handling and use of material disclosed as part of defence work. It is not clear that an ILR would be covered by this code of conduct and COPFS would wish to ensure that any evidence disclosed to an ILR is subject to the same protections that are extended under the code of conduct.

84.It is submitted that an amendment to the legislation directing that the order for disclosure by the court should contain a statutory limit on the use of that disclosure or there be a requirement for an undertaking to similar effect to be given by the ILR to the court or the Crown prior to receipt of the disclosure.

85.COPFS would also invite consideration to be given to further amendments to the provisions surrounding sections 274, 275 and the right to ILR.

86.Prosecutors are aware through experience that the timing and discussions surrounding section 275 applications can very traumatic experiences for a complainer due to the need to discuss personal and highly sensitive matters that would normally not form part of court proceedings.

87.Currently, when considering an application under section 275 to lead otherwise prohibited evidence of a complainer's sexual history or character the court first requires to be satisfied that the evidence is admissible under

common law and is not collateral. Once the court has determined that the evidence is admissible, the court then requires to consider and determine that the evidence; (i) relates to a specific occurrence or occurrences, (ii) is relevant to establishing the accused's guilt and (iii) has significant probative value.

88.It is submitted that it would be unnecessarily traumatising for complainers to have every section 275 application intimated and discussed with them, in circumstances where the court is likely to immediately determine that the evidence sought to be led is collateral and inadmissible under common law and that consequently no further consideration of the s275 application is required.

89.The current practice of the court in relation to applications for access to sensitive personal records of complainers requires the court upon receipt of an application to consider whether there is at least a prima facie case that the application is relevant prior to the court issuing a warrant for service of the application on the complainer. The appeal court in the case of Colley v HMA4 confirmed that "***The potentially traumatic effect of participation on complainers in court proceedings, especially in sexual offences, is well recognised and the potential for re−traumatisation should be avoided. Thus, when the question is whether there is even a prima facie case justifying the warrant, it can be acceptable not to intimate the petition to the complainer until that issue is resolved***."

90.In order to avoid causing unnecessary distress and trauma to complainers COPFS submit that a similar provision should be considered in relation to section 275 applications to prevent the need for intimation of and discussions about applications with a complainer in circumstances where the application may be spurious and without merit and ultimately rejected by the court on that basis, but the existence and details of the allegations within the application require to be disclosed to and discussed with the complainer prior to the court hearing to determine the application, resulting in unnecessary distress and re-traumatisation.

91.COPFS would also invite consideration of the Bill extending the protection provided by section 274 prohibiting evidence of a complainer's sexual history or character to be extended to complainers giving evidence by virtue of being referred to in a "docket" as opposed to a charge.

92.In a prosecution the Crown can add a "docket" to an indictment or complaint to give notice of an intention to lead evidence of a crime not libelled.

93.Dockets may be used when it is necessary to lead evidence of criminal conduct, but it is not competent to libel a charge detailing that conduct which may be because:

a. The offence is time-barred,
b. There is a lack of jurisdiction, i.e. the conduct occurred outside Scotland,
c. The accused has been convicted of the offence in the past,

94.An accused cannot be convicted of any conduct contained within the docket, but the evidence led in relation to that conduct can provide corroboration of the evidence of the charges on the indictment or complaint.

95.The prohibitions within section 274 of the 1995 Act apply only to complainers in charges that appear on an indictment or complaint. As dockets are not "charges" on the indictment or complaint, witnesses who are to give evidence in relation to a docket are not complainers for the purposes of section 274 and do not receive the statutory protection. Consequently, there are no restrictions on the scope of questioning such a witness in relation to sexual matters, beyond the common law prohibition on the leading of evidence that is irrelevant or collateral.

96.Currently, the Crown will often ask witnesses to give evidence in relation to dockets to provide the necessary corroboration in cases of sexual offending, but prosecutors cannot guarantee their protection from the type of questioning covered by the provisions of section 274, which is challenging for the Crown and all the more difficult for these, often vulnerable, individuals.

97.COPFS have raised with Scottish Government the issue of extending the protection for section 274 and the right to access ILR to complainers giving evidence by virtue of a "docket" and understand that this is being considered but COPFS would invite the necessary changes are made to the provisions to reflect this request.

98.COPFS would also invite consideration to be given to extending the protections of section 274 and the right to ILR to complainers in cases where there is a charge under section 1 of the Domestic Abuse (Scotland) Act 2018 (DASA) disclosing a course of abusive behaviour against a partner or expartner which contains allegation of sexual offending.

99.The offences to which the protection of section 274 apply are contained within section 288C of the Criminal Procedure (Scotland) Act 1995 and they do not currently include section 1 DASA offences. In addition to listing specific offences section 288C allows for the protection to be extended to other cases where the court is **"…satisfied that there appears to be such a substantial sexual element in the alleged commission of the offence…**"

100. The Domestic Abuse (Scotland) Act introduced an offence of engaging in a course of behaviour which is abusive of a partner or ex-partner and allows for multiple different types of behaviour directed towards a complainer to be prosecuted as a single course of conduct.

101. A course of conduct in a DASA charge can contain instances of coercive control such as controlling and regulating day-to-day activities, financial abuse, restrictions on freedom of action, behaviour designed to humiliate or degrade, as well as violent, threatening or intimidating behaviour. The Act confirms that violent behaviour includes both physical and sexual violence.

102. COPFS consider that an issue is present where the sexual element of a section 1 DASA charge may not be considered to be "substantial" when the cumulative behaviour within the charge is considered by the court. The statutory offence is designed to reflect a course of abusive behaviour which may mean that the sexual behaviour within the charge may not form a substantial element of the charge as a whole and may constitute only one element of a much wider course of behaviour intended to degrade or humiliate the complainer through coercive control.

103. This could result in the position that a complainer who is subject to a single sexual assault under section 3 of the Sexual Offences (Scotland) Act 2009 would automatically benefit from the protection of section 274 but a complainer who has been subject to identical behaviour as part of a much wider non-sexual course of offending behaviour amounting to a section 1 DASA offence, which may include serious assaults and significant coercive control, would not be entitled to the automatic protection of section 274 and in light of the "**substantial sexual element**" required in the legislation, may not receive that protection at all.

104. It is submitted that the nature of the intimate relationship that exists between an accused and a complainer in section 1 DASA cases make the necessity for the protection of section 274 particularly acute and consideration is invited to extend the protection of section 274 and the right to ILR to complainers in section 1 DASA charges containing any allegation of sexual offending.

Pilot Of Single Judge Rape Trials

105. Lady Dorrian's review identified that the current criminal justice system does not provide the best experience for victims of sexual offences. Although the Review Group was not able to reach a concluded view on the continued use of juries in the determination of sexual offences, the review report, which was prepared with input from organisations and individuals across the criminal justice sector, recommended, at recommendation 5, that consideration should be given to developing a time-limited pilot of single judge rape trials to ascertain their effectiveness and how they are perceived by complainers, accused and lawyers to enable the issues to be assessed in a practical rather than a theoretical way.

106. It is a matter for the Scottish Parliament to determine whether there should be a pilot of single judge trials but COPFS agree with the conclusions in Lady Dorrian's review that action should be taken to improve the experience of victims of sexual offending and that there is merit in consideration of a time limited pilot of single judge rape trials for the reasons set out by the Lord Justice Clerk's Review Group on Improving the Management of Sexual Offence cases.

107. Scotland is not alone in the issues faced in the prosecution of these type of offences. Worldwide statistics demonstrate a huge differential in cases reported and prosecuted and cases resulting in a conviction. Many other jurisdictions are also reassessing the ways in which such cases are

adjudicated upon. As such it is legitimate to question whether there is demonstratively a failure of judicial process.

108. The current adversarial system is not well suited to the effective prosecution of these types of crime and the development of special measures in the manner in which a complainer gives evidence and the existence of rules of evidence such as the section 274 provisions have not resolved the issues identified in Lady Dorrian's review. In order to resolve these issues, it is submitted that Scotland must achieve a satisfactory system to prosecute sexual crime through a properly functioning criminal justice system. The critical need for this is demonstrated through the current level of serious sexual offending and the enormous burden this currently places on the court system.

109. One of the conclusions and recommendations of Lady Dorrian's Review Governance Group was that any pilot should incorporate all cases of rape and attempted rape, indicted on or after the commencement date of the pilot, in which there is a single complainer and the charge of rape or attempted rape is the only or principal charge on the indictment. COPFS are extremely supportive of the above approach. The experience of our prosecutors and support staff are that convictions in these types of cases are lower than other offences and comparably lower than other sexual offence cases. COPFS is in the process of examining these specific types of prosecution to enable further details to be provided in due course. It is understood that this comparably lower conviction rate in single complainer cases is also the experience in other comparable jurisdictions further demonstrating the need for system changes to be explored.

110. An exploration of the use of single judge trials may remove a number of the perceived deficiencies in the current system and may provide for an entirely altered experience in court for complainers. It would also provide for a reasoned and written decision explaining why a particular outcome was arrived at. Such a pilot would enable evidence to be ingathered and to allow a fully informed debate to take place.

Extract from Submission from Scottish Courts and Tribunals Service

What are your views on Part 5 of the Bill which establishes a Sexual Offences Court?

For the detailed and cogent reasons set out within the report by the Lord Justice Clerk's Review Group, the SCTS fully supports the creation of a statutory "stand alone" specialist court to deal with serious sexual offending, with the stipulations and key requirements detailed within the recommendation (Recommendation 2). As the Report states "to achieve effective improvements, we have to take an entirely fresh look at the way in which sexual offences are dealt with. …Without profound reform there is a real possibility that our successors will be examining the same issues forty years hence."

The Review was necessitated by a combination of the growth in number and complexity of rape and sexual assault cases and the recognition that there was still much which could be done to improve the experience of those who participate in these proceedings. Whilst there have been a number of interim changes to court programming and recent improvements in relation to the processes e.g. the taking of evidence on commission, various obligations placed on various parties under the Victims and Witnesses (Scotland) Act 2014, the aforementioned growth in cases continues and change is required. In addition the justice system has been impacted by the covid-pandemic, and is seeking through an intensive court recovery programme to address an unprecedented backlog in case numbers.

Creation of a national court in the form recommended by the Review provides Scotland with a unique opportunity to improve the experience of complainers, the accused and court participants. To help improve the quality of, and public confidence in, the Scottish justice system overall, developing and innovating upon steps already taken in other areas including the judicially led Evidence and Procedure Review and the creation of a trauma-informed criminal justice system. The SCTS is committed to working with Scottish Government, justice partners and key stakeholders to facilitate the implementation of what would be a transformational court.

The Lord Justice Clerk's Review, did not shy away from the fact that there are likely to be at least initial resource implications in the establishment of a specialist sexual offences court in Scotland, and for SCTS those will relate principally to staffing and training personnel. Changes are not insurmountable. Further details on potential baseline costs are detailed in the Financial Memorandum and the SCTS's response to the calls for views in relation to it. A key factor will be the volume of cases that proceed through the court, which due to a number of variables can be difficult to assess.

The SCTS, as a member of the Review, and equally as a supporter of the Evidence and Procedure Review, welcomes the Bill's provisions which seek to create the necessary legal foundation to create a new national jurisdiction Specialist Sexual Offences court and specifically place on a statutory footing some of the key touchstones envisaged by the Lord Justice Clerk's Review. These include the presumption that all complainers will have their evidence pre-recorded; the requirement for ground rules hearings for complainers and vulnerable adult witnesses (and in accordance with the recommendations of the judicially Evidence and Procedure

Review, the Report of the Pre-Recorded Further Evidence Work-Stream, published 28 September 2017); and statutory requirements for trauma informed training for all participants. It acknowledges that the development of policy is a matter for the Scottish Government, and that this may have resulted in variations to some of the key elements of the proposed court recommended by the Lord Justice Clerk e.g. jurisdiction and certification and appointment and removal processes. While the SCTS does not seek to comment on policy, it will seek to comment on the operational and justice sector wide implications of some of the key proposals.

Case volumes

The SCTS entirely agrees with the position reflected in the Financial Memorandum to the Bill that there is an inbuilt uncertainty in, and ability to estimate likely caseloads before the new Court and associated costs.
We note the extensive proposed jurisdiction of the court (which goes beyond that recommended by the Lord Justice Clerk's Review and for example includes murder, and Offences under the Health and Care Act 2022). That, taken with the prosecutors discretion, and the potential for the new Court to act as an incentive for more alleged crimes to be reported, may suggest that the numbers projected at table 13 in the Financial Memorandum (paragraph 124), have the potential to be much higher, with consequential implications on resourcing. For example the latest SCTS official Quarterly Criminal Court Statistics (see Report 20 – Quarter 4 2022/23, data tables, tab 6), for 2022/23 records that 47.2% of High Court Indictments (443) and 10.2% of sheriff court indictments (605) were categorised as sexual crimes, including rape and attempted rape. The figure was 1052 in 2019/20. It is acknowledge that such an approach to estimating case numbers is not infallible either. For example the categorisation of 'sexual crimes' would include indecent image cases which are proposed to be excluded from the New Court's jurisdiction, but would not include e.g. cases of murder or attempted murder which are proposed to be within the Courts jurisdiction. The SCTS is however committed to working with justice partners to make a new Specialist Sexual Offences court, a reality irrespective of the aforementioned challenges.

Phased introduction

As the Financial Memorandum to the Bill states, the new Court is intended to be designed to allow judicial, staff and court resources across both current court jurisdictions (High Court and sheriff solemn) and the organisation generally to be used more flexibly, and for the reallocating of skilled and experience staffing resources. While the detail of any proposed phasing referenced in the Memo has yet to be discussed, the SCTS cannot as a generality agree with the position stated (at paragraph 127) of the Financial Memorandum that "a phased approach to implementing the Court will mitigate a substantial proportion of the cost pressures emerging in the early years" as it relates to the SCTS.

Phased implementation e.g. via introduction for what are traditionally High Court cases first, while leaving traditional cases and practices to remain in the sheriff court, would be more resource intensive. It would also result in an inconsistent 'two tiered' approach to sexual offences cases potentially occurring, a structure which the Lord Justice Clerk's Review's recommendations sought to prevent. The SCTS will work with

Scottish Government and justice partners to address such concerns and agree a suitable time-table for implementation of the court in so far as possible.

Pre-recording of evidence and extension of Ground Rules Hearings (GRHs)

The Financial Memorandum refers (at paragraph 133) to the Bill extending the use of pre-recorded evidence 'slightly wider' than the list of offences set out in the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019 (the 2019 Act). The Bill not only extends the list of offences, across what are currently two traditional court jurisdictions, but does so at time and pace much faster than envisaged in the draft Implementation Plan to what became the 2019 Act, and go beyond its recorded vision by covering vulnerable witnesses in sexual offence cases in the sheriff court. This will result in an increase in the number of vulnerable witnesses requiring evidence by commission with commensurate impact on the capacity of our bespoke evidence giving facilities and the staffing and judicial resources needed to support them and ground rules hearings.

Such provisions reflect aspects of the recommendations and transformational vison made in the Evidence and Procedure Review and the Lord Justice Clerk's Report, which the SCTS is supportive of. Given the resource implications, we are committed to working with Scottish Government and justice partners to support this roll out.

While the combination of Preliminary Hearings (PHs) and GRHs should limited the number of additional GRHs that may require to take place, it will in turn increase the average length of a PH and reduce the number of PH hearings that can take during each court day. The likelihood is that at least one additional PH court will required to support the court. The specific number and regularity of such sittings will depend on, amongst other things, the volume of cases before the court, and the number of vulnerable witnesses needing a GRH in each case.

Appointment, processes and training requirements

To support the new Court and its aims it is essential that the SCTS (and the judiciary) are provided with flexibility, and powers and tools to ensure the court can be sufficiently and easily resourced and programmed without unnecessary complicity. Supporting a trauma informed approach to users, and the efficient disposal of business.

While unlikely to impact costs significantly, we would note that the process requiring the SCTS to obtain approval of training courses, to comply with the requirement (as contained at section 52(1) of the Bill) for the Clerk and Deputy Clerks to have undertaken such training before their appointment, and their specific appointment more generally may place additional time constraints and administrative steps on the SCTS to complete.

What are your views on the proposals in Part 6 of the Bill relating to the anonymity of victims?

The Lord Justice Clerk's Review recommended (Recommendation 3(e)) that legislation should be introduced granting anonymity to those complaining of rape or other sexual offences along the lines of the Sexual Offences (Amendment) Act 1992. As a member

of that Review, the SCTS supported that recommendation, and is encouraged by the inclusion of provisions within the Bill which seek to take that forward. The Bill provisions also seek to expand such legal rights to a number of offences/crimes beyond sexual offences. Given that is a matter of SG policy, the SCTS does not provide any comment on that.

As with the vast majority of changes proposed in the Bill there will be some resource implications in terms of changes required to operational and case management systems to support the provisions, in addition to court, judicial and staffing resources. For example while the Financial Memorandum envisages that the use of the 'waiver' provisions for children will be rare, the SCTS would highlight that such applications will still require judicial, staff preparation and ultimate court time. Furthermore unlike the criminal costs quoted at Table 16 of the Financial Memorandum, it is understood that the Bill envisages that a civil summary application procedure, which has its own distinct process, from procedure in our criminal courts, will require to be used.

The SCTS would also note that presently there appears to some extent a cross-over and the potential for inconsistency between the current provisions (regarding the waiver of anonymity for children) and those within the Children (Care and Justice) (Scotland) Bill which deal with powers given to the court to dispense with reporting restrictions; and particularly the methods and court procedure to be followed. The latter is envisaged to take place in the criminal jurisdiction. Without clarity there is a potential for uncertainty and consequentially the potential for duplication of applications, work and costs if approaches are made in each forum. While a matter for SG policy, clarity would undoubtedly be welcomed by all.

This Part of the Bill in its present form appears not to address how (i.e. the method by which), the intention that the sheriff/court is to give the child "an opportunity to make representations" when determining a waiver application, (see proposed new section 106D(3)). Options could include requiring a solicitor to be appointed to represent the child, or other methods including the child speaking directly to the court; by completing a form or submitting a response through other documentary means or for the views of the child being taken by a child welfare reporter; or seeking the views of the child's parent or guardian (e.g. see proposed changes to section 106B of the 1995 Act as propose by the Children (Care and Justice) (Scotland) Bill). Each available method will have operational and resource implications for justice partners, including the SCTS. Clarity on this would undoubtedly be of assistance to justice partners.

What are your views on the proposals in Part 6 of the Bill relating to the right to independent legal representation for complainers?

The Lord Justice Clerk's Review gave consideration to whether sexual offence complainers should be afforded independent legal representation (ILR), particularly within the context of applications made under section 275 of the Criminal Procedure (Scotland) Act 1995 (1995 Act). It heard from and received feedback back from complainers, its members and considered experiences and recommendations made in other jurisdictions regarding ILR.

The Review recorded that the experience of many complainers was of a lack of information and engagement with COPFS and an inability to convey their response

with regard to such applications, with the extremities of the situation highlighted in recent case law. Having regard to the importance of these issues to complainers, the potential tension between their interests and those of the Crown in such applications, and the need for the court to have sufficient information before it to address the statutory test it recommended, (Recommendation 3(iv)), that in Scotland ILR should be made available to complainers, with appropriate public funding, in connection with section 275 applications and any appeals therefrom. That complainers should have a right to appeal the decision in terms of section 74(2A)(b) of the Act 1995 and that representation at any review to limit the permissible evidence under section 275(9), should be at the judge's discretion.

The SCTS, as a member of the Review Group, supported and continues to support this recommendation. It welcomes in principle the introduction of provisions in the Bill that seek to implement that recommendation.

The provisions in the Bill in some instances seek to expand upon that recommendation e.g. provisions which seek to give a complainer's representatives (and presumably the complainer) the entitlement to 'relevant' evidence/documents in the court case, over and above the section 275 application and the indictment/complaint (as applicable) subject to a court approval process together with the opportunity to make representations to the court on whether it is admissible and should be admitted. In other instances the provisions in the Bill appear to leave or are silent on other aspects of the Recommendation. E.g. a review under section 275(9)), the applicability or otherwise of which will have operational and resource implications for the SCTS, and the justice sector more widely. While the SCTS does not seek to comment on such matters of policy which are for SG, it does seek to comment on the operational implications of them, in so far as applicable.

In its consultation response the SCTS acknowledged that if ILR in the form recommended by the Lord Justice Clerk's Review were progressed there would be operational, resourcing and court programming implications. This is unavoidable given: the addition of an extra party or parties (in multiple complainer cases) to applicable hearings, and who also has a right of appeal has the potential to increase hearing lengths, the number of appeals and limit the number of cases that can call in one particular court sitting/programme. Changes would also be required to court rules, proforma and data management systems which have resource implications for the SCTS. Strong time limits, requirements for intimation and clarity in the provisions can help minimise those implications to an extent, some of which, as we return to be below, are currently lacking in the Bill's provisions.

One key variable impacting the costs, and resource implications for the SCTS and the justice sector generally is the number of section 275 applications that are made. The data in Table 17 of the Financial Memorandum to the Bill indicates that even prior to the pandemic year section 275 applications were on an upward trajectory. Analysis of the SCTS's official Quarterly Criminal Court Statistics (see Report 20 – Quarter 4 2022/23, data contained at tabs 1a and 6 in particular) indicates that the number of High Court and sheriff solemn indictments categorised as 'sexual crimes' and which therefore have the potential to be cases in which s275 applications could be made and the Bill's provisions could apply, has continued to increase from 2021/2022 onwards.

Paragraph 161 of the Policy Memorandum to the Bill, makes clear that churn can have a traumatic impact on the experience of all those involved in the case. The SCTS has concerns that from an operational and user perspective the ILR provisions in their current form; and specifically the introduction of the 'disclosure process' (proposed new subsection 4C and 4D to section 275 of the Criminal Procedure (Scotland) Act 1995 contained within section 64 of the Bill) will unintentionally have this impact. We are concerned that the provisions will unintentionally act in a way that is contrary to current court operations and to other provisions within the Bill, specifically the new Sexual Offences court which seek to support the efficient disposal of business and a trauma informed justice system.

Disclosure process

There is currently no comparative court process. New procedural steps, forms and additional judicial preparation and judicial, staff and court time would be required to support it, if approved by Parliament, with commensurate cost. In particular it is envisaged that notable judicial time may be required to review, in advance of any hearing, the documentation that COPFS propose to disclose. Currently unless the document is already referred to and produced alongside the s275 application or otherwise lodged with the court, the judiciary, and the judge making the ultimate decision in the s275 application, are unlikely to have had sight of or need to review any such documents to be disclosed given the applicable statutory tests they apply. It is not possible to anticipate the volume or level of papers that COPFS will propose to disclose in each case, however could be potentially substantial, requiring the diversion of finite judicial resource to this process.

Of additional concern to the SCTS is that currently there is a prescriptive legal timetable and thus limited window of opportunity in all 3 current applicable court forums (High Court, sheriff and jury solemn and sheriff court summary) for when this type of application can be heard, which will equally apply to the New Specialist Sexual Offences Court. The concern is that it will unintentionally have an adverse impact and cause delay to when the section 275 application can be considered by the court and a decision made. This in turn will impact on when certain other procedures, such as Ground Rules Hearings (GRHs) and evidence by commission proceedings, which support complainers and vulnerable witnesses, can take place.

As an example, the anticipated consequence of the proposal for the need for such a disclosure hearing to take place in the High Court will be that the application will have to be heard and considered at the first Preliminary Hearing (PH) in the case. This might only be possible where the section 275 application is lodged timeously. Where it is not additional court hearings and time will be required resulting in additional cost and resource implications and the aforementioned delay. The PH will have to be continued to a later date to enable consideration of the section 275 application. A decision on the section 275 application is needed to support any GRHs, and evidence by commission that require to take place. Therefore the GRHs will also have to be continued. A similar position will apply to applicable court procedure in the sheriff court.

It is therefore envisaged if all of the deadlines provided are complied with, that the process will add at least one additional PH or applicable first stage sheriff court hearing to cases in which a section 275 application is lodged. This will require additional court,

staff and judicial resource, including preparation time, which can't readily be assessed for the reasons narrated above, and potential increase the court journey time for court users.

Aside from the challenges narrated above regarding the 'disclosure application' the 21 day period for lodging a section 275 application, and the steps that will required to follow will be particularly challenging to achieve in summary procedure cases when an accused is e.g. on remand. The maximum period an accused can be held for is 40 days (in the terms of section 147 of the Criminal Procedure (Scotland) 1995 Act). This may require or place additional request on the court to extend or reduce time limits or extend remand, and the associated judicial, staff and court preparation time required.

Evidence by commission

These should take place at the earliest opportunity to support best evidence and a trauma informed justice system, with reference to court capacity and justice partner availability being taken account of. Currently under the Criminal Procedure (Scotland) Act 1995, and as proposed to apply in Commissions assigned in the new Sexual Offences court, commissioners can also determine section 275 applications if lodged no later than 7 clear days before the commission. The provisions in relation to ILR as currently presented will either require a separate hearing to take place before the commission; or alternatively the commission postponed if such applications are lodged in such close proximity to the commission. This will have consequential implications for the SCTS, justice partners, and complainers and accused.

General

The current timescales in the Bill provisions don't address timeframes for the lodging of confirmation of complainer representation, generally, or for the court to be notified of this. They also do not specify what is to happen if the complainer does not to take up their rights. This could unintentionally result in, contribute to, or encourage delay in the progression of the section 275 application itself and those hearings which rely upon that decision.

There is a currently a lack of clarity in the Bill's provisions regarding how applications made during the course of a trial are to be dealt with, if made,. Some form of adjournment of trials will require to take place. Any adjournment to a trial will have significant impact on every party within that case's journey, and justice sector journey times more generally, given court rooms and scheduling will have to change to respond to it. To accommodate the disclosure process, the length of the adjournment period will inevitably be extended further.

There is a currently a lack of clarity in the Bill's provisions on how reviews sought under section 275(9) are to be dealt with. In respect of the latter the Lord Justice Clerk's Review recommended a judicial discretionary power. It is also unclear whether a complainer (their legal representative) has an entitlement to be represented at an appeal hearing in which the appeal is being advanced by another party i.e. the Crown or the accused (currently addressed at section 64(5)). Each of these steps would require preparation and staff, judicial and court resources will be required to support this.

What are your views on the proposals in Part 6 of the Bill relating to a pilot of single judge rape trials with no jury?

The Lord Justice Clerk's Cross Justice Review examined the justifications for retaining the jury system, and for considering alternative approaches to the prosecution of sexual offences in Scotland. In doing so it looked at potential justice and operational improvements and challenges. It noted that other jurisdictions e.g. New Zealand had acknowledged that juries may not be the best means of reaching decisions in these types of cases; and that separate academic research in Scotland and in England, Wales and Northern Ireland using different techniques had indicated that certain rape myths may intrude on juror deliberations.

The Review noted that arguments in favour of trials with juries are met by equally compelling arguments for trial by judge alone. The Review ultimately recommended (Recommendation 5) that consideration should be given to piloting (for a time limited period) single judge rape trials to ascertain their effectiveness, and how they are perceived by complainers, accused and lawyers, and to enable the issues and arguments made in relation to the retention or change to the jury process to be assessed in a practical rather than a theoretical manner.

The SCTS, as a member of the Review group, supported that recommendation. It therefore welcomes the provisions within the Bill (section 65) which seek to put in place the necessary legal foundation to allow a time limited pilot of single judge rape trials to potentially take place in the future should the decision be made to do so. The present provisions, include a requirement for regulations to be prepared and laid. It is envisaged that the underlying processes required for that, should facilitate the practical discussions and consideration on such important matters and details including the circumstances and cases in which such a pilot would apply to, as envisaged by the Review, to take place.