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An t-Ionad Fiosrachaidh

**Criminal Justice Committee**

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## **Victims, Witnesses, and Justice Reform (Scotland) Bill – update for further evidence taking**

This paper sets out information on the provisions of the Bill as introduced, the issues explored during Stage 1 scrutiny, and some areas which may be the subject of Scottish Government amendment at Stage 2.

It seeks to help inform the taking of evidence by the Criminal Justice Committee in relation to the proposed amendments outlined in the [letter of 31 October 2024](#) from the Cabinet Secretary for Justice and Home Affairs.

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## Introduction

The [Victims, Witnesses, and Justice Reform \(Scotland\) Bill](#) (the Bill) was introduced by the Scottish Government in April 2023. A [SPICe briefing](#) on the Bill was published in June 2023.

Whilst much of the Bill focuses on criminal justice issues, it also deals with some civil justice matters. The main provisions of the Bill as introduced are set out in six parts:

### **Part 1 – Victims and Witnesses Commissioner for Scotland**

Measures seeking to establish a new office of Victims and Witnesses Commissioner for Scotland. The Commissioner would be tasked with supporting the rights and interests of victims and witnesses within the criminal justice system, with the possibility of this being extended to cover people involved in civil proceedings.

### **Part 2 – Trauma-informed practice**

Measures aimed at better supporting vulnerable victims and witnesses by seeking to embed the use of trauma-informed practice across the justice system, including civil as well as criminal proceedings.

### **Part 3 – Special measures in civil cases**

Measures aimed at better supporting vulnerable witnesses and vulnerable parties by expanding the availability of special measures in civil cases.

Special measures are a range of practical steps aimed at making it easier for vulnerable witnesses to give their evidence to a court, or vulnerable parties to appear at court hearings (e.g. by video link from outside the court room or from behind a screen in the court).

### **Part 4 – Criminal juries and verdicts**

Measures seeking to reform the conduct of criminal trials by:

- reducing the size of criminal juries (from 15 to 12 jurors) and providing for the minimum number of jurors required for a guilty verdict
- abolishing the not proven verdict (leaving verdicts of guilty and not guilty).

### **Part 5 – Sexual Offences Court**

Measures aimed at improving the prosecution of serious sexual offences by establishing a specialist court to deal with such offences. Where the accused is charged with such an offence, the court would also be able to deal with any non-sexual offences forming part of the case. The sentencing powers of the court would include custodial sentences up to life imprisonment.

## Part 6 – Sexual offences cases: further reform

Measures to:

- establish legislative protection for the anonymity of victims of sexual (and certain other) offences
- provide independent legal representation (ILR) for complainers in sexual offence cases where there is an application to use evidence relating to the sexual history or character of the complainer
- allow for the running of a pilot of rape trials before a judge without a jury.

## Stage 1 scrutiny

The Criminal Justice Committee was designated as lead committee for parliamentary consideration of the Bill. The [Stage 1 report](#) was published on 29 March 2024. In relation to the general principles of the Bill, the report stated:

“As a Committee, we are content to agree the general principles of the Bill at Stage 1. The Bill contains proposals which are intended to improve the justice system for victims and witnesses. Not every Member supported every proposal in the Bill. Some Members have concerns about the extent of legal reform contained in one Bill and the potential unintended consequences of the cumulative effect of the system changes. There are some areas where we have recommended that further evidence, data and scrutiny is required. We have made a number of suggestions on how the Bill can be improved. Allowing the Bill to progress to Stage 2 enables such improvements to be made. For some Members, the final composition of the Bill at Stage 3 will determine whether they are ultimately able to support it.” (para 1,276)

The Scottish Government provided a [written response](#) to the Stage 1 report on 16 April 2024.

The Bill completed Stage 1 with the [Stage 1 debate](#) on 23 April 2024, following which the general principles of the Bill were agreed to – for 60, against 0, abstentions 62. The numbers of MSPs voting by party were as follows:

- for – 54 SNP and 6 Green
- abstentions – 30 Conservative, 21 Labour, 6 SNP, 4 Liberal Democrats and 1 Alba.

## Proposed Stage 2 amendments

On 31 October 2024, the Cabinet Secretary for Justice and Home Affairs wrote to the Criminal Justice Committee outlining [areas where the Scottish Government is planning to lodge Stage 2 amendments](#). These include proposed changes to provisions in all six of the main parts of the Bill – although with more significant changes proposed for some parts.

The Scottish Government's also indicated that it intended to lodge amendments which would allow it to take forward [planned reforms to the Victim Notification Scheme](#).

More information on the provisions of the Bill, the issues explored during Stage 1 scrutiny, and proposed Scottish Government amendments is set out below.

## **Part 1: Victims and Witnesses Commissioner for Scotland**

### **Stage 1**

Part 1 of the Bill as introduced provides for the creation of the office of Victims and Witnesses Commissioner for Scotland (the Commissioner).

Under those provisions, the Commissioner would be tasked with supporting the rights and interests of victims and witnesses within the criminal justice system, with the possibility of this being extended to cover people involved in civil proceedings.

The Commissioner would be independent of the Scottish Government and justice agencies (e.g. the Crown Office & Procurator Fiscal Service, Police Scotland, and the Scottish Courts & Tribunals Service); and would be accountable to the Scottish Parliament. Whilst initial funding would be provided by the Scottish Government, ongoing funding would be provided by the Parliament.

The Criminal Justice's Committee's [Stage 1 Report](#) highlighted three issues the Committee had considered in relation to the proposals:

“First, the Commissioner would be a new voice which would be required to fit into the existing landscape of organisations which already advocate for victims' rights and interests, with considerable effectiveness. Some have argued that this new voice would bring a fresh focus and impetus. However, another view, which we are concerned about, is that the post could create another layer of bureaucracy and stand in the way of victims and advocacy groups engaging directly with policy-makers.” (para 159)

“Second, the proposal in the Bill would result in the creation of another commissioner, at a time when public finances are under pressure and there are already eight commissioners funded by the Scottish Parliamentary Corporate Body with a further three commissioners being proposed by current members bills.” (para 160)

“Third, we must also consider whether there would be an ‘opportunity cost’, associated with the establishment of a Victims and Witnesses Commissioner. By that we mean that the costs of funding the Commissioner post would not be available to be used for other purposes to support victims and witnesses.” (para 162)

In the Stage 1 Report, the Criminal Justice Committee concluded that:

“In light of these considerations, we remain to be convinced that a strong case has been made for the establishment of a Victims and Witnesses Commissioner. Instead, we consider that better outcomes may be achieved by focusing spending in areas which have a more direct and immediate benefit for victims and witnesses.” (para 164)

However, the Committee also set out some recommendations and comments applying to a situation where the proposals for the Commissioner are taken forward. These included that the post of Commissioner should initially be established as a time-limited pilot.

In its [written response](#) to the Stage 1 report, the Scottish Government reiterated a commitment to its proposals for the Commissioner. As part of the justification for this, it argued that the Commissioner would provide an area of accountability that is currently lacking:

“No existing public body or organisation has the statutory power of holding criminal justice agencies to account in relation to how the rights of victims and witnesses are met or upheld, nor is this a role that can be given to a third sector organisation.” (p 1)

During the [Stage 1 debate](#), the Cabinet Secretary for Justice and Home Affairs referred to concerns expressed by the Criminal Justice Committee:

“I note the committee’s reservations, particularly around resource and the impact on victim support organisations. However, I believe that the role can be established in a way that is cost efficient and which will enhance the work of support organisations rather than diminish or duplicate their efforts.” (col 27)

The Committee’s Stage 1 report also noted that the Finance & Public Administration Committee was conducting an inquiry into the role of commissioners, adding that:

“We raise the possibility that there may be a need to amend the proposals for the Victims and Witnesses Commissioner depending on the outcome of that report”. (para 161)

The Finance & Public Administration Committee’s [Report on Scotland’s Commissioner Landscape: A Strategic Approach](#) was published in September 2024, and [debated in the Chamber](#) on 31 October 2024.

### **Proposed Stage 2 amendments**

The Cabinet Secretary’s letter of 31 October 2024 set out the following proposals for amendments:

- “- expanding the definition of ‘victim’, to ensure that the Commissioner can engage with as wide a group of people as possible
- strengthening the powers of the Commissioner in the event of a criminal justice agency failing to comply with a request for information

- providing criminal justice organisations the opportunity to review any recommendations included in any report from the Commissioner, prior to publication
- technical amendments in relation to how criminal justice organisations are collectively referred to, making clear that decisions made by the Parole Board for Scotland remain independent of the Scottish Ministers.”

In relation to the above proposal to strengthen the powers of the Commissioner, it may be noted that the Criminal Justice’s Committee’s Stage 1 Report included the following:

“On the power given in the Bill for the Commissioner to require persons to give evidence and produce documents, we note that the Bill does not contain any powers to enforce these provisions. The Cabinet Secretary observed that this is something which Parliament would be able to pursue and consider what further action would be appropriate. We ask the Scottish Government for clarity on how this would work in practice, and ask whether there is a need for enforcement power to be included on the face of the Bill.” (para 168)

## **Part 2: Trauma-informed practice**

### **Stage 1**

Part 2 of the Bill as introduced seeks to improve the experience of people who become involved in the justice system (e.g. victims and witnesses) by embedding the use of trauma-informed practice. Some of the measures would cover civil as well as criminal cases.

The provisions deal with the following aspects of the justice system:

1. Justice agencies – the Bill as introduced would require the Crown Office & Procurator Fiscal Service, Scottish Prison Service, Police Scotland, Scottish Courts & Tribunals Service, and the Parole Board for Scotland to have regard to the principle that victims and witnesses should be treated in accordance with trauma-informed practice. This would include stating how they will do so in their standards of service.
2. Court rules – the High Court and Court of Session already have powers to set out rules regulating practice and procedure in court proceedings. The Bill as introduced seeks to make clear that these powers would include the ability to regulate proceedings to promote trauma-informed practice.
3. Scheduling of court business – certain members of the judiciary (e.g. the Lord President and sheriffs principal) have responsibilities for ensuring that arrangements are in place to secure the efficient disposal of court business. The Bill as introduced seeks to add that, in carrying out their responsibilities in this area, they must have regard to the desirability of doing so in a way that accords with trauma-informed practice.

In the [Stage 1 Report](#), the Criminal Justice Committee highlighted the evidence it had received from survivors. The Committee commented (paras 412-413) that the “significant and unnecessary trauma they faced during their journey through the criminal justice system is unacceptable”, and that:

“We are therefore in no doubt of the importance of embedding trauma-informed practice which will enable victims to give their best evidence.”

The Stage 1 Report noted that Committee members had differing views on whether legislation is needed to encourage trauma-informed practice, whilst also setting out recommendations for strengthening the legislative proposals in this area.

Recommendations included expanding the requirement for training in trauma-informed practice:

“We think it is vital that all participants in the court should be required to conduct themselves in a manner that accords with trauma-informed practice. This is the principle being followed for the proposed new Sexual Offences Court, in which judges and defence lawyers will be required to undertake training in trauma-informed practice before attending this court. We see no reason why these training requirements should not be extended to defence lawyers and judges participating in all court proceedings. We recommend that they should be.” (para 418)

In relation to this recommendation, the Scottish Government’s [written response](#) to the Stage 1 report stated that:

“We note the Committee’s desire to see more widespread trauma-informed training for defence lawyers and judges, and we are open to exploring with partners ways in which trauma-informed training could be further embedded and mainstreamed.” (p 8):

### **Proposed Stage 2 amendments**

The Cabinet Secretary’s letter of 31 October 2024 indicated that the Scottish Government is planning to bring forward amendments to expand the definition of trauma-informed practice in the Bill.

On this issue, the Criminal Justice’s Committee’s Stage 1 Report stated that:

“we believe that the definition of trauma-informed practice in the Bill requires to be strengthened. We recommend that the definition in the Bill should be amended to bring it in line with that put forward in the Knowledge and Skills Framework created by NHS Education for Scotland.” (para 417)

## Part 3 – Special measures in civil cases

### Stage 1

Part 3 of the Bill as introduced deals with special measures in civil cases. These are a range of practical steps, such as giving evidence by video link, aimed at making it easier for vulnerable witnesses to give their evidence to a court, or vulnerable litigants to appear at court hearings.

Examples of situations where a witness or litigant may be potentially vulnerable in a civil case include where they are suing for damages in the context of a rape or childhood sexual abuse. Another example could be where the court is being asked to grant a civil protection order, to protect the person from future harm or abuse, including domestic abuse.

At present, special measures in civil cases are covered by two pieces of legislation:

- the Vulnerable Witnesses (Scotland) Act 2004 (the 2004 Act), which introduced the original scheme for special measures
- the Children (Scotland) Act 2020 (the 2020 Act) which aims to address some weaknesses in the 2004 Act's provisions but is not yet in force.

The main policy aim of Part 3 of the Bill is to extend certain changes to special measures provided for in the 2020 Act (those applying to one type of family case) to most types of civil case.

Key features of Part 3 include:

- specific categories of witness in civil cases would be 'deemed vulnerable', meaning their vulnerability would not have to be assessed by the court in an individual case
- a new special measure, which prohibits a litigant from conducting their case personally, as opposed to being represented by a solicitor. There would be a presumption (or starting point for the court) in favour of this special measure in certain circumstances
- the possibility for the first time of special measures in 'non-evidential hearings', that is, court hearings other than where evidence is being taken and witnesses cross-examined on it.

In respect of the first bullet point above, there are two main classes of 'deemed vulnerable witness' proposed under Part 3 of the Bill:

- those who have been the victim of certain offences, including sexual offences and offences relating to domestic abuse, in respect of which a litigant is being prosecuted, or has been convicted, in the criminal courts
- those who currently benefit from a civil protection order in their favour prohibiting certain conduct towards them by a litigant in the proceedings.



Note that, even where a witness is ‘deemed vulnerable,’ they would not have an absolute right to special measures under Part 3. The need for special measures would still be assessed by the court applying certain statutory tests.

In addition, where the new special measure prohibiting personal conduct of a case is in force a solicitor would be appointed from a register of solicitors to represent the litigant affected by the special measure.

In its [Stage 1 Report](#), the Criminal Justice Committee welcomed the overarching policy objective of Part 3 to enhance the availability of special measures in civil cases.

However, the Committee’s report (para 486) expressed concern that there was further proposed legislation on special measures in civil cases when some existing legislation, including the 2020 Act, was not yet implemented. While Part 3 did not feature much in the [Stage 1 debate](#), this issue was also referenced in a couple of places (see cols 35 and 74).

In the Stage 1 report, the Committee sought a clear timetable for implementation of Part 3. In its [written response](#) to the Committee’s report, the Scottish Government stated that implementation of Part 3 would take around two years, but with the potentially important qualification that this was from the commencement of the Bill provisions enabling implementation.

The Stage 1 Report (paras 456-461) referred to some evidence that, even where there is an entitlement to special measures at present (e.g. for children), in practice there can be inconsistencies in the availability of those measures between courts. The Committee (para 487) expressed its view that providing sufficient resources will be key to successful implementation of Part 3.

The Stage 1 Report (paras 438-447) also highlighted the arguments made by some stakeholders that the scope of those witnesses who are ‘deemed vulnerable’ should be broadened. For example, the Committee (para 442) referred a [submission from Rape Crisis Scotland](#) arguing that witnesses in civil cases should be deemed vulnerable where the civil proceedings incorporate assertions of rape or sexual violence.

In its report, the Committee also noted (paras 452-455) the somewhat mixed evidence received on whether the entitlement to special measures for deemed vulnerable witnesses should be absolute, rather than assessed by a court in an individual case according to various statutory tests. It expressed its concern (para 489) at some of the restrictions on accessing special measures, and asked the Scottish Government for its response to the stakeholders’ views in this area.

In its written response to the Stage 1 Report (p 11), the Scottish Government committed to considering whether any government amendments should be brought forward in this regard. (See below on relevant amendments now proposed.)

The Stage 1 Report welcomed the plan to establish a register of solicitors who may be appointed by the court to act for a person when that person has been prohibited from representing themselves in court. However, following concerns expressed by

representatives of the legal profession (see the Stage 1 Report at paras 477-481), the Committee criticised the lack of details associated with how the register will work in practice. The Committee asked the Cabinet Secretary to address this in advance of Stage 3 (para 490). In its written response to the Stage 1 Report (p 11-12), the Scottish Government provided details of a [2021 consultation on possible regulations to establish and operate a register under the 2020 Act](#). This was on the basis that the register under Part 3, also requiring secondary legislation, “would be along similar lines.”

## **Proposed Stage 2 amendments**

The Cabinet Secretary’s letter of 31 October set out proposals for amendment relating to Part 3 in three areas.

First, the Scottish Government proposes to extend who is ‘deemed vulnerable’ when involved in a civil court case. This would extend who is deemed vulnerable to include:

- individuals who provide evidence from a reputable source (e.g. a health practitioner) of domestic abuse or sexual assault committed by a litigant in the case
- individuals applying for a civil protection order against domestic abuse or for damages following a sexual assault.

In other words, the Scottish Government is now proposing to go further than the Bill as introduced but not as far as some stakeholders wanted.

The second area on which the Scottish Government is proposing to lodge amendments is on what the courts should do when a person is deemed vulnerable. No further details are available on this at this stage.

The third area involves two sets of miscellaneous amendments.

## **Part 4 – Criminal juries and verdicts**

### **Stage 1**

Part 4 of the Bill as introduced seeks to reform:

- criminal juries – making changes to both jury size and the majority required for a guilty verdict
- criminal verdicts – abolishing the not proven verdict (leaving verdicts of guilty and not guilty).

In relation to jury size, it provides for a jury formed with 12 jurors instead of the current 15. This number could be reduced if one or more jurors were discharged during a trial (e.g. due to illness) but the jury would need to retain at least 9 members to continue hearing the case.

Under the provisions of the Bill as introduced, a guilty verdict would require the support of at least 8 out of 12 jurors (compared to the current 8 out of 15). This would be reduced to 7 where juror discharges resulted in a jury of 9 or 10 members. (Under the current system the support of 8 jurors is needed for a guilty verdict even if juror numbers are reduced to the minimum allowable level of 12.)

In relation to verdicts, three options are currently available following a trial – guilty, not guilty, and not proven. This applies to both jury and non-jury trials (where the outcome is decided by a sheriff or justice of the peace). In legal terms, the implications of a not proven verdict are the same as a not guilty verdict in that the accused is acquitted. The Bill as introduced seeks to abolish the not proven verdict.

In the [Stage 1 Report](#), the Criminal Justice Committee expressed support for abolishing the not proven verdict:

“On the balance of evidence, having heard arguments for and against, we believe the not proven verdict has had its day and should be abolished.” (para 672)

The report noted that:

“the Scottish Government’s position is that, if the not proven verdict is abolished, then changes are needed to jury size and (in particular) the majority required for conviction in the interests of maintaining a ‘fair and balanced’ system. Put simply, its view is that abolishing the not proven verdict will make convictions somewhat more likely, and so other changes (often referred to as ‘balancing measures’) are required which would have the opposite effect.” (para 676)

However, the Criminal Justice Committee reported that the evidence it had taken on whether changes to juries were needed and what those changes should be, had not produced a clear answer. On this basis, it stated that:

“Overall, then, we recommend that should the Scottish Government proceed with the abolition of the not proven verdict we cannot support the proposed changes to jury size and majority because we have not heard compelling evidence to support this.” (para 690)

In its [written response](#) to the Stage 1 report, the Scottish Government welcomed the Criminal Justice Committee’s support for abolishing the not proven verdict. In relation to jury size and majority, the Scottish Government highlighted the evidence it had relied on in bringing forth its proposals, whilst also stating that (p 16):

“However, as we have previously stated, it is essential that any reforms to our criminal justice system command confidence in its integrity. Therefore, we take it very seriously that the Committee does not support the proposed changes to jury size and majority and will give careful consideration to the issues they have raised.” (p 16)

## **Proposed Stage 2 amendments**

The Cabinet Secretary's letter of 31 October 2024 indicated that the Scottish Government is planning to bring forward amendments to retain 15 person juries in criminal cases (removing provisions in the Bill which would reduce them to 12 jurors).

However, she added that she remained of the view that a move away from the possibility of being found guilty by simple majority is still needed in a system without the not proven verdict – to avoid any increased risk of wrongful convictions. She concluded:

“After careful consideration, I believe that the most prudent approach, best able to maintain balance and confidence in our system, is to seek support for a model with two verdicts, fifteen jurors, and a two thirds majority requirement for conviction. This is the model that the majority of Senators preferred if Scotland changes to a two verdict system.”

This implies a requirement for at least 10 out of 15 jurors in favour of conviction.

The letter doesn't go into further detail, but scrutiny of proposed amendments might include consideration of:

- the minimum number of jurors required for a jury to continue hearing the case where one or more of their number are discharged during the trial (e.g. due to illness) – under current rules a 15-person jury can be reduced to 12
- the majority required for a guilty verdict where a jury is reduced in number (e.g. 8 out of 12 jurors).

## **Part 5 – Sexual Offences Court**

### **Stage 1**

Part 5 of the Bill as introduced seeks to improve the prosecution of serious sexual offences by establishing a specialist court to deal with such offences. Under its proposals, the Sexual Offences Court would include the following features:

1. Jurisdiction – the Sexual Offences Court would have the power to deal with a wide range of sexual offences prosecuted under solemn procedure (used for more serious cases). In effect, part of the current caseload of solemn sheriff courts and the High Court could instead be dealt with by the Sexual Offences Court. Where a case involved a mix of sexual and non-sexual offences, it would be able to deal with both.
2. Judiciary – existing High Court judges and sheriffs could be appointed as judges of the Sexual Offences Court. They would need to have completed training on trauma-informed practice in sexual offence cases and have the necessary skills and experience.

3. Sentencing – the Sexual Offences Court would be able to impose any sentence which the High Court could impose for the same offence. This would include a sentence of life imprisonment for some offences.
4. Rights of audience – solicitors, solicitor advocates and advocates would generally be able to represent an accused person in the Sexual Offences Court. They would (like the judiciary) need to have completed training on trauma-informed practice in sexual offence cases. However, the right to represent an accused would be limited to solicitor advocates and advocates in relation to some very serious charges. Decisions on who presents the prosecution case in the Sexual Offences Court would be left to the Lord Advocate.
5. Procedures – the way in which the Sexual Offences Court works would include a presumption in favour of vulnerable complainers being able to provide their evidence in advance of trial. More generally, its procedures would be based on those of the High Court, with the possibility of more bespoke rules and practices being developed.

In the [Stage 1 Report](#), the Criminal Justice Committee noted that its members were split on whether the proposals for a Sexual Offences Court should be taken forward:

“Some Members support the proposals in the Bill for a new Sexual Offences Court. For those Members, the model of a new Sexual Offences Court has the potential to deliver a degree of improvement in the handling of sexual offence cases which cannot be realised using existing mechanisms. Those Members encourage the Scottish Government to take the necessary steps to address the concerns outlined in this report regarding the status of the new court.”

Other Members do not support the proposals for a standalone sexual offences court. Their view is that it would be possible to achieve the necessary improvements and address concerns raised by some elsewhere in this report through the creation of specialist divisions of the High Court and Sheriff Court. For them, a new specialist court will not in itself achieve a meaningful improvement to the experience of victims.” (paras 893-894)

The Stage 1 Report also set out some areas of concern. For example (including brief information on the Scottish Government’s [response](#)):

#### Legal representation

Committee – all cases which would previously have been prosecuted in the High Court should still involve representation by solicitor advocates or advocates if prosecuted in the Sexual Offences Court.

Scottish Government – endorsed this in principle whilst highlighting potential difficulties in setting this out in legislation.

### Prosecution of murder

Committee – any case involving a charge of murder should still be prosecuted in the High Court.

Scottish Government – considering whether Stage 2 amendments are appropriate.

### Tenure of judges

Committee – sought reassurance on whether the process of removal of judges from the Sexual Offences Court would be appropriate.

Scottish Government – noted that it had been exploring alternative mechanisms and that it would bring forward amendments at Stage 2.

### Court estate

Committee – given that the existing court estate would be used for the Sexual Offences Court, sought reassurance that this would be fit for purpose.

Scottish Government – whilst acknowledging limitations within the court estate, pointed to benefits for the Sexual Offences Court in being able to use any part of the High Court and sheriff court estates in selecting appropriate locations.

### Evidence of vulnerable witnesses

Committee – recommended that the presumption in favour of vulnerable complainers providing their evidence in advance of trial should not unduly limit their choice in how they want to give evidence.

Scottish Government – acknowledged the Committee’s concerns and stated that it was exploring the issue with justice partners.

During the [Stage 1 debate](#), the Cabinet Secretary for Justice and Home Affairs reiterated her reasons for believing that a new court is needed:

“Victims cannot afford for us to rely on the historical status and structure of the existing court system to deliver changes that we all agree are needed and which the status quo has singularly failed to deliver. If we fail to take ambitious action now, we risk consigning victims to unnecessary retraumatisation through a court system that is not sufficiently specialised or focused on improving victims’ experiences.” (col 28)

### **Proposed Stage 2 amendments**

The Cabinet Secretary’s letter of 31 October 2024 repeated her support for the proposed Sexual Offences Court, whilst also indicating several areas where the Scottish Government plans to bring forward amendments:

1. Legal representation of accused – seeking to add a mechanism to address concerns that accused persons should be able to access the same level of legal

representation in the new court as they can under current arrangements. It is envisaged that the new court will deal with a range of cases which are currently prosecuted in the High Court, where the defence is always presented by an advocate or solicitor advocate.

2. Tenure of judges – seeking to enhance the security of tenure of judges in the new court, thereby helping to safeguard the independence of judicial decision-making.
3. Evidence of vulnerable witnesses – exploring amendments to embed choice for adult deemed vulnerable witnesses (i.e. complainers in cases involving sexual offences, domestic abuse, stalking or trafficking) as to whether they pre-record their evidence or provide it live at trial. Goes on to comment that the use of pre-recorded evidence “remains a fundamental bedrock” of the new court.
4. Remuneration of judges – seeking to allow the Scottish Government to make bespoke arrangements for the remuneration of judges in the new court. The Criminal Justice Committee’s Stage 1 Report (para 792) noted evidence from the Sheriffs and Summary Sheriffs Association that it is not clear whether sheriffs will be paid at an enhanced rate where presiding over cases in the new court.
5. Double jeopardy – seeking to apply the new evidence exception, as set out in the Double Jeopardy (Scotland) Act 2011, to cases that are prosecuted in the new court.

The Double Jeopardy (Scotland) Act 2011 sets out the rule against double jeopardy, which generally prevents someone from being tried twice for the same crime. However, it also sets out three exceptions to this rule where further prosecution is possible:

- exception for tainted acquittals – the original acquittal is tainted by an offence against the course of justice (e.g. one involving the intimidation of witnesses)
- exception in relation to admissions – the prosecutor has new evidence that the accused admitted committing the offence
- new evidence exception – the prosecutor has other new evidence of guilt (i.e. something other than an admission).

Under the current provisions of the 2011 Act, the third exception only applies to cases which were prosecuted in the High Court.

On a separate point, the Cabinet Secretary’s letter does not indicate that the Scottish Government is planning to amend the Bill to ensure that any case involving a charge of murder is still prosecuted in the High Court. As noted above, the Criminal Justice Committee’s Stage 1 report recommended that the Bill should be amended in this way.

## Part 6 – Anonymity for victims

### Stage 1

Current arrangements in Scotland for protecting the anonymity of victims in sexual offence cases largely rely upon convention and the responsibility of the press. Section 63 of the Bill as introduced seeks to provide automatic statutory protection for the anonymity of victims of a wide range of sexual and related offences (e.g. human trafficking).

It would generally prevent the publication of information likely to lead to the identification of a person as being a victim of a relevant offence. The protection would continue to apply during a victim's lifetime. The concept of publication is defined broadly (e.g. to include information made available on social media as well as newspapers and television).

The right to protection would not be dependent upon any proactive steps by the victim (e.g. reporting the matter to the police). Nor on any formal action being taken in a case (e.g. a suspect being charged or prosecuted). Section 63 of the Bill as introduced defines 'victim of an offence' as meaning:

“a person against or in respect of whom an offence has been, or is suspected to have been, committed”.

A failure to comply with the restrictions on publishing would be a criminal offence. This would be subject to certain defences (e.g. based on the information already being in the public domain).

An adult victim would be able to give others permission to publish information. Where the victim is still a child (under 18), the victim's consent would not be sufficient – the matter would have to be considered by a court.

The restrictions on publication would not prevent a victim of any age publishing information likely to identify themselves (e.g. on social media).

In the [Stage 1 Report](#), the Criminal Justice Committee welcomed the proposals in the Bill as introduced.

However, it raised several issues, including ones seeking clarification of:

- the application of the public domain defence where someone shares information which has already been made public by a child victim
- the application of the Bills' definition of a 'victim' to situations where an accused has been acquitted.

In its [written response](#) to the Stage 1 report, the Scottish Government confirmed that the policy intention is:



- that the public domain offence would not apply where someone shares information which has been made public by a child victim, but that further consideration was being given to situations where friends or family of the child share such information
- that an acquittal should not affect the protection of victim anonymity, and that consideration was being given to whether the Bill should be amended to make this clearer.

### **Proposed Stage 2 amendments**

The Cabinet Secretary's letter of 31 October 2024 indicated that the Scottish Government is planning to bring forward amendments to:

- provide for the primacy of the protections for anonymity for victims of sexual offences set out in the Bill over existing provisions protecting the anonymity of children set out in the Criminal Procedure (Scotland) Act 1995
- make clear that the public domain defence does not apply to people who publish information identifying a child victim, even where the child has self-published their own story
- put beyond doubt that the right to anonymity does not terminate after an acquittal in a criminal case
- ensure there is no loophole which would allow the publication of information identifying a child victim on the basis that the perpetrator was under the age of criminal responsibility.

In relation to the first bullet point, [section 47](#) of the Criminal Procedure (Scotland) Act 1995 provides protection for the anonymity of children involved in court proceedings; whether as complainers, witnesses or accused. They apply in respect of newspaper reports, and sound and television programmes.

## **Part 6 – Independent legal representation for complainers**

### **Stage 1**

Existing legislation restricts evidence being led about the sexual history and character of complainers in sexual offence trials – sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995.

Section 64 of the Bill as introduced seeks to strengthen those restrictions by giving complainers a right to independent legal representation (ILR) where there is an application to the court to lead sexual history and character evidence. Specifically, it would:

- require the prosecution to provide the complainer with information on the application to allow sexual history and character evidence

- allow the complainer to be represented by a lawyer in relation to that application
- provide for the disclosure of relevant evidence to that lawyer
- allow the lawyer to make representations to the court on the application
- allow the lawyer to appeal a court decision to grant an application.

In the [Stage 1 Report](#), the Criminal Justice Committee welcomed the proposals in the Bill as introduced, whilst also commenting that it would have liked additional information on how the current provisions are working in practice.

Shortly after the Stage 1 Report was published, a report of relevant research funded by the Scottish Government was also published – [The Use of Sexual History Evidence and ‘Sensitive Private Data’ in Scottish Rape and Attempted Rape Trials](#). The report noted that the research aimed to address gaps in evidence on how the provisions in sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995 were operating, taking into account shifts in law, policy and practice since previous research was published in 2007. It stated that the research highlights areas where there has been positive change, as well areas where further improvements could be made.

In relation to the way in which the Bill sought to provide for ILR, the Stage 1 Report noted concerns raised in evidence about the practicality of some of the procedures provided for. For example:

“we heard several comments that the proposed arrangements for disclosing relevant information in relation to a case could be simplified. For example, the Senators of the College of Justice suggested that the procedures in the Bill would prove ‘time-consuming and cumbersome’, due to the requirement for the Crown to ask the court’s permission to disclose evidence to the complainer’s representative.” (para 1,037)

It went on to recommend that the Scottish Government addresses such points, including bringing forward amendments where necessary to simplify the procedures.

In its [written response](#) to the Stage 1 report, the Scottish Government acknowledged that the provisions need to be workable for all concerned, and stated that:

“We are discussing with stakeholders how we might simplify some of the operational aspects. This includes the process for disclosing relevant evidence to the independent legal representative and we will bring forward amendments at stage two. As well as alleviating resource pressures this would of course avoid additional delay to the complainer’s journey time.” (p 37)

## **Proposed Stage 2 amendments**

The Cabinet Secretary’s letter of 31 October 2024 indicated that the Scottish Government plans to bring forward amendments to:

- simplify the process for disclosure of evidence to independent legal representatives
- place a duty on independent legal representatives to notify the prosecution and the court when appointed by a complainer
- ensure that independent legal representatives are subject to a duty of confidentiality
- ensure that complainers have the same amount of time in which to instruct independent legal representatives when they are giving their evidence by commissioner
- extend the restrictions in section 274 of the Criminal Procedure (Scotland) Act 1995 so that they apply to –
  - witnesses who are giving evidence in relation to an act or omission which is connected with a sexual offence with which the accused is charged ('docket witnesses')
  - complainers who are giving evidence about an offence under section 1 of the Domestic Abuse (Scotland) Act 2018, where the commission of that offence is said to involve any kind of sexual element (not just a substantial sexual element).

[Section 1](#) of the Domestic Abuse (Scotland) Act 2018 sets out an offence of abusive behaviour towards a partner or ex-partner. Such abuse may include a sexual element. Where it does, current rules provide that the restrictions set out in [section 274](#) of the Criminal Procedure (Scotland) Act 1995 apply where the court has made an order that the behaviour in the charge includes a 'substantial sexual element'. The proposed amendment in this area would mean that the restrictions would apply where the charge includes any sexual element (not necessarily a substantial one).

## **Part 6 – Rape trial pilot**

### **Stage 1**

Under current arrangements, rape is always prosecuted under solemn procedure in the High Court. As discussed earlier, Part 5 of the Bill as introduced provides for the creation of a specialist Sexual Offences Court to deal with sexual offences prosecuted under solemn procedure, including rape.

At present, all prosecutions under solemn procedure involve a jury where there is a trial. The provisions seeking to establish the Sexual Offences Court would not change this.

Separate from the proposals for a Sexual Offences Court, sections 65 and 66 of the Bill as introduced would allow the Scottish Government to establish, by secondary legislation, a pilot scheme for criminal trials of rape or attempted rape under solemn procedure without a jury. The pilot would:

- take place within the High Court and/or the proposed Sexual Offences Court

- involve a single judge delivering the verdict following a trial and providing written reasons for that verdict
- be followed by a review and publication of a report on how it operated.

In relation to the purpose of the pilot, the Bill's [policy memorandum](#) states that:

“The policy objective is to gather evidence to enable an analysis, properly informed by empirical research, to be undertaken of some of the difficulties encountered in Scotland in the prosecution of cases involving rape, and in particular to allow an assessment of the system by which verdicts are reached.”  
(para 567)

In April 2024, after publication of the Stage 1 Report, the Scottish Government published some additional [statistics on conviction rates in rape cases](#). They point to a particularly low conviction rate where a case involves a single complainer.

In the [Stage 1 Report](#), the Criminal Justice Committee noted that the proposed pilot of rape trials without juries was one of the most controversial aspects of the Bill. The Committee was split on whether the proposal should be supported.

Members supporting the proposed pilot acknowledged that departing from the principle of trial by jury for serious crimes required significant justification. They argued that this existed in the need to improve the current experience of rape complainers. They believed that a time-limited pilot could provide a valuable opportunity to obtain evidence on issues such as rape myths,<sup>1</sup> and how both experiences and outcomes might differ where there is no jury. They also highlighted the opportunity to obtain written reasons from judges deciding cases.

Members who did not support the proposed pilot gave various reasons, including:

- the fact that the pilot would determine outcomes for real people in real cases
- the value of juries in representing a broader range of experiences than are found amongst the judiciary
- an inadequate evidence base for having a pilot, including conflicting evidence on the prevalence of rape myths
- the risk of the pilot undermining public confidence in the justice system.

In its [written response](#) to the Stage 1 report, the Scottish Government:

- stated that it would seek to amend the Bill to include more detail on the criteria for cases being included in the pilot, and that it was also considering whether more information on how the pilot would be evaluated should be set out in the Bill

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<sup>1</sup> Potential rape myths include beliefs that a victim will always fight back or shout for help, and that false accusations are commonly made.

- indicated that it was considering the possibility of trials under the pilot being heard by a panel (a judge plus two lay members) rather than a single judge alone.

### **Proposed Stage 2 amendments**

The Cabinet Secretary's letter of 31 October 2024 indicated that the Scottish Government will seek to amend the Bill at Stage 2 to remove provision for a pilot:

"I recognise there is not enough cross-party support at this time for the pilot of single judge rape trials to progress. In the interests of building as much consensus as possible around the Bill, I will no longer pursue this policy and bring forward relevant amendments to remove it from the Bill."

She added that:

"I am working on a range of legislative and non-legislative measures to explore and address the underlying issues the pilot was seeking to address. Legislatively, I will bring forward amendments to allow for research to be carried out into jury deliberations which is currently heavily restricted by the Contempt of Court Act 1981. This would pave the way for further development of the evidence base on whether and how rape myths affect the verdicts juries reach in rape and attempted rape cases, to help us all understand if these myths are a barrier to the proper administration of justice and if that is the case, to inform debate on how that could best be addressed."

The Scottish Government's intention is to make relevant changes to the [Contempt of Court Act 1981](#) by way of amendments to the current Bill.

There was, during Stage 1 scrutiny, some discussion about the extent to which the current provisions of the Contempt of Court Act 1981 restrict jury research (e.g. see paragraphs 512 to 514 of the [Stage 1 Report](#)). Section 8 of the Act includes the following:

"Confidentiality of jury's deliberations: Scotland and Northern Ireland

(1) In Scotland and Northern Ireland, subject to subsection (2) below, it is a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings.

(2) This section does not apply to any disclosure of any particulars—

(a) in the proceedings in question for the purpose of enabling the jury to arrive at their verdict, or in connection with the delivery of that verdict, or

(b) in evidence in any subsequent proceedings for an offence alleged to have been committed in relation to the jury in the first mentioned proceedings,

or to the publication of any particulars so disclosed."

## Victim Notification Scheme (VNS)

### Current provisions

The Victim Notification Scheme (VNS) was created by provisions in the Criminal Justice (Scotland) Act 2003. It came into force on 1 November 2004. Since then, it has been amended and expanded. Information on the current arrangements is set out in [guidance for victims](#) published by the Scottish Government in 2018.

The VNS gives a victim the right to receive information about the release of the offender where they are serving a custodial sentence. They may also be able to make representations where release is being considered. There are provisions dealing with cases where an offender is detained in hospital for mental health treatment.

Taking part in the VNS is voluntary; an eligible victim needs to opt-in.

Different rules apply depending on the length of sentence a prisoner is serving. In broad terms, these are as follows.

Victims of offenders sentenced to less than 18 months can contact the Scottish Prison Service if they would like to receive information on the date of release of the offender.

Where the offender has been sentenced to 18 months imprisonment or more, a victim can choose to join parts 1 and 2 of the VNS (either or both). Part 1 allows the victim to receive a range of information, including the date of the offender's release and when the offender first becomes eligible for temporary release. Part 2 allows the victim to make representations about the release of the prisoner (including temporary release by the Scottish Prison Service and decisions by the Parole Board about release on parole).

### Independent review of the VNS

The [report of an independent review of the VNS](#) was published in May 2023, setting out a range of recommendations (not all of which would require legislation). In its conclusions, it commented that:

“Our brief recognised that victims and victim support organisations had concerns about the current operation of the scheme in that it was seen as bureaucratic, difficult to navigate, disjointed and confusing. Concerns had been expressed about the level of take-up and that some victims may be failing to engage for reasons which were not entirely clear.” (p 72)

And that:

“Our principal recommendation is the establishment of a new team to provide responsive and personalised information for victims, to inform fully and avoid misunderstandings, as well as refer effectively to support.” (p 72)

In October 2024, the Scottish Government published a [response to the review](#) stating that it “agreed with or agreed in principle with the majority of the recommendations” (p 3). In relation to implementation, it said:

“We have already started our considerations of how to implement the recommendations. We will prioritise those that require changes to primary legislation.

The key innovation from the review was the establishment of a victim contact team, which will provide personalised support for victims. This will be our priority.

We intend to use the Victims, Witnesses and Justice Reform (Scotland) Bill, which is currently at Stage 2, to deliver recommendations that need primary legislation. This Bill presents the ideal opportunity to deliver the benefits of VNS reform quickly, which we all will want to see.

We intend to take forward recommendations that need changes to secondary legislation in a way that dovetails with recommendations that will be delivered by this Bill.

Many of the review recommendations do not need legislation, so we will work with victim support organisations and justice partners to take these forward in tandem to the recommendations that need legislative change.” (p 3-4)

The Scottish Government also issued a news release – [Improved support for crime victims](#) (October 2024).

### **Proposed Stage 2 amendments**

The Cabinet Secretary’s letter of 31 October 2024 also stated that the Scottish Government will seek to use the current Bill to take forward its planned reforms to the VNS:

“The Scottish Government wants to ensure this work on VNS reform takes place as quickly as possible, but we are aware that legislation can often take much time to develop and introduce. Therefore, we intend to use the Victims, Witnesses, and Justice Reform (Scotland) Bill to deliver the recommendations that need primary legislation. The fact that this Bill is still within Parliament presents an opportunity we must grasp so we can deliver at pace the benefits of VNS reform we all want to see, and I would hope the Committee would support that aim.”