

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

## **Business and Regulatory Impact Assessment**

**April 2023**

# Final Business and Regulatory Impact Assessment

## Title of proposal

Victims, Witnesses, and Justice Reform (Scotland) Bill

## Purpose and intended effect

### Background and objective

The Victims, Witnesses, and Justice Reform (Scotland) Bill (“the Bill”) responds to concerns raised about the need to improve the experiences of victims and witnesses within Scotland’s justice system, especially the victims of sexual crime. At the same time, it continues to safeguard the operation and principles of the system and protects the rights of those accused of crime.

The Bill contains a package of reforms which collectively form a transformed approach to how victims are treated in more sensitive and responsive justice system.

In particular, the Bill

- strengthens the rights of victims of crime and embeds trauma-informed practice across the justice system
- improves the experience of vulnerable parties and witnesses in civil cases
- looks to address longstanding concerns and difficulties in how justice operates for victims of the most serious sexual crimes.

A summary of the policy content of the Bill and the specific aim of each policy is set out below.

### Establishing a Victims and Witnesses Commissioner for Scotland

The Bill will establish an independent Victims and Witnesses Commissioner for Scotland to promote and support the rights and interests of victims and witnesses. Part of the Commissioner’s role will be to monitor criminal justice agencies’ compliance with the [Victims’ Code for Scotland](#) and [Standards of Service for Victims and Witnesses](#).

### Embedding trauma-informed practice across the justice system

The Bill aims for the justice system to treat victims and witnesses more compassionately. This means engaging with people in ways that understand the impact trauma can have on them and try to avoid the risk of re-traumatising them. This is intended to help people to give their best evidence and support their recovery.

## **Special measures for vulnerable parties and witnesses in civil cases**

The Bill extends special measures to non-evidential hearings and ban personal self-representation in certain circumstances. This will better protect vulnerable parties and witnesses in civil cases.

## **Abolition of the not proven verdict and related reforms**

The Bill will abolish the not proven verdict in all criminal trials in Scotland. This is intended to increase public confidence that criminal verdicts are returned on a sound, rational basis while ensuring balance and fairness to all parties.

The Bill recognises the complex and interlinked nature of the jury system. It also contains related reforms to reduce juror numbers (from 15 to 12) and change the majority required for a conviction.

## **Creating a Sexual Offences Court**

The Bill will create a new Sexual Offences Court, which is distinct from existing court structures. This is intended to improve the experiences of complainers in serious sexual offence cases.

The new Court will place an emphasis on increased pre-recording of evidence and improved judicial case management. It will introduce a requirement for specialist training for all personnel. In addition, the Court will also provide a framework within which to develop and implement best practice in the management of sexual offences cases.

## **Lifelong anonymity for complainers in sexual and certain other offences**

These provisions will protect the dignity of victims by providing an automatic lifelong right of anonymity for complainers of sexual offences and limited other offences (human trafficking, modern slavery, female genital mutilation, and the carrying out of hymenoplasty and virginity testing).

Preserving the anonymity of complainers in such cases serves an important protective function. It will help to minimise the re-traumatisation of victims before, during and after the court process and, in turn, increase the confidence of victims to come forward and report such crimes in the first instance.

## **Right to independent legal representation for complainers when applications to lead sexual history and/or 'bad character' evidence are made in sexual offence cases**

The Bill creates an automatic right to publicly funded independent legal representation for complainers when applications are made to lead evidence of their sexual history or 'bad character' in sexual offence cases.

This is intended to improve the complainers' experience in sexual offence trials, in particular their understanding and ability to provide their views and be heard in court in respect of an especially intrusive aspect of criminal procedure.

## **Enabling a pilot of single judge trials for cases of rape and attempted rape**

The Bill gives Ministers powers to conduct a time-limited pilot of single judge trials for cases of rape and attempted rape, removing the jury as a decision-maker in these cases.

Conducting the pilot will provide evidence to inform debate into the effectiveness of single judge rape trials. The pilot will also provide an insight into the extent to which single judge rape trials can improve the experience of complainers and increase the efficiency of cases through the court system.

## **Further information**

Further information about the background and the policy intention of the Bill is set out in the Policy Memorandum which accompanies the Bill.

Further details relating to costs are included in the Bill's Financial Memorandum, which should be read in conjunction with this BRIA.

The Scottish Government acknowledges that there are different words to describe those who have experienced crime, particularly sexual offences. Views on which terms are used can be strongly held. Some terms, for example 'complainer' are used when describing a person in a legal setting; 'victim' or 'survivor' are more commonly used when referring to a person in a broader context not restricted to the legal system. This BRIA uses a mix of these terms with the choice of term influenced by the context.

## **Rationale for Government intervention**

The Bill contributes to the following objectives of the [National Performance Framework](#)

- live in communities that are inclusive, empowered, resilient and safe
- respect, protect and fulfil human rights and live free from discrimination

The Bill is part of a wider programme of work set within the context of the [Vision for Justice in Scotland](#) and outlines the aims and priorities for the justice system over the next four years. The provisions in this Bill progress the Vision's transformation priority of a person-centred and trauma-informed justice system and take forward the priority actions of hearing victims' voices and ensuring women and girls are better served by our approaches to justice.

The Bill has been informed by the work of the [Victims' Taskforce](#), [Lady Dorrian's Review into Improving the Management of Sexual Offence Cases](#) and the [Review's Governance Group](#), as well as by [independent jury research published in October 2019](#). It has also been informed by public consultations on [improving victims' experiences of the justice system](#) and on [the not proven verdict and related reforms](#), as well as by extensive engagement with stakeholders.

Evidence from these sources shows that the justice system is often distressing and re-traumatising for those who come into contact with it, and that legislative

reforms are necessary to progress the transformation required to improve the experiences of victims, witnesses and vulnerable parties and ensure that the public have confidence in the system.

## Consultation

### Within government

Within government and justice delivery agencies, consultation has taken place with the Access to Justice Unit, Justice Analytical Services, Scottish Courts and Tribunals Service (SCTS), the Judiciary of Scotland, the Crown Office and Procurator Fiscal Service (COPFS), Police Scotland and the Scottish Legal Aid Board (SLAB).

Consideration of some of the measures has also taken place at the Scottish Government-led [Lady Dorrian Review Governance Group](#), which brings together partners from across the justice system to consider approaches to implementing the recommendations of the Review on a cross-sector basis.

This engagement has helped us consider the practicalities of the proposals and has helped inform our analysis in relation to costs.

### Public consultation

The [public consultation on improving victims' experiences of the justice system](#) included proposals relating to the measures in the Bill. The consultation ran for 14 weeks between 12 May and 19 August 2022.

The consultation received 69 responses - 24 (35%) from individuals and 45 (65%) from organisations, which are broken down in the following table:

Organisation type	Number of respondents	Percentage of respondents
Advocacy/support organisation (children and young people)	3	7%
Law enforcement	3	7%
Legal organisation	4	9%
Local authority (including justice partnerships)	6	13%
Other (academia)	3	7%
Other (campaign)	4	9%
Other (third sector)	4	9%
Public body	5	11%
Victim/witness support organisation	13	29%

An [independent analysis of the consultation responses](#) found that, across the responses, there were strong levels of support for almost all of the proposals posited. While some attracted a more neutral response than others, very few proposals were met with a negative response.

The analysis found that the main perceived impact for businesses and the third sector was a potential increase in demand for support and advocacy services as a result of some of the proposals being put forward, which may impact on

existing services and require additional funding/resourcing as a result. Smaller organisations working with victims and witnesses (especially in rural and remote areas) may be particularly affected.

It was felt that the appointment of a Victims and Witnesses Commissioner may also impact on the workloads of those already in the victim/witness support sector (in terms of engagement) and would also need to be resourced. Similarly, it was suggested (mainly by victim and witness support organisations) that clear structures and processes would need to be put in place to ensure that the Commissioner engages properly with third sector organisations working within the justice system.

Comments were also made about impacts of the proposals on court business scheduling and the speed with which cases could progress through court, and the need for more legal aid funding to support victims.

As part of the consultation process, [a workshop was held with stakeholders to consider the proposals to establish a Victims and Witnesses Commissioner](#).

Attendees included representatives from local government, criminal justice agencies, the legal sector, academia, the third sector and individuals with lived experience of crime. The impact of the Commissioner on victim support organisations and the need for the role to be sufficiently resourced were considered at this event.

The other consultation which has been used to inform the Bill was [a consultation on the not proven verdict and related reforms](#). The [analysis of responses to that consultation](#) did not identify any significant matters relevant to the BRIA.

## **Business**

The measures in the Bill will mainly impact on public service providers, the third sector and the legal profession. Given this, engagement has primarily focused on stakeholders from these areas during the development of policy for the Bill.

The Law Society of Scotland and the Faculty of Advocates, which represent the legal profession in Scotland, provided responses to the consultations, as did a number of third sector organisations who provide advocacy and/or support to victims and witnesses. A summary of the feedback in relation to impacts on businesses is set out in the 'Consultation' section above.

Further consultation in relation to the measures which create a Sexual Offences Court and the right to independent legal representation has taken place with organisations representing the legal profession to help us consider what specific impacts they may have on businesses in this area.

This has involved exploring options, with SLAB and the Public Defence Solicitors Office (PDSO) on how best to implement independent legal representation to achieve security of service, sufficient capacity and quality of service delivery. The Scottish Government considers that there should be flexibility around the delivery mechanism to allow models to be tested and adapted against service demand, including any wider changes arising from the implementation of the other provisions within the Bill. The framework of any operational delivery mechanism for independent legal representation is still being considered and defined, and it is not considered necessary or helpful to frame that within the Bill.

Discussions have also taken place with SLAB and PDSO about the impact of the proposals to establish a Sexual Offences Court, as well as with the Law Society and Faculty of Advocates both unilaterally and through a [working group that reports to the Lady Dorrian Review Governance Group](#), which was set up to consider aspects associated with the creation of the new Court in order to help with its implementation.

The policy development for the right to anonymity noted that there may be an impact on media businesses, but no direct consultation was carried out as this is not considered a substantively new impact. Instead, the measure formalises current convention and existing code of practice by media business outlets.

The potential impact on third sector support and advocacy services in terms of increased demand and the creation of a Victims and Witnesses Commissioner (as highlighted in the responses to the consultation on improving victims' experiences) has been considered as part of the policy development process, which has involved engagement with victim support organisations.

## Options

### Option 1 – Do nothing

The policy impact of doing nothing and retaining the status quo is that little or no improvements are likely to be made to improve people's experiences of the justice system, resulting in continued distress and re-traumatisation for those who come into contact with it, which will affect public confidence in the justice process.

There may be less of an impact to do nothing in relation to the measures that extend special measures in civil cases. There is existing provision in the Children (Scotland) Act 2020 ("the 2020 Act") which covers child contact and residence cases, in which there is a strong likelihood of there being vulnerable parties and witnesses. As such, there is an option to implement the provisions in the 2020 Act, rather than proceed with the measures in this Bill.

### Option 2 - Non-regulatory / more restricted legislation

For some of the measures in the Bill, this is not an option as legislation is required for them to be implemented.

For measures where a non-regulatory route is an option, the policy impact is likely to be limited, for example the Victims and Witnesses Commissioner would not have the requisite powers to undertake their role effectively and there may be much less consistency in how trauma-informed practice is embedded without legislation.

This option also includes creating specialist divisions of existing courts, namely the High Court and Sheriff Courts to hear sexual offences cases. This option would likely require legislation to implement but on a much more restricted basis as there would be no need to create a new type of court with bespoke judicial appointments, sentencing powers or rights of audience. Again, the policy impact of this would likely be limited as it would facilitate only iterative, cosmetic

changes and would therefore fail to deliver the meaningful and lasting improvements necessary to deliver a better experience for complainers.

### **Option 3 – Regulatory option**

This option would take forward the legislation as planned. This option will have the greatest policy impact as it will provide the legislative framework that is required to create new rights for victims, witnesses and vulnerable parties and to embed practice and procedure designed to improve the experiences of those who come into contact with the justice system.

### **Sectors and groups affected**

The proposed measures will affect victims, witnesses and vulnerable parties in the justice system.

It will also affect justice sector organisations including operational delivery agencies such as COPFS and SCTS, SLAB.

In terms of businesses, the legal profession and organisations that support victims will be affected.

People who are accused of crime and subject to civil proceedings will also be affected by the measures which change court practice and procedures and through the measures relating to trauma-informed practice.

### **Benefits**

#### **Option 1 – Do nothing**

There will largely be no immediate additional costs arising from this option.

If the provisions in the 2020 Act were implemented instead of the measures in the Bill which relate to special measures in civil cases, there will be costs. These would, however, be less than taking forward the measures in the Bill and might be quicker generally, as there would be fewer issues to consider. This option would benefit vulnerable witnesses and parties in certain family cases, which would be a significant proportion of civil cases generally.

#### **Option 2 - Non-regulatory / more restricted legislation**

This option will generate fewer immediate costs and may provide some improvements in terms of people's experiences of the justice system.

It may result in some longer-term savings through more efficient management of sexual offences cases by establishing specialist divisions in existing courts to prosecute such cases.



## **Option 3 – Regulatory option**

A number of measures in the Bill require legislation, so this will enable the full package of reforms to be taken forward. The Bill will strengthen the rights of and enhance support for victims, witnesses and vulnerable parties and ensure consistency of approach nationally.

There will be potential savings for SCTS through the reduction in jury size. Reducing the amount of time spent on jury duty by 20% could result in savings for all businesses, third sector, and public sector organisations across Scotland who would have to excuse fewer staff for this civic duty, as well as reduced upheaval making alternative staffing arrangements, and lower spending for those employers who opt to compensate employees during periods of jury service.

It is likely that a reduction in jury size will have particular impact on both larger businesses, which may currently have to accommodate on average more members of staff on jury duty, and smaller businesses which may find the inconvenience of absent employees more of a burden.

The model of Sexual Offences Court provided for by the Bill is intended to facilitate a more flexible use of the existing court estate as well as of other court and judicial resources, resulting in more efficient and effective management of sexual offence cases. This is anticipated to result in savings in the longer term.

## **Costs**

### **Option 1 – Do nothing**

While there are generally no direct costs arising from this option it would mean that potential savings arising from more efficient management of court and judicial resources as would be achieved by option 3 would not be realised.

Significant work on training staff in trauma-informed practice is already underway across the justice sector and justice agencies have previously committed to implement the aims of 'Trauma Informed Justice – A Knowledge and Skills Framework for Working with Victims and Witnesses' across their workforces. The costs set out in the Bill's Financial Memorandum in respect of trauma-informed training should therefore be seen in the context of longer-term work already in train across the sector, rather than as only resulting from the provisions of the Bill. This means that the option of not progressing the Bill will still have costs in respect of this type of training.

In respect of implementing the provisions in the 2020 Act on special measures in child contact and residence cases rather than extending the provisions to other family cases and to civil cases generally, there will be costs to the Scottish Government in setting up and running a register of solicitors when a party is prohibited from representing themselves and carrying out personal cross-examination and providing public-facing information about the changes in special measures under the 2020 Act. There will also be costs to SCTS in the purchase of equipment for special measures (e.g. TV links, screens and equipment enabling those in the court to see the individual who is giving participating via a

TV link). There may also be costs for any additional power, network costs or additional building work and any rent, additional hardware (broadband link etc) if an external room is required.

SCTS will also have costs in terms of additional hearings if information is required to be obtained from criminal databases. This will happen if there is a dispute as to whether or not one of the parties in a case has been convicted of, or is being prosecuted for, a criminal offence against one of the other parties, which is a trigger for special measures under the 2020 Act. It is noted that such hearings are anticipated to be relatively rare.

## **Option 2 - Non-regulatory / more restricted legislation**

The costs set out in option 1 would be applicable under this option.

In addition, there would be further costs to SCTS in relation to trauma-informed training for staff dealing with sexual offence cases, as this option would set up specialist divisions in existing courts rather than create a new Sexual Offences Court.

The establishment of such specialist divisions would also result in costs for COPFS. It is anticipated to embed specialism and raise standards in the management of sexual offence cases, which will result in a more resource intensive process for prosecutors in their approach to the preparation and presentation of cases and in terms of support and communication with witnesses and complainers. This will inevitably generate costs for COPFS.

Costs may also be incurred by law firms if there is a requirement for legal practitioners to complete trauma-informed training before gaining rights of audience to specialist courts.

## **Option 3 – Regulatory option**

The Bill will result in costs for agencies and businesses in the justice sector.

These are considered in detail in the Financial Memorandum for the Bill and are summarised below.

### **Establishing a Victims and Witnesses Commissioner for Scotland**

This will result in costs for the Scottish Government and Scottish Parliament in the set-up of the office and thereafter running costs.

It is noted that the analysis of responses to the consultation on improving victims' experiences of the justice system highlighted that some respondents felt that clear structures and processes would need to be put in place to ensure that the Commissioner engages properly with third sector organisations working within the justice system. While the practical details of engagement will be a matter for the independent office of the Commissioner, the Bill provides that engagement must take place and that the Commissioner must prepare and keep under review a strategy for engagement.

## **Embedding trauma-informed practice across the justice system**

There will be costs to justice agencies - SCTS, COPFS, the Scottish Prison Service, Police Scotland and the Parole Board for Scotland - in respect of trauma-informed training for staff. As set out in option 1, these costs should be seen in the context of longer-term work already in train across the sector, rather than as only resulting from the provisions of the Bill.

## **Special measures for vulnerable parties and witnesses in civil cases**

The costs set out in option 1 in relation to setting up the register of solicitors, the purchase of equipment, updating public-facing information and hearings to obtain information from databases also apply to this option. The cost of running the register of solicitor will be greater than in option 1, as the measures in the Bill will apply to more cases than those in the 2020 Act.

## **Abolition of the not proven verdict and related reforms**

No significant costs have been identified in relation to these measures. Potential savings are described in the benefits section above.

## **Creating a Sexual Offences Court**

It is not anticipated that new court buildings or additional staff or judicial resourcing will be required to establish and operate the Court. Rather, the model of specialist court provided for by the Bill is intended to facilitate a more flexible use of the existing court estate as well as of other court and judicial resources as a result of which some savings are expected. Adoption of a phased approach to operationalising the Court may also mitigate some of the costs identified below.

SCTS will incur additional costs in terms of establishing and operationalising the Sexual Offences Court. The most significant costs that SCTS are expected to incur as a result of setting up the new Court will arise from the development and implementation of training for clerks and court staff to resource the Sexual Offences Court. Expenditure will also be incurred in order to put in place the infrastructure required to implement the new Court including upgrades to existing IT systems as well as rebranding of the court estate to take account of the Sexual Offences Court.

Staffing costs will also represent the most significant recurring cost that will be incurred by SCTS as a result of establishing the new Court. Recurring costs will also arise from the expansion of Ground Rules Hearings to all cases in which a complainer is required to give evidence.<sup>1</sup>

Ongoing costs are expected to be incurred by COPFS as a result of establishing the Sexual Offences Court. The Court is designed to embed specialism and raise standards, providing an opportunity for wholesale improvement and transformational change. If this ambition is to be maximised, this will inevitably

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<sup>1</sup> At present Ground Rules Hearings only take place where a witness that is considered to be vulnerable has their evidence taken by a commissioner. Under the proposals for the Sexual Offences Court a Ground Rules Hearing will take place in all instances where a vulnerable witness is giving evidence whether that be on commission or at trial.

result in a more resource intensive process for prosecutors in their approach to the preparation and presentation of cases and in terms of support and communication with witnesses and complainers. This will be seen most acutely in the changes required in the approach to solemn cases which would otherwise have been prosecuted in the Sheriff Courts.

Any significant increase in the use of pre-recorded evidence will have significant resource implications for COPFS. While to a great extent, irrespective of the Bill, these would have been incurred from further implementation of the 2019 Act, it is recognised that the ambition of the Court is to better support complainers to give their best evidence and that an increased use of pre-recorded evidence will be an important aspect of that approach.

The proposed extension of Ground Rules Hearings to all cases calling in the Court where evidence is to be given by a vulnerable witness will also have resource implications for COPFS in preparing for and presenting at further procedural diets. Costs to COPFS will be dependent on operational decisions that are taken after the legislation is agreed.

The expansion of the power to impose Orders for Lifelong Restrictions (OLR) to those presiding over cases in the Sexual Offences Court will place additional costs on the Risk Management Authority (RMA), the non-departmental public body with responsibility for administering and overseeing the standard setting, accreditation and approval processes that support OLRs. The power to impose an OLR is currently restricted to those presiding over cases in the High Court, for which senators and temporary judges undergo specific training on the imposition of OLRs and the risk criteria associated in doing so. The extension of this power to sheriffs principal and sheriffs who are appointed to preside over cases in the court as Judges in the Sexual Offences Court means that they will also be required to undergo this training, which will come with an associated cost for the RMA.

Costs will also be incurred by solicitors' firms arising from the requirement for legal practitioners to complete trauma-informed training before gaining rights of audience to the Sexual Offences Court.

### **Lifelong anonymity for complainers in sexual and certain other offences**

There are no significant costs associated with this measure. Those who currently publish identifying information will not be permitted to do so in the future, and this is not considered to be a significant number as mainstream media already follow a non-statutory protocol in this area.

While the measure creates a new criminal offence of breaching anonymity and provides a court process in which children may waive anonymity through third party publishers, such as newspapers or television programmes, it is expected that both of these aspects of the measure will be rarely used. This assumption has regard to breach rates of equivalent offences in England and Wales and other available (costless) routes through which third party publishers may tell a child survivor's story, either through anonymous publication or through the young person's unilateral written consent at age 18.

## **Right to independent legal representation for complainers when applications to lead sexual history and/or 'bad character' evidence are made in sexual offence cases**

This measure will have cost and resource implications for SCTS. These will include the costs associated with the proposed introduction of a requirement on the courts to consider applications for disclosure of evidence by the Crown to the complainer's independent legal representative. To date there is no reasonable comparator of the type of application in the current court process making quantification of costs particularly difficult.

It is also anticipated at this juncture that additional court time will be incurred to facilitate the making - and the consideration by the judiciary - of representations from the complainer's independent legal representative at the hearing where the application to lead sexual history/'bad character' evidence is being considered. SCTS has advised that the additional time taken and the associated cost implications is extremely difficult to assess given the number of variables involved in such applications, including length, terms, number of accused, as well as the uncertainty of volume. A similar approach to costings for the disclosure applications is likely to apply with additional court time and reducing the number of procedural hearings that can proceed in a court day. Again, for the reasons narrated above, estimated costings cannot be provided at this stage.

There will be resource costs arising from COPFS having new statutory duties including to notify a complainer of the application to lead sexual history/'bad character' evidence and to disclose specified information to the complainer's independent legal representative. The specific costs will depend on a number of variables, with the use of the provisions being demand-led. The costs arising will also depend on how COPFS operationalise the new requirements.

There will be costs associated with communication and widening awareness of the Bill and its implication for complainers, but these are not considered to be significant, and may involve utilisation of existing methods and processes.

### **Piloting single judge trials for cases of rape and attempted rape**

Provisions in the Bill give Scottish Ministers the necessary powers to bring forward secondary legislation to enable a pilot of single judge trials for cases of rape and attempted rape. The provisions do not specify the detailed case criteria for how such a pilot should operate. This will be subject to further consideration through secondary legislation that will be brought forward for parliamentary scrutiny at a future date.

## **Regulatory and EU Alignment Impacts**

### **Intra-UK Trade**

The measures are not likely to impact on intra-UK trade.

## **International Trade**

The measures are not likely to impact on international trade and investment.

## **EU Alignment**

The measures are not likely to impact on the Scottish government's policy to maintain alignment with the EU.

It is noted, however, that some of the measures are in line with provisions to protect victims set out in [EU Victims Directive](#).

## **Scottish Firms Impact Test**

The costs identified will largely fall on public sector delivery organisations in the Scottish justice system. Engagement has taken place with relevant stakeholders in this area via the public consultation and direct engagement throughout the policy development for the Bill.

Potential impacts on legal firms have been identified in respect of the measures relating to independent legal representation and the Sexual Offences Court.

The creation of a right to independent legal representation may place an additional burden on the number of qualified solicitors in Scotland who are able to undertake the role of an independent legal representative.

The requirement on legal practitioners to complete trauma-informed training before they are able to appear in the Sexual Offences Court will inevitably have an impact on solicitors firms arising from the costs in both time and financial resources associated with putting the relevant employees through this training. Those firms that do not put relevant legal practitioners through the necessary training will experience a financial impact arising from being unable to collect fees for representing the accused in cases indicted to the Sexual Offences Court.

Engagement about these measures has taken place with the legal profession, again through the consultation and directly with organisations including SLAB, the Law Society of Scotland, the Faculty of Advocates and PDSO.

The potential impact on third sector support and advocacy services in terms of increased demand and the creation of a Victims and Witnesses Commissioner (as highlighted in the responses to the consultation on improving victims' experiences) has been considered as part of the policy development process, which has involved engagement with victim support organisations.

## **Competition Assessment**

The requirement on legal practitioners to complete an approved course of trauma-informed training before they are able to appear in the Sexual Offences Court may impact on the pool of solicitors, solicitor advocates and advocates available to represent those accused whose case is indicted to the Court. Legal practitioners may decide that they do not wish to complete trauma-informed

training in which case they would remove themselves from the list of those able to represent an accused and thereby reducing the choice of representation available for someone charged with a sexual offence.

This is alongside provisions in the Bill which prohibit an accused from self-representing in cases indicted to the Court and which mean that an accused must be represented by a solicitor, solicitor advocate or advocate as well as existing pressures on the criminal defence bar highlighted which is restricting the availability of legal practitioners.

## **Consumer Assessment**

The Bill will have a positive impact on victims, witnesses and vulnerable parties as it contains measures which strengthen their rights and introduces reforms aimed at improving their experiences and providing increased protections for when they come into contact with the justice system.

Individuals accused of crime and subject to civil proceedings may also benefit through the embedding of trauma-informed practice. The measures which are aimed at improving case management will also have a positive impact on people accused of crimes as they should lead to less delay and increased certainty about scheduling.

The requirement in the Bill on legal practitioners to complete trauma-informed training before being able to appear in the Sexual Offences Court may impact on the ability of an accused in a case which features a sexual offence on the indictment to secure legal representation. It is possible that some solicitors, solicitor advocates and advocates may decide against completing trauma-informed training which would reduce the pool of legal practitioners available to represent an accused. This is against a backdrop of shortages in the number of those working in the criminal defence bar and exacerbated by court backlogs generated by the COVID-19 pandemic which are placing significant pressures on the legal sector.

## **Test run of business forms**

Civil court rules may be needed for some of the measures in the Bill, including special measures in civil cases and the right to anonymity. The Scottish Government will, in line with usual practice, send a policy paper to the Scottish Civil Justice Council to propose new rules.

It is expected that forms will require to be amended or new ones created to reflect the proposed procedures and associated legislative changes in relation to the Sexual Offences Court and independent legal representation.

For the former, it is anticipated that new forms will be required relating to the transfer of cases into and out of the Sexual Offences Court.

Potential changes to forms in respect of independent legal representation may include:

- amended or new forms associated with confirmation of notification to the complainer
- a notification form to the court/prosecutor of the independent legal representative's appointment
- any notification form seeking disclosure from the prosecutor
- any application for disclosure of evidence and associated intimation forms for the accused
- current forms associated with applications to lead sexual history/'bad character' evidence and appeals therefrom will also require updating

The costs associated with this are likely to be minimal but cannot be quantified at present. The Scottish Government will work with SCTS to consider the impact and ensure new forms are co-developed with relevant organisations and businesses, where applicable.

## **Digital Impact Test**

There is no evidence that the provisions will have a disproportionate impact either on offline or on-line businesses.

The measures on special measures in civil cases may result in an increased use of live TV links, but this is not anticipated to have a significant impact other than additional costs to SCTS to purchase equipment to facilitate this. It is noted that wider work is ongoing in relation to the impact of the increased use of technology in civil cases, with the Scottish Government having commissioned research on the lessons to be learnt from the remote hearings which took place during the COVID-19 pandemic. This project is due to report in Spring 2023.

While the right to anonymity may relate to information published online, digital technologies/markets/the online context have no bearing on the ability to provide for this measure in law. The measure is automatic with no positive actions required and is applicable regardless of context.

## **Legal Aid Impact Test**

Some of the measures in the Bill may result in additional expenditure from the legal aid fund.

### **Special measures for vulnerable parties and witnesses in civil cases**

There could be additional costs to the legal aid fund through the enhancement of special measures in civil cases. This would be the case under both options 1 and 2. SLAB has noted low levels of expenditure over the past 10 years met through the legal aid fund in relation to existing provisions on special measures in children's legal aid cases and civil cases. This expenditure could increase once special measures in civil cases are enhanced.

This expenditure may relate to hearings where evidence is taken by commissioner and where the legal aid fund is meeting the costs of the commissioner and shorthand writer; and/or it may relate to meeting costs associated with a supporter attending court with the applicant.



In particular, there may be costs in relation to extending special measures in non-evidential hearings if a party who has, for example, experienced domestic abuse wishes to have a supporter. In particular, this may happen at Child Welfare Hearings in child contact and residence cases, as Child Welfare Hearings are generally non-evidential.

As set out in the costs section and in relation to special measures in civil cases, there could be additional hearings in relation to obtaining lawful authority to disclose information from databases. However, this is likely to be relatively rare. The need should only arise when a factual issue of this nature is disputed between the parties or there is uncertainty. When there is a dispute, the ability to seek a court order to obtain information from databases may act as an incentive to resolve the matter before any hearing takes place.

### **Creating a Sexual Offences Court**

While there are no direct costs to SLAB arising from provisions establishing the Sexual Offences Court, the new Court will require changes to existing legal aid provision.

Under current arrangements, an accused who is granted legal aid in a case indicted to the High Court automatically receives an enhanced entitlement to legal aid for the purposes of instructing an advocate or solicitor advocate. This reflects the fact that solicitors are not entitled to appear in the High Court. In the Sheriff Courts, where cases can be conducted by solicitors as well as advocates/solicitor advocates, an accused wishing to receive funding to instruct an advocate/solicitor advocate must apply to SLAB for sanction to do so. As the Sexual Offences Court will bring cases together that would previously have been heard across these two courts, consideration will be given as to how to best reflect and provide for this in terms of legal aid entitlement across the range of cases the Court will hear.

How legal aid will work in the Sexual Offences Court, specifically in relation to entitlement to sanction for counsel, is still being determined and will likely be brought forward through secondary legislation. A full Legal Aid Impact Test on the Sexual Offences Court will be conducted as part of the development of amendments to these Regulations.

### **Lifelong anonymity for complainers in sexual and certain other offences**

The measures creating a statutory right to anonymity may also incur additional expenditure from the legal aid fund. This is by virtue of one aspect of the policy that where a third-party publisher wishes to publish identifying information about a child complainer (aged under 18), they must seek court permission to do so through a summary application process to the civil court.

While third party publishers who are not individuals, i.e. media organisations or publishers, are not currently eligible for legal aid for summary applications (and there is no proposed change to this) it is recognised that any child who is the subject of the application by a third party publisher will require to participate in the court proceedings and share their views. The policy is that the child should

have access to legal aid in order to benefit from a legal representative during this process.

Under the existing legal aid framework, civil legal aid (and civil advice and assistance) would be available for children if a third-party publisher applied to the court to waive a child's anonymity because the child would be an individual party to civil summary application proceedings, in respect of which there is existing legal aid provision. This measure would not require any regulatory change. In practice, the waiver application process is not anticipated to be used very much, if at all. Accordingly, any additional expenditure from the legal aid fund is expected to be minimal.

Following engagement with SLAB, one overarching aspect for policy consideration is the question of means testing. The current standard eligibility criteria for civil legal aid require regard to be had to parental resources in many circumstances. A policy determination is therefore to be made as to whether legal aid for the child anonymity waiver process should be means tested or non means tested.

### **Right to independent legal representation for complainers when applications to lead sexual history and/or 'bad character' evidence are made in sexual offence cases**

Details are still to be confirmed around the exact funding mechanism for the introduction of independent legal representation, but this option will have read across and a potential impact on the legal aid budget.

While the funding and delivery mechanism is not set out within the Bill, it is intended that complainers will automatically be entitled to fully publicly funded independent legal representation, on a non-income assessed basis, in relation to applications to lead sexual history/'bad character' evidence. If the Bill passes, amendments to existing legal aid regulations will make provision for legal aid for independent legal representation, in these circumstances, to be available to all complainers on a non-means tested basis.

The costs to SLAB of funding the proposals are difficult to estimate as they will be demand-led and will increase considerably if this right were subsequently extended to other offences. There is also currently limited data held on applications to lead sexual history/'bad character' evidence, adding to the difficulties of estimating costs for the measure.

It is acknowledged that capacity within the legal sector is currently under significant pressure and these provisions are likely to add to that. There will also likely be costs with establishing and maintaining the operational delivery model for this measure, ongoing training and evaluation of the effectiveness of such a role.

Future and ongoing costs will also be considered alongside wider financial developments relating to the provision of legal aid.

## **Enforcement, sanctions and monitoring**

The operation of the measures is a matter for SCTS, COPFS and the other justice agencies which may be impacted by them.

Court rules may be needed for some of the new or amended procedures, including extended special measures in civil cases and the waiver of anonymity for children in respect of third-party publishing, meaning that these would be monitored by the court.

## **Implementation and delivery plan**

The Scottish Government intends to take the Bill forward in the current parliamentary year.

There is no set timescale for implementation. This will be carefully managed and will be phased, depending on resources and wider transformation work.

## **Summary and recommendation**

Option 3 – to proceed with the Bill – is recommended.

While this will bring about the most costs, it will – by far – bring about the most benefits. The evidence which has been considered throughout the policy development for the Bill clearly shows that the justice system can be distressing and re-traumatising for victims, witnesses and vulnerable parties and that action is required to address this.

Some of the proposed measures cannot be put in place without legislation, while a non-legislative approach for others would be less likely to ensure consistency of approach nationally, meaning that there would be much less of a positive impact.

Implementation of the Bill will be dependent on resources and wider transformation work to ensure that additional costs are managed accordingly.

Engagement remains ongoing with justice agencies and the legal profession in terms of the cost impacts of the Bill on them.

The potential impact on third sector support and advocacy services in terms of as highlighted in the responses to the consultation on improving victims' experiences is noted and engagement will also continue with stakeholders in this sector.

## **Summary costs and benefits**

### **Option 1 – Do nothing**

Total benefit per annum:

- no need for existing resources, guidance and/or systems to be updated

Total cost per annum:

- funding would largely be maintained at current level

- there will be costs associated with the provisions in the 2020 Act
- there will be costs in relation to trauma-informed practice
- savings associated with more efficient and effective management of sexual offence cases through the Sexual Offences Court would not be realised

### **Option 2 – Non-regulatory / more restricted legislation**

Total benefit per annum:

- no need for additional legislative process / minimal legislative processes needed

Total cost per annum:

- there will be costs associated with developing guidance and additional resource, as well as the costs set out in option 1
- there will be costs in relation to creation and operation of specialist divisions in the existing courts
- full extent of savings associated with more efficient and effective management of sexual offence cases through the Sexual Offences Court would not be realised

### **Option 3 – Regulatory option**

Total benefit per annum:

- enables the full package of reforms to be taken forward
- ensures consistency of approach nationally
- provides the legislative framework required to create new rights for victims, witnesses and vulnerable parties and to embed practice and procedure designed to improve the experiences of those who come into contact with the justice system
- there will be savings in the longer term through improved case management and a reduction in jury size

Total cost per annum:

- significant additional costs for justice agencies
- some additional costs and resource implications for the legal profession
- potential additional costs for victim support organisations
- additional legal aid expenditure

## **Declaration and publication**

I have read the Business and Regulatory Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

**Minister's name:** Angela Constance

**Minister's title:** Cabinet Secretary for Justice and Home Affairs

**Date:** 14 April 2023

**Scottish Government contact point:** Criminal Justice Division



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