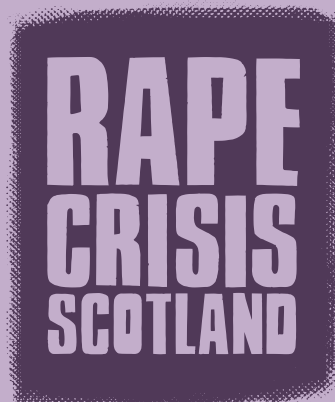




# EVIDENCE

**RAPE CRISIS SCOTLAND  
WRITTEN EVIDENCE ON  
THE VICTIMS,  
WITNESSES AND  
JUSTICE REFORM  
(SCOTLAND) BILL**



Rape Crisis Scotland welcomes the vast majority of the provisions contained within the Victims, Witnesses and Justice Reform (Scotland) Bill. This Bill has the potential to transform the experiences of survivors of rape and sexual violence accessing justice in Scotland and we are strongly supportive of almost all the provisions in this bill.

We have some concerns over proposed changes to the jury majority and the potential for this to disproportionately affect complainers in rape and serious sexual violence cases. There are some sections of the Bill, including the provisions of independent legal representation and measures for witnesses in civil cases which could be strengthened.

### **Summary of Positions**

#### **Victims and Witnesses Commissioner**

We are supportive of this.

#### **Trauma informed practice**

We welcome the proposals in the bill but think that they should go further and make a statutory commitment to end the use of 'floating trials'<sup>1</sup> and improve the process of how victims receive information.

#### **Special measures in civil cases**

We support the Bill where it extends these rights but think that the protections should be stronger.

#### **Not Proven verdict**

We support the abolishment of this verdict.

#### **Change to the jury majority**

We have concerns that this would negatively impact victims of rape as rape cases have very low conviction rates and it can be difficult to persuade juries to convict, even in the face of considerable evidence.

#### **Sexual offences court**

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<sup>1</sup> This is where the victim does not get a set date for coming to court but can be called and asked to come at short notice

We are supportive of the introduction of a specialist court but would like this to have extra features to protect survivors.<sup>2</sup>

### **Anonymity**

We support the introduction of a legal right to anonymity for victims of rape and sexual violence.

### **Independent legal representation (ILR)**

We support the extension of ILR as detailed in the Bill but would like the provisions to go further and guarantee victims of sexual offences the right to legal advice throughout proceedings.<sup>3</sup>

### **Single judge pilot**

We support the introduction of a pilot scheme of Single Judge trials in rape cases.

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<sup>2</sup> You can read more about this here; [Specialist-Sexual-Offences-Court---Briefing.pdf \(rapecrisisscotland.org.uk\)](https://rapecrisisscotland.org.uk/Specialist-Sexual-Offences-Court---Briefing.pdf)

<sup>3</sup> You can read more about this here; [1666867844 Beyond-Independent-Legal-Representation.pdf \(rapecrisisscotland.org.uk\)](https://rapecrisisscotland.org.uk/1666867844-Beyond-Independent-Legal-Representation.pdf)

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

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

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

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

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

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

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

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

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

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

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

Complainers of serious sexual crime are by their nature amongst the most vulnerable category of witnesses who come before the courts. As stated by Burman and Brooks Hay; 'sexual offences have a profound and distinct impact on those who experience them'<sup>4</sup> they are crimes which 'fundamentally challenge a victim's sense of dignity and autonomy with acts that remove power, control and dignity from them.' The importance of adopting a trauma-informed practice and embedding this within the workings of every aspect of the justice system cannot be overstated.

During our consultation process, a survivor commented:

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

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

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

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<sup>4</sup> [Delays-in-Serious-Sexual-Offence-Cases.-Dec-2021.pdf \(sccjr.ac.uk\)](#)

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

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

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

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

*"In terms of the legality side, it was a horrendous ordeal and completely traumatising - from the court dates being suspended and rescheduled, the actual trial itself... and the way I was perceived by all professionals involved, other than the lovely victim support girls on the day of trial and of course Rape Crisis, as doing something wrong in speaking out."* (A survivor)

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

For survivors, this is important when considering the methods of cross examination often used to discredit and undermine their evidence. We have seen far too many examples of cruel and distressing cross examination of survivors which have been subject to judicial criticism. For

example, in a notable case where a QC, referred to a survivor as a *'wicked, deceitful, malicious, vindictive liar'* in his cross examination.<sup>5</sup> The use of this line of questioning was criticised by the Lord President, Lord Carloway. In the case of *Macdonald v HMA*, it was found that; *'during her cross examination, this complainer was subjected to repetitive and at times irrelevant questioning. She became highly distressed and rightly so. The court did nothing to intervene. Were this to be repeated, the situation in sexual offences trials would be unsustainable.'* The court should be under an obligation to prevent this type of conduct and place an onus on the defence to adhere to trauma-informed standards. Cross examination is a means to test evidence and protect against miscarriages of justice, but this does not need to be at the expense of the fair treatment of the complainer.

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

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

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

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

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<sup>5</sup> [QC rebuked for calling rape complainer "malicious liar" defended by peers | HeraldScotland](#)

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

However, the provisions in the Victims, Witnesses and Justice Bill do not go far enough to ensure the proper implementation of trauma informed practice. There needs to be a specific commitment to improve the provision of information to complainers and a clear commitment to dispense with floating trial diets in rape and sexual offences cases.

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

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

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

### Court Scheduling

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



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

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

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

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

Rape Crisis Centres from rural and island communities have reported to us the specific trauma that floating trials can cause to survivors they support. They have to travel significant distances and often wait for a long time in a hotel. On one occasion the survivor was put in the same hotel as the accused. The impact of this is not just on the survivor attending court but on the provision of RCS advocacy services to other survivors as the advocacy worker who has travelled with them is not available to support other service users.

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

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

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

### Information Sharing

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

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

Survivors need to be given detailed and meaningful information regarding their rights, this should include things like their right to read their witness statement in advance of giving evidence, to be told of sensitive record or sexual history applications. This should also include information about the criminal proceedings itself, when the case will call, decisions to withdraw and the verdict. We routinely see that survivors are let down on this front and often when they do receive information the person giving it is unable to tell them what it means or advise what might happen next in the process.

The RCS Survivor Reference Group (SRG) is a group made up of survivors of sexual violence, many of whom have experience of the justice system,

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

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

One survivor said the *'accused always gets all the information, you are left in the dark. It has to be consistent, and everyone offered the same experience and service.'*

Survivors agreed that they often are the ones needing to chase the information and that it would be helpful to receive an update that even just says there is no update. Someone described having to phone six different people just to be told that the case hadn't gone ahead.

The way in which information was received made a big difference. One survivor said:

*'I got told through email that the case was dropped. I felt there was no protection from the perpetrator and didn't know why it wasn't going ahead. I had to chase and persevere for answers.'*

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

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

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

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

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

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

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

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

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

the law would not provide such a basic protection in such obvious circumstances.

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

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

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

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

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

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

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

#### Prohibition on Cross-Examination

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

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

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

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

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

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

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

These protections should be obvious from the start and guaranteed to survivors.

#### **4. What are your views on the proposal in Part 4 of the Bill to abolish the Not Proven verdict and move to either a guilty or not guilty verdict?**

*'Out of every proposed change... I feel that the most important is the Not Proven, I think it despicable that we still deem this to be acceptable.'* (a survivor commenting on the Bill)

We fully support the proposal in the Bill to abolish the Not Proven verdict. The Not Proven verdict is used disproportionately in rape cases. In 2019/20, only 43.48% of rape and attempted rape cases resulted in convictions, the lowest rate for any type of crime. Not Proven made up 44% of rape and attempted rape acquittals, compared with 20% for all crimes and offences. Statistics from 2019/2020 show that on average only 1% of accused persons in all summary trials received a verdict of not proven but in sexual offences cases this was delivered in 12% at summary level in. In the same year, in solemn cases, a not proven verdict was delivered in 5% of all crimes and offences, in 14% of sexual assault cases and 25% of rape cases.

There is considerable evidence that juries can be reluctant to convict in rape cases, and that preconceived notions of how someone should react to rape may impact on their decision making. There are real worries that the existence of the Not Proven verdict gives juries in rape trials an easy out and contributes to guilty people walking free.

The distinction between the Not Proven and not guilty verdicts is unclear, and the explanation frequently given to survivors is that it means the jury believed you but didn't want to acquit the perpetrator for some other reason. We have spoken to many survivors who received a verdict of 'Not Proven' and hear that it left them feeling confused and let down. The uncertainty was distressing and impacted on their ability to recover.

Survivors feel that it gives the jury an easy way out to make decisions which allow them to 'sit on the fence'.

*'After three years of fighting the trauma of this attack and a four day trial my cases verdict was 'not proven.' It felt horrific, I have never been more let down by anything in my life. After all that pain to be told nothing will be*



*done about it just made me regret reporting it in the first place. This is why more women don't come forward.'* (A survivor)

*'I'm essentially being believed about what happened but that there will be no consequences. Got the same consequences as a 'not guilty' verdict. I feel like I've wasted my time. Feeling not protected is a big thing, feels like I have to wait until he does something until the police protect me. He's getting to live a life of not guilty even though the jury believed it happened but there just wasn't forensic evidence.'* (A survivor)

*'The not proven verdict would have the greatest positive impact going from my own experience. When you have to give evidence and relive the trauma you suffered to then have it come back as a not proven can leave a person confused and unsettled...All these questions but no full explanations or answers.'* (A survivor)

We concur with the opinion of the Scottish Government that the evidence is overwhelming that the Not Proven verdict does not serve the interests of justice. We should also highlight that not all survivors share a common experience, whilst we have had overwhelming support for the abolishment of the not proven verdict there are some survivors who have expressed some feeling of 'comfort' from the Not Proven verdict being better than a not guilty verdict. This points to the need for improved confidence in the integrity of decision making in sexual crime cases.

## **5. What are your views on the changes in Part 4 of the Bill to the size of criminal juries and the majority required for conviction?**

We are concerned about the impact of the proposed changes to the size of criminal juries and the majority required to reach a conviction.

At present, there would be 15 members on the jury and 8 of these would need to be persuaded to return a guilty verdict however under the new proposals of a jury size of 12, still 8 would need to be persuaded. The recent figures, discussed above, show that the not proven verdict was only used in 1% of summary cases and 5% of solemn cases, it is difficult to imagine that such a drastic change is needed to counterbalance any perceived prejudice to an accused person.

The Not Proven verdict is disproportionately used in rape and sexual offences cases and this change to the jury majority will have the most significant impact on survivors of sexual violence and lowers their odds of receiving a guilty verdict. If the Not Proven verdict potentially contributes to wrongful acquittals, it makes no sense to then put in place a measure which will make it more difficult to get a conviction.

If this provision is implemented, it could mean that the overall impact of this bill is to lower convictions in sexual offence cases.

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

*'Having specialist courts would encourage others to come forward.'* (A survivor)

Rape Crisis Scotland is strongly supportive of this development. We believe it could improve the experiences of survivors of sexual violence and rape seeking justice in Scotland. Too many survivors tell us about the trauma and distress caused by the criminal justice process. There is a clear and compelling need for change. As this new court is formed, it is crucial that the experiences and voices of survivors are at the core of decision making. There are a number of key features that should be incorporated in the new court to ensure that it is genuinely trauma informed.

The bill seeks to create a standalone sexual offences court and we note that the policy memorandum states -

*'The ambition of the Sexual Offences Court is to bring together all solemn level sexual offence cases into one unified court, removing the existing distinctions between those cases tried in the sheriff court and the High Court. This recognises the common challenges faced by all complainers in serious sexual offence cases regardless of the forum their case is prosecuted.'*

We have consulted with survivors and there is general support for this proposition including the ability of Sheriffs to sit on cases of rape that would have previously only been dealt with by a High Court Judge. However, we are concerned that the provisions in the Bill do not provide for the proper

protection of complainers in serious sexual violence cases. The rights of audience that are provided for in the Bill mean that only cases of rape and murder will have the restriction that an advocate or solicitor advocate can defend an accused person and only an Advocate Depute can prosecute. We do not feel this restriction on the rights of audience goes far enough to provide protection as there are many cases that would have been heard in the High Court that would not have included a charge of rape, for example a case of attempted rape. All cases that would have been tried in the High Court under the current model should continue to have the protection afforded by the appropriate level legal representatives appearing.

We welcome the proposal for the introduction of an element of 'ticketing', where all those who appear in the Court are required to complete specialist training. However, a system of ticketing is only meaningful where there is a process to remove that 'ticket' where serious concerns arise about someone's suitability to be involved in the sexual offences court. A recent example is a high-profile KC who sent an intimate image of himself in an aroused state from the High Court toilets immediately after defending in a rape case. There appears to be no process currently to consider whether someone who engages in this type of behaviour should be involved in a specialist sexual offences court. The lack of such provision would undermine the principles of a trauma informed sexual offences court.

At RCS we hear consistently about poor experiences within the current court structure. There is a lack of awareness and sensitivity of the needs and experiences of survivors of sexual violence. Complainers of sexual offences tell us of additional, unnecessary trauma caused by floating trial diets, how evidence is taken and the layout/facilities in court buildings. Too often, the process of attending court and participating in a sexual offence trial causes significant levels of unnecessary re-traumatisation.

We see first-hand the effects of how the court delays are affecting survivors. This was a problem prior to the pandemic and has now been significantly compounded. Survivors are often waiting two to three years, and sometimes longer, for their case to be heard in court. This is unacceptable and must be urgently addressed. For some survivors, these delays mean that they feel they must keep their memories of their experience fresh so they can give evidence properly and remember details. Others will defer

receiving therapy because they are worried that their therapy notes might be used against them. As Burman and Brooks Hay comment, 'a range of adverse consequences will likely be precipitated by inordinate delays, impacting on the personal, domestic and professional lives of victim-survivors.' A survivor stated that it felt like: 'Building up to something that's always around the corner but never materializes. Our mental and physical state deteriorates over time and this set us up for the rest of our lives.'

We are impressed with the success of the court pilot scheme in New Zealand and feel like the Scottish model could learn a lot from this example.

<sup>6</sup> Features of this include dedicated judges, control of cross-examination and greater use of special measures. It also incorporated features for the comfort and safety of complainers for example, meeting all court parties, being shown round court and having separate entrances for complainers and the accused. It was considered that the court dealt with delays in an efficient way and improved trial quality with better evidence. The average time to disposal of a case was 134 days. Survivors were better prepared for the trial and the court was more alert to unacceptable questioning which afforded them protection. There were also firm trial dates. Independent victim advocates worked alongside the court. This led to more pre-trial guilty pleas. There was general reporting that complainers felt reduced re-traumatisation. There has been unanimous support for this to be developed nationally and this is in progress.

### Pre- Recorded Evidence

We also welcome the introduction of a presumption in favour of pre-recorded evidence, including the taking of evidence on commission from survivors in rape and sexual offences cases.

All the survivors we spoke to, during consultation on these provisions, were in support of visually recorded evidence being available as standard. Even those who chose to give their evidence in court, with or without the use of special measures, were of the view that it should be available as an option for any survivor.

We are strongly in favour of a statutory presumption that survivors will be entitled to give evidence on commission and that they can have their cross

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<sup>6</sup> [Sexual Violence Court Pilot Evaluation Report | The District Court of New Zealand \(districtcourts.govt.nz\)](#)

examination pre-recorded prior to the trial. This can then remove the need for the survivor to be in court at all, in most cases, and help to reduce delays as the evidence will be captured before the trial, meaning the survivor does not have the ongoing anxiety and stress caused by the prospect of having to give evidence in court. It means increased scrutiny over the style of questioning in cross examination. As stated in the Lady Dorrian review 'experience suggests that well-conducted visually recorded evidence taken by commissioner, can have at least as much impact as evidence given in person at trial.' The review also highlights evidence from procedure in England and their pilot scheme resulted in 'cross examinations to be more witness friendly, focused, relevant and pared down than in conventional trials.'

*'We believe that **pre-recorded evidence** is a way of getting the best evidence from a survivor. We have had really positive experiences where evidence by commissioner has been used already and welcome this change to extend to the vast majority of survivors. Survivors report to us feeling much more relaxed and at ease and liked getting their evidence "out of the way" before the trial date' (A Rape Crisis Centre)*

There are some concerns expressed by Rape Crisis advocacy workers that the increased use of evidence on commission means that survivors are being rushed to do it to 'get it out the way' or being pressured to take this up when it does not feel right for them. Giving evidence on commission should be available as a standard but should always be optional.

Implementation of this provision will require significant expansion of the availability of evidence on commission, otherwise we could see lengthy delays in complainers being able to access this, which would undermine one of the key benefits of evidence on commission, which is being able to give evidence early and with certainty about when it is happening.

### Ground rules Hearings

The extension of the use of ground rules hearings as standard is a welcome proposal within the Bill. Ground rules hearings ensure that significant attention is placed on the examination of the witness, focusing on the questions asked and the form this will take.

The introduction of grounds rules hearings as standard practice will ensure that there can be judicial oversight of the nature of cross examination, the lines of questioning, the length of cross, the breaks the survivor might need. This places a greater onus on parties to be mindful of trauma-informed practice and the nature and style of their cross examination which should not be inherently distressing or re-traumatising.

### Survivor Voices

Members of our SRG were strongly in support of the creation of a specialist court; One stated:

*'if you have a specialism that's a benefit and there's an ideology of it being compassionate and empathetic. It feels not as clinical or as brutal.'*

They also highlighted the importance of having the option to view proceedings and the control and information this gave back to them, but that the facilities to do so were not acceptable.

There was strong support for the creation of a private viewing area for survivors to watch proceedings. There is a requirement to understand that although giving evidence on video is desirable this does not mean that they do not want to know what else is said in trial. Survivors are frequently told they should not watch from the public gallery because it looks bad to the jury. One survivor said that in order to watch proceedings, she had to look over her attacker's shoulder. All survivors we consulted felt that a private viewing gallery or a live stream would be the best options. Miss M described how this caused her particular distress as she was encouraged to remain in the witness room throughout the criminal trial while a family member watched and tried to report back to her. Many survivors whose cases resulted in Not Proven verdicts described particular distress as not knowing what evidence led to this. In one example the survivor had been given reassurances about the case from the police and the Crown as there was a video recording of her rape. She was advised not to watch the rest of proceedings but was left in shock by the Not Proven verdict, she has been left unaware of what the accused could have said to convince the jury that the video recording was not sufficient evidence.

Survivors also highlighted the fear of bumping into the accused, or his family, at court. Many described this actually happening and there are far

too many accounts of them being approached and intimidated. The importance of separate entrances and waiting areas is key.

During the course of giving evidence, complainers are often given the special measure of the use of a supporter however they are not always permitted to have the use of their own advocacy worker in court. They may, instead, be given a supporter from the witness service. While this can be a valuable service for many witnesses, rape complainers consistently speak of the benefits of having a known supporter with them in court. There are numerous difficulties with the trusted person not being with the survivor and it causes distress. Survivors are often not told until the last minute and this fact makes no sense to them. This was one of the key findings of the 'Justice Journeys' research.<sup>7</sup>

### Features of the Specialist Court

RCS supports the key elements of the specialist courts as recommended in Lady Dorrian's Review and reflected in the Bill;

1. The pre-recording of the evidence of all complainers
2. Increased judicial case management, including ground rules hearings for any evidence to be taken from a complainer, either on commission or in court
3. Accredited and specialist trauma-informed training for everyone involved in the trial, including judges and lawyers.

The ethos of this system must be trauma-informed and victim-centred in its approach. This does not mean providing a one-off training course to professionals, it is about an ethos which confers principles onto practice. Those of choice, collaboration, trust, empowerment and safety.

In addition, we believe that the court should feature:

1. Dedicated advocacy and court support provided by Rape Crisis advocacy workers – our staff are specially trained to deal with the needs of survivors and often have established relationships.

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<sup>7</sup> [Justice Journeys Report – Justice Journeys \(justicejourneysonline.com\)](https://www.justicejourneysonline.com)

*'From my own experience I only felt truly supported and guided by my supported from rape crisis. Thereby having someone trained, equipped and with experience of supporting others I feel would make a significant difference for victim's experiences of a court process.'* (a Survivor)

*'Having Rape Crisis workers present would be advantageous. RC workers make a world of difference to survivors but for some it may take courage to access the service, therefore it should be provided to all in court if they haven't been able to access it beforehand.'* (a survivor)

2. A totally new approach to the scheduling of trials which avoids floating trial dates.

*'The impact of floating trials is a lot more severe than can be put in words....the uncertainty and rescheduling of hearing dates is significantly detrimental.'* (a survivor)

*'We feel that **Fixed trial dates** are essential, the rescheduling of trials is one of the most challenging things to support survivors through, it can't be underestimated the effect that this has on the survivor's life, we feel complicit in a system that causes harm to already vulnerable people.'* (A Rape Crisis Centre)

3. Separate entrances and waiting areas for the survivor and their family and the accused. Survivors have spoken of the fear of seeing the accused, or his family, at court and many reported that this happened to them.

*'This is very important... from my own experience I did bump into the offender's family.'* (A survivor)

*'Survivors can be intimidated and retraumatised simply by seeing the individual. It [can] bring back flashbacks of the incident. By the time the*



*crime is heard in court, the victim knows the incident was horrific and the damage this dangerous perpetrator is to them, which in turn causes concentration issues, fear, and mental energy issues.'* (A survivor)

4. A protected area where the survivor and her family can watch proceedings. Survivors emphasised the importance of having the option to view proceedings and control what information they receive. The facilities to do so are currently not acceptable. All survivors we consulted felt that a private viewing gallery or a live stream would be the best options.

*'I was in to testify and not necessarily able to watch the case myself without stigma being associated to myself for being present in watching. However, I feel that it should be a right for victims to be able to watch the proceedings play out.'* (A survivor)

5. A standard of practice and ticketing service for Counsel and lawyers participating in the court.

*'There should be effort made in training lawyers specifically for this field.'* (A survivor)

*'Many legal professionals including defence lawyers... have no understanding of the impact on sexual abuse and trauma. Their actions and comments alone can traumatise victims throughout the trial. Causing further long-term damage to mental health.'* (A survivor)

We are strongly opposed to this court having any reduced sentencing powers as see this creating at the very least the impression of a downgrading of rape and other serious sexual offences and are glad that the Bill does not propose to do this.

### Implementation

The implementation of the provisions in the bill relating to the specialist court will require the upmost care and consideration and considerable

funding to ensure that the intentions of the bill are realised and the needs of survivors wholly considered. The principles set out in the Bill are excellent but need proper implementation and real investment. The new court (or courts) need to be genuinely trauma informed, including the lay out of the building and the scheduling of trials. Simply requiring personnel to undertake training in trauma, while important, is not enough.

*'ERCC as a whole also spends significant time providing emotional support to survivors who have been re-traumatised and made anxious or confused by the justice process and their interactions with COPFS. The proposed changes may enable us to focus more support time on the impact of survivors' experience of sexual harm, as opposed to the negative impact of the justice system' (A Rape Crisis Centre)*

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

*'It's not my identity I wish to hide, I know I did nothing wrong... But I know I would feel less vulnerable in an environment in which was made to take care of victims like me, to make us feel safe.'* (A survivor on the right to anonymity)

RCS are strongly in favour of the creation of a legal right to anonymity for survivors of rape and sexual violence. This has been a significant oversight of our current system which has left many vulnerable individuals at risk. This right should be automatic, the survivor should not need to apply to the court or go through any other procedure to obtain this protection. We are supportive of the Bill in this regard. Anonymity is key to ensuring that victims of sexual violence and rape feel able to come forward and report these matters through the justice processes. Many do not report at least in part because of a fear of being exposed themselves. It is particularly pressing that this is brought into force considering the risks to complainers over the rise of social media use and blogging. Survivors have been exposed on these mediums despite court orders being in place and the law needs to make a firm stance that this is unacceptable.

We strongly welcome the change in policy position from the original consultation regarding the point at which anonymity begins and recognise

that the Scottish Government has listened and responded to the points raised by RCS on behalf of survivors.

It is right that anonymity should start at the earliest possible point; and with no positive actions required by the victim to report to the police and we welcome that -

*'The right to anonymity provided for in the Bill takes effect from the moment a relevant offence is committed.'*

The Bill goes some way to recognising that survivors, who choose to disclose, will do this in a number of different ways and for some, the criminal justice system is not the most appropriate forum for this. While the overall aim of introducing this right is to increase the confidence of survivors to report within the criminal justice system, we must recognise that, at present, this is a reality that is far removed for many. There may be issues of accessibility to reporting for those who are young or old or those with disabilities and care needs. There are communities who understandably might have mistrust in the police, for example, those with insecure immigration status. A woman living in a coercively controlling relationship could find it impossible to attend the police station. Children may disclose to social workers or teachers, university students to lecturers or supervisors.

In recent years, we have seen a number of successful cases in the civil courts where survivors, such as Miss M, have brought claims against their abusers. If a survivor chooses to use this forum to address the abusive behaviour, then protection of her anonymity should be enshrined in law. It is also important to note that the disclosure of abuse might be made during other civil proceedings such as child contact or divorce.

Entering the criminal justice system can be an intrusive and intimidating experience, survivors are concerned about how they might be treated and that they might not be believed. They may have made a conscious choice to disclose the abuse in a different forum. Sexual violence entails a large degree of shame and embarrassment, and the concept of publicity is a major deterrent to reporting. Survivors need to be reassured that their cases will be handled with sensitivity and respect for their privacy. Survivors

should have the security and respect that anonymity provides, no matter how they disclose.

We support that the right to anonymity should exist in all the offences covered within the Bill but submit that there should be a 'catch all' provision. This should include a right to anonymity where the offence has a significant sexual element, even if that offence is not specifically named on the list. For example, an offence under s39 of the Criminal Justice and Licensing (Scotland) Act 2010 (stalking) or s1 of the Domestic Abuse (Scotland) Act 2018 (coercive control) could contain elements of sexual abuse such as threats, or humiliation of a sexual nature. We see the Bill in its current form may not protect the anonymity of some survivors of sexual violence and we think this would ensure absolute protection.

The question of when anonymity should end is a difficult decision to address. The effect of sexual abuse and rape on a survivor can be so profound that the traumatic implications can seem to radiate beyond even the finality of death. Survivors will report the concern they have for their family members, children and loved ones and the secondary trauma that they suffer as well. It is easy to see how the idea of anonymity extending beyond death is appealing. We do however recognise that in legal reality, this may be a difficult to put into practice. As such, the Bill takes a sensible approach in proposing to end anonymity on the death of the victim.

Section 63 of the Bill makes clear that the anonymity protections do not prevent the victim themselves from self-publishing information regarding their experience, including on their own social media accounts. This includes self-publication for adults and children. We support this provision of the Bill and consider it to provide the required level of autonomy to survivors.

We are strongly supportive of complainers of sexual violence having the ability to set aside their anonymity without judicial intervention. These provisions should empower survivors and allow control over who they disclose to and when. We are aware of attempts in other jurisdictions to impose anonymity requirements that extend to the survivor themselves, for example in Victoria and Tasmania, Australia. The campaign #letherspeak showed that laws which were originally put in place to protect

survivors from media exploitation had the effect of *'silencing individual survivors who wish to speak out publicly, thereby increasing their sense of isolation, powerlessness and voicelessness'*.<sup>8</sup>

We support that for a third party to publish the information relating to an adult survivor they must receive written permission to do so. This puts a positive onus on the publisher and will improve standards within journalism and online publications. Awareness of these provisions should be made to the public so they will be aware of the change of law and how it affects social media use.

We also support the requirement contained in Section 106D for a level of judicial oversight when children seek to waive their anonymity for third party publication, we welcome that the Bill provides that any third party publisher wishing to tell a child victim's story on their behalf must apply to the Sheriff Court for an order to dispense with the anonymity restrictions as this places the burden for doing so on the publisher and not the child.

In Scotland, 'children' are recognised as being under the age of 18. We, along with other bodies who support under 18s, recognise a distinction between children (usually under 12) and young people (around 12-18). We support many young people within our organisation and recognise the agency and maturity many demonstrate and feel that should they wish to discuss their own experiences they should have that freedom and be supported to make those decisions where appropriate. We need to consider the differences between children and young people because the application of this would be incredibly different if we are discussing the implications for a 10-year-old survivor or a 17-year-old. Children and young people should be appropriately supported to seek a waiver and Sheriffs and Judges should consider the autonomy and agency of young people in these circumstances.

We are pleased to see that the only circumstances that the right to anonymity can be set aside are where there is a relevant conviction, for example relating to perverting the course of justice. This will provide the strongest guarantee to survivors of sexual violence. We would stress that instances of relevant offences, as referred to in the Bill, being committed

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<sup>8</sup> [#LetHerSpeak](#) | [#LetUsSpeak](#)

are exceptionally rare and in our experience, the individuals involved are usually particularly vulnerable and care should be taken when waiving any anonymity.

We note that defences have been provided to the offence of breaching a survivor's right to anonymity, we believe that this should be a robust offence that should deter people from sharing this information without permission and as such the defences should be used in limited circumstances. The Bill provides that it is a defence if it can be proven they were not aware, nor did they suspect or have reason to suspect, that the publication included the matter in question. We suggest it should be reasonable to include a requirement that they demonstrate what steps they took to ascertain that written permission had been given.

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

We strongly believe that there should be an automatic right to independent legal representation (ILR) for survivors when applications are made under s275 to lead sexual history or character evidence in sexual offence cases and welcome the provisions set out in the Bill.

As stated by Keane and Convery<sup>9</sup>, in many cases the nature of the questioning proposed in such applications would 'represent a particularly intimate, sensitive and important aspect of a complainer's private life.' The type of evidence they seek to raise speaks to the most private and intimate aspects of a survivor's personal life and the evidence is often used in cross-examination to undermine their credibility by depicting the survivor as not being of 'chaste' character. These are outdated and unhelpful concepts which draw on the potential prejudice of the jury, or 'rape myths' and bear no relevance to what we know about the causes of sexual violence. Recent crime surveys show that most rape and sexual assault goes unreported – only 23% of this gets reported to the police but sexual cases make up 75% of the High Court business. The Gillen review revealed that many complainers withdraw due to fear of their sexual past being publicly explored.<sup>10</sup>

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<sup>9</sup> [Proposal for Independent Legal Representation in Scotland for Complainers where an Application is Made to Lead Evidence of their Sexual History or Character — University of Edinburgh Research Explorer](#)

<sup>10</sup> [Gillen Review Report into the law and procedures in serious sexual offences in NI | Department of Justice \(justice-ni.gov.uk\)](#)

This would go some way to address the 'justice gap' in Scotland, and how effective the rape shield provisions are in practice, as routinely there are issues with their application.

The provisions in s274 and s275 are extremely complicated. For complainers to meaningfully protect their privacy rights, they require access to state funded legal advice and representation. It is important that this advice is independent. What we see from the evidence is that there are occasions where the Crown do not object to these applications where a complainer would wish to. There is no obligation on the Crown to pursue their position and they must weigh up the competing interests of complainer, accused and wider community and cannot pursue a survivor's interest above others. They cannot offer independent legal advice to her or assist her in understanding what the application entails. They cannot offer any degree of confidentiality. The nature of the relationship and the potential conflicts for the Crown in being able to effectively representing complainers' privacy interests has been highlighted in the writings of Fiona Raitt, Keane and Convery, Sharon Cowen and in the Lady Dorrian Review.<sup>11</sup> There have been numerous appeal cases – for example of RR, RN, CH, LL and Macdonald – where the Crown's failure to object to a s275 application has been criticised by the Bench.

As pointed out in the Lady Dorrian review, a notable feature of many of these judgements is the lack of Crown opposition. Figures referred to in Cowen's article indicate that prosecutors rarely challenge the applications. In 2016 data from Scotland's Cabinet Secretary for Justice showed that between January to April 2016, 57 applications were made. Of these, 42 were granted in full and 5 in part. 5 were refused and of those the Crown only opposed in 1, demonstrating that even when the evidence sought was ruled inadmissible, the Crown fail to recognise this in advance. What is clear from the complex nature of the legislation and case law surrounding s275 applications, is that the court require to hear the position of the complainer on any application, and that complainers cannot meaningfully give an informed view without access to independent legal advice.

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<sup>11</sup> [Independent legal representation for complainers in sexual offence trials: research report for Rape Crisis Scotland — Discovery - the University of Dundee Research Portal](#)  
[The use of sexual history and bad character evidence in Scottish sexual offences trials | Equality and Human Rights Commission \(equalityhumanrights.com\)](#)

The provision of ILR available in Scotland currently falls short of what complainers in other countries are entitled to. A notable example of this is the Republic of Ireland where ILR with legal aid is currently available to survivors of rape, and the recommendation is to extend this beyond to all sexual offences. It is considered by practitioners, and by Rape Crisis Ireland, to have had a positive effect on the experience of complainers in sexual offence trials.

There is therefore overwhelming evidence to support the incorporation of ILR for survivors in s275 applications. Survivors entering this process need to be guided through this complex legal landscape for their voices to be truly heard and their decisions regarding these applications be fully informed.

Keane and Convery highlight the important functions that ILR could provide for sexual offence complainers:

- Explain the legal framework within which the admissibility is assessed and appropriate case law
- Explain complex and constantly evolving areas of law which complainers cannot reasonably be expected to have a proper grasp of without ILR
- Informed opinion of likely outcomes
- Take detailed instructions in relation to the evidence that might be particularly offensive to the complainer's dignity and privacy
- Vindicate interests at hearings in a way 'no existing actor in the present process currently does'
- Properly explain the effect of any determination under s275 so that the complainer would be aware of what could and could not be asked of them

This amounts to more than having the right to object to the evidence. ILR would enable complainers to receive important advice on the process and potential outcomes of a complex legal landscape, contributing to towards reducing re-traumatisation and improving survivor experiences.

*'Every survivor should have the right to a Witness Supporter or Rape Crisis Representative and trials should not be able to start until this is in place. It may be helpful for survivors to have independent legal representation - we*



*are not experts on criminal law and so can't be expected to understand or act when we are not being treated reasonably or fairly.'* (A survivor)

We support the mechanisms within the Bill which provide for the change in time limits for when the defence must lodge a s275 application to the court. However, we suggest the time frame should be wider to allow more time for the survivor to engage with a solicitor. The Bill's suggested timeframe is 21 days, but within that time the Crown will need to inform the complainer and thereafter they will have to obtain and instruct a lawyer and obtain legal aid. We suggest a minimum period of 28 days is a fair time period for this to be completed in. We agree that the most appropriate body to inform the complainer of the application and their rights is the Crown, but we do note the difficulties that have been reported to us by survivors in their ability to receive information from the Crown. We suggest that a timescale is imposed on the Crown to send the required information to the complainer (within 2 days) to ensure they receive the information straight away. A system must be implemented to ensure that complainers are directed to appropriate sources of legal advice and representation.

#### RCS call to extend the right to legal representation for complainers of rape and sexual violence

The provisions for ILR in the bill do not go far enough to protect the rights of complainers. There should be a right to independent legal advice (ILA) throughout proceedings within the criminal justice system. We understand that there has been a commitment made to address this in the future, but survivors have been waiting long enough and this Bill could be bolder in this regard. This proposal is distinct and separate from the proposed rights to ILR in relation to s275. There is a strong case for widening access to ILA for survivors throughout the entirety of the case, not just limited to representation in sensitive records or sexual history applications. The criminal justice system is a complex and intimidating environment for complainers to negotiate. It has a myriad of rules and potential pathways. It is demanding of a complainer's dedicated input and personal information often leading to no return. It is complex territory for lawyers to understand, let alone a survivor.

Complainers need information about legal rules and processes; they need the nature of evidence and procedure explained to them. The confusion

that is caused to complainants contributes to secondary trauma and can mirror the loss of control and agency that they experienced through rape or sexual abuse. Lawyers can give impartial advice and offer confidentiality. They can explain the effects of different decisions or outcomes and guide through the process. They could inform of procedure, update on the case, process of evidence and general nature of the defence case. This could run through the investigation stages, the trial, outcome and any appeal or parole proceedings.

Support for this has been found in the pilot for providing ILR in Northumbria, England, where in addition to ILR they also provided legal advice at other stages in the process and preliminary stages. They found that even within police and Crown Prosecution Service requests for sensitive data were excessive and rooted in myths about sexual violence, decisions to give up data or have cases dropped were unfair and the presence of legal advice at these stages reduced the intrusion.

We have outlined the difficulties with cross-examination. Legal advice could be provided to mitigate against the trauma caused by this process. What we propose is very far from being able to 'coach' complainants of sexual violence regarding their answers or to provide the full nature of the defence evidence but to advise them of the general line of defence and the nature of cross examination. Understanding this and having legal advice could lessen the most traumatic part of the process.

ILA could also provide essential improvements in information-sharing with complainants of sexual violence, including information on their rights and on the process of the investigation or trial. International comparisons provide a great deal of support for further extension of legal support to survivors.

In the article 'Review of Advocacy for Rape Complainants'<sup>12</sup> the provision for legal advice in other countries is outlined. In Canada, in addition to ILR, five hours of state funded legal advice is offered. In India, there is provision for state funded legal advice which included advice prior to reporting to the police and to prepare the complainant for cross-examination. In Ireland, solicitors for the survivor have been permitted to sit in the trial and monitor the cross-examination, they can indicate to the prosecutor if something is

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<sup>12</sup> [\(PDF\) SCOPING REVIEW: Legal & Non-Legal Advocacy for Rape Complainants in Adversarial Jurisdictions. \(researchgate.net\)](#)

wrong. Many of the Nordic countries afford far more by way of provision of legal advice and can represent complainers throughout proceedings. Sweden provides legal advice throughout proceedings and about police processes. In Denmark, guidance is given on cross examination. Research has found that legal advocacy positively impacted complainants wellbeing and caused no negative impacts on the accused right to a fair trial. We found universal support for ILA from survivors.

Miss M stated that having this in her criminal process:

*'would have made a huge difference, you spend a lot of time trying to understand legal jargon, I could spend weeks trying to work out what something meant only to work out that I got it wrong. That is traumatic and stressful and takes up your life'*

She commented that:

*'So many people can't cope with the (criminal) legal system so pull out. ILA could lead to fewer people pulling out.'*

Miss AB, who went through a similar legal process also compared the level of support she received her Civil case are favourable to that which she received in the criminal trial.

One survivor in the SRG stated that she had:

*'No indication of kind of questioning which felt like a character annihilation. I didn't feel prepared for how vicious it was. The way I was treated, and the lack of knowledge felt left more trauma than the incident itself. Thinks more information would have been a bit more helpful.'*

Another stated:

*'people think the justice system is supposed to protect victims but it doesn't it protects the accused and the fact we don't have legal representation shows this.'*

There is a strong case for the extension of legal advice to all survivors of sexual violence during their journey through the criminal justice system.

This will help reduce secondary trauma and increase confidence in the system, potentially leading to more survivors reporting. This is not a change to the nature of the adversarial system – this is about understanding processes, reducing re-traumatisation, providing better access to rights which already exist and giving professional advice to the most vulnerable victims of crime.

*'I feel extremely mislead, and left with no sense of direction. I don't feel like victims are well prepared for the length of time it takes to go through a trial, being blamed and shamed by defence. We were not educated on anything about floating trials, moved preliminary hearings, the intimidation of court. Victims do not get enough warning about the process they are about to endure; I wouldn't wish anyone to go through the awful experience I did. It's left me with far worse trauma than what it did before I had gone through court.'* (A survivor commenting on ILA)

*'Having access to legal representation would have helped me, I feel like he had all of these people he was paying to help him and I couldn't have any of that, I didn't understand so much of what was going on and although my worker was so helpful it would have been good to have the same rights as him.'* (A survivor)

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

We support a pilot of single judge trials with no jury. We find these the proposals for this in the Scottish Government's policy memorandum to be thorough and convincing and agree that –

*'It is not compatible with a trauma informed approach to require complainers to participate in a system which they perceive is stacked against them. Any shortcomings of the systems in place to administer justice cannot be left unchecked and must be identified, analysed and, if necessary, reformed.'*

The only meaningful way to properly investigate the impact of making such a significant change to the current system is to run the pilot scheme.

In Scotland, conviction rates for rape are the lowest of any crime type. For cases that reach trial the conviction rate is around 51% compared to 91% for all other crimes. Most cases never make it as far as court: in 2021/22 there were 2,298 rape and attempted rapes reported to the police, but only 152 prosecutions and 78 convictions.

There are serious concerns about the ability of a jury to properly determine a trial involving rape or sexual violence. There is sound research that juries are overly affected by the concept of rape myths. Fiona Leverick's research demonstrates overwhelming evidence that rape myths impact jury decision making.<sup>13</sup> These myths related to the effect of alcohol, length of time in reporting and assumptions about how 'real' rape victims should present, despite evidence to the contrary. Research also alluded to the fact that there is a real perception of jury members that 'false allegations are routine' (reported in more than half of the cases) and that delay in reporting is indicative of a false allegation. Meaningful and in-depth research has concluded that the instance of genuine 'false' allegations sits somewhere around 3% of all cases reported. Rape myths can also have a basis in racism or involve a bias against someone's sexual orientation or gender identity. There can also be misunderstandings about how people with disabilities are affected by sexual violence.<sup>14</sup>

*'Standing in that witness box reliving my experiences, sharing it with a room full of strangers felt so intimidating- I felt like I was on trial, that I was the one who had done something wrong. Knowing that these strangers now know such personal and intimate details of my life is very strange to me.'* (A survivor)

*'I was terrified of the jury. I wondered, "who are these people?", "what are they capable of?" and "how much do they understand about sexual violence?'"* (A survivor)

*'The jurors don't stand a chance in making an educated decision because they are so full of prejudice and societal behaviours that completely*

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<sup>13</sup> 'What do we know about rape myths and juror decision making?' – Fiona Leverick – 2020, Chalmers J and Leverick F (2018) Methods of Conveying Information to Jurors: An Evidence Review. Edinburgh: Scottish Government.

<sup>14</sup> <https://now.org/wp-content/uploads/2018/02/Black-Women-and-Sexual-Violence-6.pdf>  
<https://now.org/wp-content/uploads/2018/02/Black-Women-and-Sexual-Violence-6.pdf>  
<https://devonrapecrisis.org.uk/about-us/myths-facts-and-statistics/>

*override their influences. Society tells you this is what a rape victim should look like, this is how a rape should happen, and anything that's different from that definitely needs scrutiny and definitely needs doubt...it's not their fault, it's about the system that they are in.'* (A survivor)

There is also evidence that juries do not understand complicated legal rules. This was demonstrated in the mock jury research conducted in Scotland and published in 2019 – this found inconsistent and incorrect views on the meaning of 'not proven' and there were issues around understanding of concepts like the 'burden of proof' or special defences.<sup>15</sup>

Research in New Zealand found that defence counsel would opt for a jury 'nine times out of ten' and the main reason for this was that, when it came down to credibility of the complainer it was easier to persuade a jury to entertain doubt.<sup>16</sup>

Many countries do not use juries at all to decide cases (including Norway, Germany, Netherlands, Turkey and Italy). Jury free trials are not a breach of the right to a fair trial under Article 6 of the ECHR. Some positive outcomes were seen in a single judge trial pilot in New Zealand where it did appear that complainers were less negatively impacted, and the admission of irrelevant evidence was reduced. The sample size was too small to draw any substantive conclusions.

The Lady Dorrian review discussed several benefits that could result from single judge trials: improved complainer experience, mitigating the impact of rape myths, more focused questioning, the provision of a written verdict and saving court time and expense.

A written verdict could be a very positive development for complainers. A judge would be required to give reasons for a decision. Some survivors describe the lack of any explanation for a jury's decision as distressing because it means they are never able to understand what happened. The written judgments from the three civil rape cases which have taken place over the past decade are positive examples of the benefit of reasoned decisions being given in writing.

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<sup>15</sup> <https://www.gov.scot/publications/scottish-jury-research-fingings-large-mock-jury-study-2/>

<sup>16</sup> <https://www.gov.scot/publications/scottish-jury-research-fingings-large-mock-jury-study-2/>

One judge quoted in the report from Lady Dorrian's review commented:

*'In cases where there is evidence of a quality and quantity which for any other kind of crime would lead to a conviction, I see a number of acquittals each year in rape cases which, to my mind, are not explicable by rational application of the law to the evidence. Every year I preside over several rape trials of this kind in which I would have no difficulty on the evidence in being satisfied beyond reasonable doubt of the guilt of the accused only to see the jury return a verdict of acquittal, usually not proven.'*

### Survivor Voices

Survivors we consulted were, in the most part, favourable to the concept of judge led trials. Concerns were raised about the demographic of the majority of judges but compared to the effects of a jury it was considered a better option and worthy of the pilot scheme. There are also concerns expressed by some Rape Crisis Centres about their experiences of supporting survivors in cases with unsympathetic and unreceptive judges. There are concerns about the reliance on such a small number of people who hold a lot of power.

Issues regarding the diversity of judges should be addressed by training and recruitment practices. Judges are legally trained in a way that juries are not. They are trained to evaluate evidence and are less likely to be distracted by irrelevant or collateral issues. It is also much easier to educate judges, if needed, on the falsity of rape myths as they are a small body of people who can engage in interactive training sessions.

While concerns have been raised by survivors, compared to the effects of a jury it was considered a better option and worthy of a pilot scheme.

*'It felt like a dramatic play where my actions could affect the jury.'* (Miss M, survivor)

Survivors described feeling 'watched' by the jury and feeling that everything had to be a performance for them. They were warned about how things might look to the jury and what they might think of them. This heightened anxiety immensely.

There were concerns that judges may hold biases and views that would impact their verdict. One survivor felt that the judge was normalising what had happened to her throughout the trial and showed favour towards the accused. There were concerns that even with trauma-informed training, judges may still hold biased views against survivors. Survivors also raised concerns over the lack of racial diversity among the judiciary and the potential for racist attitudes and biases to lead to unfair trials for both accused persons and complainers of colour. There were also concerns about judge led trials leading to a higher rate of appeals from perpetrators.

However, survivors also felt that the current jury system was not working for them. They felt juries weren't informed enough about how trauma impacts survivors and that it was intimidating to give evidence in front of so many people.

*'I would have preferred to have had the jury removed when I gave evidence. I was terrified of the jury.'* (A survivor)

*'I am in two minds about the idea of removing juries from sexual cases. On one hand the comfort of knowing that more than one person is getting to look at the evidence...and judgment can't be made until all parties agree. I feel more time is on hand with this as the jury do not come back into court until a decision has been reached, and this is left to however long it takes, whereas you may get individuals feeling like if its left to a judge alone it may be a rushed decision due to busy schedule. I feel like their needs to be so much in-depth information of the reason why this has been considered to allow individuals to have a better understanding.'* (A survivor)

*'I think removing the jury would be a massive step forward in the right direction as often there is too much bias in the jury. In my case, for example, I had a jury of 15 which composed of a small minority of females (around 3) the rest were male and of the older generation. I know this sounds stereotypical, but I think it does play a part.'* (A survivor)

*'My greatest trepidation before my case reached its conclusion was that I would be forced to relive some of the most harmful experiences of my life for people who were untrained or ill-equipped or too into victim blaming culture to recognise the truth when they heard it.'* (A survivor)



*'To be honest, I found it quite bizarre that there were people in that room who have studied and trained to get to the position they are now in as lawyers, solicitors and judges however the verdict is decided by the general public that just doesn't make sense to me.'* (A survivor)

*'Sexual violence is not like any other crime therefore we should not prosecute it like any other crime. We need recognise the reasons behind the low conviction rates and that although we have come so far, we are still part of a society where rape myths are believed, where misogyny is rife, where sexual violence is trivialised and where we do not treat victims of trauma with the kindness and respect that they deserve.'* (A Rape Crisis Centre)

*'The single judge pilot could see a lot of positive developments. Firstly, it would ensure that an explanation is given on decisions made. Survivors are often left asking why, even after a guilty verdict. Secondly, sexual offences law is very complex and often juries are fully informed or don't fully understand the law, Moorov, corroboration, not proven, etc. It would decrease the chances of decisions being made based on rape myths and personal bias. It would also ensure that verdicts are given with a legal understanding; judges know what the law is while juries don't. And finally, we've had negative experiences such as jury members laughing while the survivor was giving evidence, and these negative experiences could be avoided.'* (A Rape Crisis Centre)

*'My attacker was found not guilty and I felt like the jury's judgement of me had a lot to do with this. I know I did not come across as upset I came across as angry because I had to stop giving evidence lots of times because I was so angry and frustrated at what lies his lawyer was trying to say. I was frustrated that my case had already been part heard 18 months previously and had been rescheduled 3 times. It was 4 years since I reported it.'* (A survivor)

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

If we are serious about taking a trauma informed approach to the prosecution of sexual crimes, we need a firm commitment within the Bill to the abolishment of floating trial diets. There should also be positive obligations and time scales enshrined in legislation regarding the duties of

the COPFS to provide information to survivors as they are entitled to receive.

We call on the Bill to be bolder and extend the provisions of independent legal representation for survivors to provide a wider right to legal advice as outlined above.

The bill should include a commitment to providing complainers of sexual crime copies of transcripts of their trials without a fee.

We wish to see the introduction of non-harassment orders as a standard sentence when a person is convicted of rape or sexual violence.

We would like to see the introductions of protections on the use of sexual history evidence in civil cases.

We welcome and support many aspects of the Bill but this is only one step forward in the improvement of the rights of complainers of sexual crime and there is a long way to go before their position is entirely improved. This is a significant step in the right direction, but it is only part of wider reform which is required.

*'Our view is that the criminal justice system requires more than reform. We would like to see efforts and resources being directed towards reimagining what justice can look like for survivors of sexual harm, and in our society more generally.'* (A Rape Crisis Centre)