



Victims, Witnesses, and Justice Reform (Scotland) Bill

About the Scottish Women's Rights Centre

The Scottish Women's Rights Centre (SWRC) is a collaboration between Rape Crisis Scotland, JustRight Scotland and the University of Strathclyde Law Clinic. The SWRC works with self-identifying women who have been affected by abuse and violence in Scotland with the aim of improving their access to justice and experience of the justice system.

The SWRC strives to fill the gaps that exist between women's experiences of gender-based violence and their ability to access justice by working with specialist solicitors and experienced advocacy workers.

Informed by our direct work with victims/survivors of violence and abuse, we seek to influence national policy, research and training to improve processes and systems, and ultimately to improve justice outcomes for women who have experienced gender-based violence.

Our Response

Our response to the consultation on Victims, Witnesses, and Justice Reform (Scotland) Bill.

Scottish Women's Rights Centre

The SWRC is a collaboration between Rape Crisis Scotland (Scottish Charity No SCO25642), the University of Strathclyde Law Clinic and JustRight Scotland (Scottish Charity No SC047818). All legal advice and representation provided through the SWRC is by the solicitors of JustRight Scotland.

Registered in Scotland, no 258568.

1st Floor, 10 Bothwell Street, Glasgow, G2 6LU

T ▶ 0141 331 4183

▶ www.scottishwomensrightscentre.org.uk

▶ @SWRC_



Question 1:

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

At the Scottish Women's Rights Centre (SWRC), we are supportive of the creation of a statutory Victims and Witnesses Commissioner for Scotland and see that this could enhance and protect the rights of victims of gender-based 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's support organisations in Scotland.

The independence of the Commissioner is key to being able to hold accountable agencies like COPFS, the Police or the court and tribunals systems and to engage with partners and stakeholders in a common effort to dismantle structural barriers to accessing justice for victims and witnesses.

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 some of the survivors of gender-based violence whom we support through our services. These survivors will potentially encounter a range of justice agencies and their experience will not be limited to the remit of the criminal justice system, as they can often be involved in several of these processes simultaneously and not view them as separate. 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 victims' 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 direct policy and make decisions.

We are interested in the ways in which the Victims Commissioner could further protect and promote the obligations of the Scottish Government under human rights international conventions.

Under international law, both the UK and Scottish Governments are under obligations to take measures to ensure women's full enjoyment of human rights on an equal basis with men, as contained in:

- The Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW) and



- The Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention).

CEDAW is a UN Convention which was signed by the United Kingdom in 1981 and ratified in 1986. This international treaty is reflective of the importance for gender equality to underpin human rights so that women and girls can enjoy them fully and without discrimination, as defined in Article 1: *“Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”*

The UK signed the Istanbul Convention in 2012 and ratified it in 2022; the Convention came into force on 1st November 2022.

The Scottish Government has human rights obligations under CEDAW to eliminate gender stereotypes in the criminal justice system and in wider society. Article 5 of CEDAW places a positive obligation on states, which requires them to take proactive steps to ensure women enjoy the fulfilment of their rights under international law to bring about gender equality, including adopting appropriate legislative measures and establishing legal protection of the rights of women and girls. Responsibility for ensuring that the CEDAW requirements are met in Scotland sits with the Scottish Government - which has already committed to ensuring realisation of the Convention in Scotland.¹ The new Commissioner should have a clear remit to uphold these standards in Scotland.

Greater protection for victims and witnesses is needed in Scotland, and that is why we are in favour of the creation of a Commissioner with a clear remit, empowered to hold the government to account, independent, well-resourced and directly informed by the views of victims and witnesses.

Question 2:

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

The adoption of trauma-informed practices is a central way in which the experience of victims can be improved. Individuals who go through the justice process are already traumatised, and for some, their experiences of the system itself traumatise

¹ Scottish Government, Convention on the elimination of all forms of discrimination against women: position statement.



them further. As such, we welcome the proposal to embed trauma-informed practice across the justice system.

At SWRC we have prioritised the incorporation of trauma-informed practice within our own services, we have built these on being person centred and have seen that this yields better outcomes for survivors accessing our services. At SWRC we provide domestic abuse training for solicitors, a two-day course which is centred on trauma-informed practice and the importance of this when working with survivors of domestic abuse. The survivors we work with in our legal and advocacy services have told us about the importance of this to them.

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

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"² and at SWRC we are supportive of the introduction of specific provisions to incorporate trauma informed practice. This is important, not just for the criminal justice system but also key for the civil justice system, as we support many survivors of gender-based violence (GBV) who have faced dissatisfactory experiences within the civil courts. The importance of adopting a trauma-informed practice and embedding this within the workings of every aspect of the justice system cannot be overstated.

We note that the use of trauma-informed practice is part of the Justice Strategy³ (2022) and was also one of the key findings of the Women's Justice Leadership Panel.⁴

This will help create a better feeling of trust within survivors accessing the system, we often hear of women who are too intimidated by the processes themselves to engage. This is a significant barrier to justice which prevents many survivors of GBV from accessing their rights or the protections they are entitled to.

This includes applying for protective orders, such as interdicts. We are aware that the use of these orders is not used to their full potential. Some women report that they find the prospect of going to court to obtain one daunting and distressing. The fact that many are unable to instruct a solicitor due to the legal aid crisis and lack of solicitors who are able to provide these services is also a significant factor.

²² [Lady Dorrian Review Governance Group: Specialist Sexual Offences Court Working Group Report - gov.scot \(www.gov.scot\)](https://www.gov.scot/binaries/content/documents/govscot/publications/specialist-sexual-offences-court-working-group-report-2022-02/vision-justice-scotland/documents/vision-justice-scotland-2022/govscot:document/vision-justice-scotland-2022.pdf)

³ <https://www.gov.scot/binaries/content/documents/govscot/publications/strategy-plan/2022/02/vision-justice-scotland/documents/vision-justice-scotland-2022/vision-justice-scotland-2022/govscot:document/vision-justice-scotland-2022.pdf>

⁴ <https://www.gov.scot/binaries/content/documents/govscot/publications/independent-report/2023/08/womens-justice-leadership-panel-case-gendered-intersectional-approaches-justice/documents/womens-justice-leadership-panel-case-gendered-intersectional-approac>



Survivors we spoke to were strongly in favour of Trauma Informed Training for everyone involved in the justice process. Many survivors we spoke to felt retraumatized by the court 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.

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

Question 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 that the Bill will aim to improve the situation for all civil cases, not just those in child contact cases as the 2020 act would do.

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 Criminal Injuries Compensation Authority (CICA) cases alongside claiming damages. These clients are often vulnerable because of the abuse they have experienced, and we have had examples of cases where we have found it challenging to convince the court to grant special measures even where the content of the case involved such abuse.

SWRC also 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.

However, whilst the Bill goes some way to resolve these matters, we do foresee some potential barriers that may still exist in accessing special measures and ways in which they could be strengthened.

Special Measures for Vulnerable Witnesses in Civil cases



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 would exclude some survivors we support from being 'deemed' vulnerable and we note that under these provisions the survivor in the Miss M case (and cases of that kind) would not have been automatically entitled to special measures. The Miss M case involved civil proceedings to claim damages against her rapist.

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. We have found that obtaining a civil court order such as an interdict, is not an option for many of the women we support. We have 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 the use of these provisions. It does not 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 if 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.

Miss AB noted that, having received special measures, *'they should be offered automatically then the survivor could decide.'* 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 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'* and note that Bill as framed may fall short in achieving this aim.

The prohibition on cross examination follows the same requirements as discussed above for special measures to be granted, which again 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 three civil damages for rape proofs that have taken place in Scotland, to date none of those survivors have received financial compensation. 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 system 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 her rapist could potentially represent himself, and this was a real concern for some time. She had to factor that into her decision to continue with the case, and whilst she chose to proceed, we are concerned that many other women, in a similar position, might choose not to, for this reason alone.

Survivors could find the experience of being cross-examined by their abuser intimidating and it could place them at a disadvantage. This process could also give an alleged abuser the means to further control and/or commit further abuse. The civil justice process should seek to carefully balance the rights of victims and alleged perpetrators; an important part of striking this balance, must be consideration of circumstances in which seemingly neutral court processes could be used as a means of abuse. Any protections which are developed to support victims and witnesses, in these circumstances, should be obvious from the start and clearly explained to all parties.



character evidence in sexual offence cases and welcome the provisions set out in the Bill. We believe that this could lead to better access to justice for survivors.

As stated by Keane and Convery, 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.'⁷ 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 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 explored⁸.

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 IRL with legal aid is currently available to survivors of rape, and the recommendation is to extend this beyond to all sexual offences. This has led to further reform to the system to accommodate the changes; there was no requirement for preliminary or pretrial hearings, meaning the sexual history applications were argued at the start of the trial. This has led to procedure changing to accommodate the survivors' right to be represented. Benefits found are that the Crown can focus on the significance of applications only to the prosecution and it ensures that the complainers are satisfied that their views were heard. With advice from a legal representative, not all survivors opposed the applications. 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 for 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 the applications be informed in the knowledge of their legality and the consequences of them.

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

⁷ [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](#)

⁸ [Gillen Review Report into the law and procedures in serious sexual offences in NI | Department of Justice \(justice-ni.gov.uk\)](#)



- 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 was to be asked of them and what could not.

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

Providing ILR will require a commitment to the necessary funding to allow proper access to such legal advice. We are currently facing a legal aid crisis where we have seen an increase in enquiries to our services from survivors of GBV who are unable to obtain legal aid funded representation. This included those who have been unable to find representation in criminal cases. There should be assurances that there will be appropriate funding available to allow solicitors to carry out this duty on behalf of complainers in criminal proceedings.

For further information, please contact SWRC at:

info@scottishwomensrightscentre.org.uk

07.09.2023