

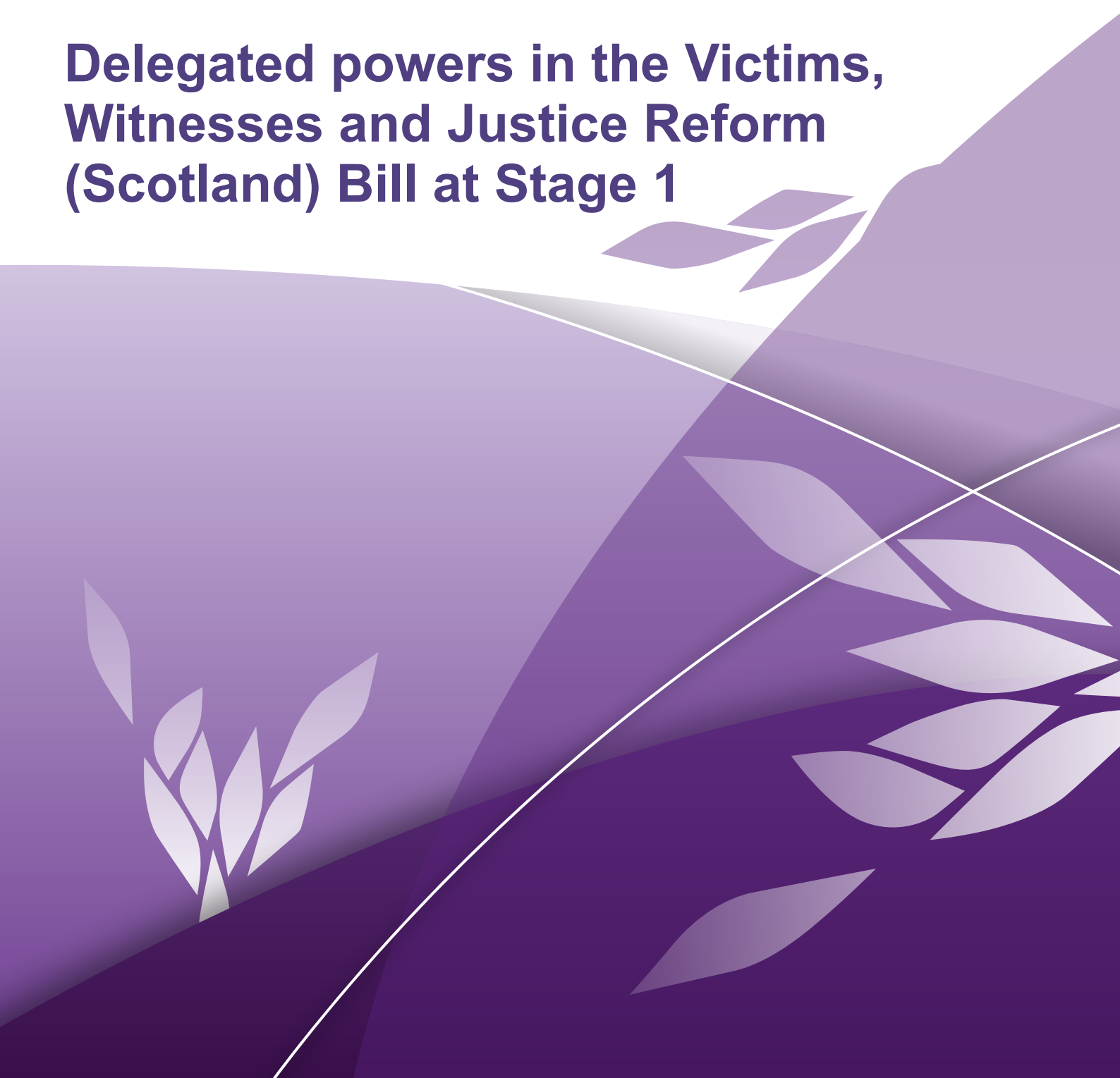


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# **Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh**

## **Delegated powers in the Victims, Witnesses and Justice Reform (Scotland) Bill at Stage 1**



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# Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



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# Committee Membership



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Scottish Conservative  
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**Colin Smyth**  
Scottish Labour

# Membership changes

1. The following changes to Committee membership occurred during the course of the Committee's scrutiny of the delegated powers provisions in the Victims, Witnesses and Justice Reform (Scotland) Bill:
  - on 16 November 2023, Colin Smyth MSP replaced Mercedes Villalba MSP.

# Introduction

2. At its meetings on 24 October<sup>i</sup> and 19 December 2023, the Delegated Powers and Law Reform Committee considered the delegated powers contained in the [Victims, Witnesses and Justice Reform \(Scotland\) Bill](#) ("the Bill") at Stage 1.
3. The Committee submits this report to the lead Committee for the Bill under Rule 9.6.2 of Standing Orders.

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<sup>i</sup> Mercedes Villalba MSP submitted apologies for this meeting.

## Overview of the Bill

4. This Scottish Government Bill was introduced by the Cabinet Secretary for Justice and Home Affairs, Angela Constance MSP, on 20 June 2023. The lead committee is the Criminal Justice Committee.
5. The Scottish Government states in its [Policy Memorandum](#) that the Bill responds to calls for justice process and practice to be more trauma informed, and is the product of engagement with victims, witnesses, justice stakeholders and the general public. Two public consultations have been held on the Bill. The first, on the Not Proven Verdict and Related Reforms, ran between 13 December 2021 and 11 March 2022 and received 200 responses in total. The second, on Improving Victims' Experiences of the Justice System, ran between 12 May 2022 and 19 August 2022 and received 69 responses. Further, the Bill has been informed by the findings of Lady Dorrian's Review into Improving the Management of Sexual Offence Cases which was published in March 2021.



# Delegated powers

6. The Bill contains 19 delegated powers in total. It confers 10 powers to make subordinate legislation on the Scottish Ministers, seven on the High Court, one on the Court of Session and one on the President of the Sexual Offences Court.
7. The Scottish Government has prepared a [Delegated Powers Memorandum](#) (“DPM”) which sets out the reasons for taking the delegated powers in the Bill and for the procedure chosen.
8. At its meeting on 24 October, the Committee indicated that it was content with 17 of the delegated powers:
  - Section 3(1): Victims and Witnesses Commissioner – Civil function;
  - Section 12(5): Victims and Witnesses Commissioner – Investigations: witnesses and documents;
  - Section 23(2): Victims and Witnesses Commissioner – Interpretation of Part;
  - Section 25(2): Criminal courts: conduct of proceedings;
  - Section 26(2) and (3): Civil courts: conduct of proceedings;
  - Section 32(4): Vulnerable witnesses – Register of solicitors for section 22B of the Vulnerable Witnesses (Scotland) Act 2004;
  - Section 34(2): Jury size and quorum;
  - Section 39(6): Sexual Offences Court – Jurisdiction: sexual offences;
  - Section 44(3): Sittings of Sexual Offences Court;
  - Section 53(2): Sexual Offences Court records;
  - Section 54(4)(b): Sexual Offences Court records: authentication and electronic form;
  - Section 55(5): Sexual Offence Court procedure;
  - Section 63: Sexual offences: anonymity and restriction on publications;
  - Section 65(5): Pilot of single judge rape trials;
  - Section 68(1): Ancillary provision; and
  - Section 71(2): Commencement.
9. However, the Committee agreed to write to the Scottish Government to raise questions on the following delegated powers:
  - Section 55(2) - sexual offence court procedure; and
  - Section 65(1) - pilot of single judge rape trials.

## Delegated Powers and Law Reform Committee

Delegated powers in the Victims, Witnesses and Justice Reform (Scotland) Bill at Stage 1, 78th Report, 2023 (Session 6)

10. The Committee [wrote](#) to the Scottish Government on 27 October and received a [response](#) on 21 November. The Committee's consideration of this, and the other delegated powers contained in the Bill, are set out in the next section of the report.

# Review of relevant powers

## Section 3(1): Victims and Witnesses Commissioner – Civil function

### Power conferred on: the Scottish Ministers

### Power exercisable by: Regulations made by Scottish Statutory Instrument

### Parliamentary procedure: Affirmative

#### *Provision*

11. Section 1 of the Bill establishes the office of the Victims and Witnesses Commissioner for Scotland. The general function of the Commissioner is to promote and support the rights and interests of victims and witnesses involved in criminal proceedings. Section 3(1) confers a power on the Scottish Ministers to make regulations to amend the Commissioner's general function so as to include the civil function. The civil function is to promote and support the rights and interests of persons involved in proceedings other than criminal proceedings.
12. Such regulations may provide for the exercise of the civil function to include engagement, promoting best practice and undertaking and commission research.
13. Regulations may also modify Part 1 of the Bill, including schedules 1 and 2.

#### *Committee consideration*

14. The Scottish Government states in its DPM that the majority of respondents to the consultation agreed that the experience of victims and witnesses in the civil justice system should be within the remit of the Commissioner. It states that the policy ambition is to extend the Commissioner's remit to certain aspects of the civil justice system, and that this power will allow for further development work and engagement in this area.
15. The extension of the Commissioner's remit to include the civil function would be a significant change. The establishment of a Commissioner's office is typically thought to merit primary legislation. However, on balance, the regulation making power may be considered appropriate given that the Victims and Witnesses Commissioner will likely have the experience and expertise to deal with the civil justice system alongside the criminal justice system. It is considered that it is likely a better use of parliamentary time to include this option in this Bill, which can thereafter be implemented by regulations, rather than requiring more primary legislation at later date to cover victims and witnesses in the civil justice system. The affirmative procedure seems appropriate in the circumstances.

16. **The Committee finds the power acceptable in principle and is content that it is subject to the affirmative procedure.**

## Section 12(5): Victims and Witnesses Commissioner – Investigations: witnesses and documents

## **Power conferred on: the Scottish Ministers**

### **Power exercisable by: Regulations made by Scottish Statutory Instrument**

#### **Parliamentary procedure: Negative**

##### *Provision*

17. Section 10 of the Bill provides for the Victims and Witnesses Commissioner to carry out an investigation into whether, by what means and to what extent a criminal justice agency has, or has had, regard to the rights, interests and views of victims and witnesses in making decisions or taking action that affect them. Section 12 gives the Commissioner powers to require any person to give evidence on any matter within the terms of an investigation, and to produce documents in the custody or control for that person which have a bearing on any such matter, in order to enable the Commissioner to carry out an investigation.
18. Section 12(5) provides the Scottish Ministers with the power, by regulations, to make further provision in relation to the giving of evidence or the production of documents.

##### *Committee consideration*

19. The Scottish Government explains in its DPM that the power is sought to provide flexibility to make any detailed provision that might be needed in relation to giving evidence and providing documents as part of an investigation. It states that it will allow the Scottish Government to respond to situations that emerge over time, once the Commissioner's office is operational.
20. This power appears narrow in scope and may only be used in relation to the giving of evidence or the production of documents. It is considered that such regulations are likely to provide additional detail to such a process, and it is not considered that the power could be used to implement any change of policy. The negative procedure is considered appropriate for regulations which make such detailed provision.

21. **The Committee finds the power acceptable in principle and is content that it is subject to the negative procedure.**

## **Section 23(2): Victims and Witnesses Commissioner – Interpretation of Part**

### **Power conferred on: the Scottish Ministers**

### **Power exercisable by: Regulations made by Scottish Statutory Instrument**

#### **Parliamentary procedure: Affirmative**

##### *Provision*

22. Section 23(2)(a) confers a regulation making power on the Scottish Ministers in order that they may modify the list in the definition of “criminal justice agency” in subsection 1. The power allows the Scottish Ministers to add, vary or remove entries. Section 23(2)(b) enables the Scottish Ministers to modify the definition of

“victim” and “witness”, and section 23(2)(c) enables the Scottish Ministers to make other modifications as they consider necessary or expedient in consequence of the modification of the definitions of “victim” or “witness”.

23. Regulations made under this power would be subject to the affirmative procedure.

*Committee consideration*

24. The Scottish Government explains in its DPM that the powers are sought in order to future-proof the legislation, and to allow a potential extension to victims and witnesses in the Children’s Hearing System. Such an extension would require a change to the definitions of “criminal justice agency”, “victim” and “witness”.
25. It is considered that the definitions of “victim” and “witness” could be viewed as central to the Bill and therefore changes to such definitions should be subject to a high level of parliamentary scrutiny. However, it is accepted that it is foreseeable that the definitions may require to be modified, particularly if the power to extend the Commissioner’s remit to include the civil function is used. It therefore appears proportionate that such a power is available to make modifications which would likely be in keeping with the aims of the Bill as it stands now. The affirmative procedure would allow Parliament sufficient control to intervene should the power be used to update definitions in an unexpected way.

- 26. The Committee finds the power acceptable in principle and is content that it is subject to the affirmative procedure.**

**Section 25(2): Criminal courts: conduct of proceedings**

**Power conferred on: High Court of Justiciary**

**Power exercisable by: Act of Adjournal**

**Parliamentary procedure: Laid, no procedure**

*Provision*

27. Under section 305 of the Criminal Procedure (Scotland) Act 1995, the High Court of Justiciary may, by Act of Adjournal, regulate practices and procedures in relation to criminal procedure. Section 25(2) amends that section to include the power to regulate practices and procedure for the purpose of ensuring that criminal proceedings are conducted in a way that accords with trauma-informed practice.
28. Consistent with the current procedure under the 1995 Act, regulations would be laid before the Parliament but not subject to any further parliamentary procedure.

*Committee consideration*

29. The Scottish Government states in its DPM that the power ensures that the High Court can make operational changes to criminal court procedure that help embed the principles of trauma-informed practice. It is considered most appropriate for court rules on operational matters to be set by the courts themselves, rather than prescribed by the Scottish Ministers.

30. It is standard that changes to court rules be made by an Act of Adjournal which is laid before the Parliament but not subject to any further procedure.

**31. The Committee finds the power acceptable in principle, and that an Act of Adjournal made under it would be laid before the parliament but not subject to any further procedure.**

### **Section 26(2) and (3): Civil courts: conduct of proceedings**

**Power conferred on: Court of Session**

**Power exercisable by: Act of Sederunt**

**Parliamentary procedure: Laid, no procedure**

#### *Provision*

32. Section 103 of the Courts Reform (Scotland) Act 2014 provides a power for the Court of Session to regulate its own practice and procedure, by Act of Sederunt. Section 104 makes similar provision in respect of for civil proceedings in the sheriff court and the Sheriff Appeal Court. The powers are accompanied by a non-exhaustive list of matters that the powers may be used to make provision in relation to. Sections 26(2) and (3) add trauma informed practice to those lists, in order that the Court of Session may regulate practices and procedures for the purpose of ensuring that civil proceedings are conducted in a way that accords with trauma-informed practice.

33. An Act of Sederunt made under this power would be laid before the Parliament but not subject to any further parliamentary procedure.

#### *Committee consideration*

34. The Scottish Government states in its DPM that the power ensures that the Court of Session can make operational changes to civil court procedure that help embed the principles of trauma-informed practice. It is considered most appropriate for court rules on operational matter to be set by the courts themselves, rather than prescribed by the Scottish Ministers.

35. It is standard that changes to court rules be made by an Act of Sederunt which is laid before the Parliament but not subject to any further procedure.

**36. The Committee finds the power acceptable in principle, and is content that an Act of Sederunt made under it would be laid before the parliament but not subject to any further procedure.**

### **Section 32(4): Vulnerable witnesses – Register of solicitors for section 22B of the Vulnerable Witnesses (Scotland) Act 2004**

**Power conferred on: The Scottish Ministers**

**Power exercisable by: Regulations made by Scottish statutory instrument**

**Parliamentary procedure: Affirmative if textually amending primary legislation, otherwise negative procedure**

*Provision*

37. Section 32(4) inserts a new section 22E into the Vulnerable Witnesses (Scotland) Act 2004, requiring the Scottish Ministers to establish and maintain a register of solicitors who may be appointed by the court when a party has been prohibited from conducting their own case in civil proceedings. Section 22E provides for certain provision about the register to be made by regulations. It requires the Scottish Ministers, by regulations, to specify the requirements that a person must satisfy in order to be included or remain on the register, and set out the processes for including a person on, and removing a person from the register or each part of it.
38. Regulations may also make such modifications to other enactments as the Scottish Ministers consider appropriate for the purposes of, or in connection with, or for giving full effect to provision made by virtue of section 22E(2)(d)(i) which enables the Scottish Ministers to confer the duty of maintaining the register on a person.
39. Regulations made under this power would be subject to the negative procedure, unless textually amending primary legislation in which case affirmative procedure would apply.

*Committee consideration*

40. The Scottish Government states in its DPM that the power is required to make detailed provision to establish a register of solicitors. It states that flexibility is required in order that the eligibility criteria, such as training and qualification requirements and the rates of remuneration may be kept up to date on an on-going basis.
41. It is considered that the power will be used to make administrative, operational and procedural provision in relation to the establishment of a register of solicitors. The power to modify primary legislation is limited in its scope, in that it may only be in connection with the conferring of the duty of maintaining the register.

42. **The Committee finds the power acceptable in principle and is content that regulations made under it would be subject to the negative procedure, unless it is used to amend primary legislation in which case it will be subject to the affirmative procedure.**

**Section 33(3): Vulnerable parties**

**Power conferred on: The Scottish Ministers**

**Power exercisable by: Regulations made by Scottish statutory instrument**

**Parliamentary procedure: Affirmative procedure**

*Provision*

43. Section 33(3) inserts section 22F into the Vulnerable Witnesses (Scotland) Act 2004. This authorises the court to order the use of special measures to reduce



distress to vulnerable parties caused by attending or participating in hearings. New section 22F(6) specifies the special measures available to the court and 22F(6)(d) provides that the Scottish Ministers may by regulations prescribe further special measures that may be used to assist vulnerable parties.

44. Regulations made under this power would be subject to the affirmative procedure.

*Committee consideration*

45. The Scottish Government states in its DPM that the power is taken to ensure that there is flexibility in order that the range of special measures available to the court is kept up to date. It gives the examples of new or improved technology, the identification of other appropriate support measures and changes in best practice for supporting vulnerable parties.

46. It is common for powers such as these to be included in Bills. The affirmative procedure provides adequate control for the Parliament to ensure that the power is being used appropriately.

- 47. The Committee accepts the power in principle, and is content that it is subject to the affirmative procedure.**

**Section 34(2): Jury size and quorum**

**Power conferred on: High Court of Justiciary**

**Power exercisable by: Act of Adjournal**

**Parliamentary procedure: Laid, no procedure**

*Provision*

48. Section 34(2) reduces the default jury size in a criminal trial from 15 jurors to 12 jurors, by amending section 88 of the Criminal Procedure (Scotland) Act 1995. The 15 juror quorum is provided for under the common law. Section 34(2) re-enacts provision in the 1995 that provides that jurors should be chosen in open court by ballot from the list of persons summoned, in the manner prescribed by Act of Adjournal.
49. An Act of Adjournal made under this power would be laid before the Parliament but would not be subject to any further parliamentary procedure.

*Committee consideration*

50. The Scottish Government states in its DPM that the delegated power in section 34(2) is simply re-enacting the existing power which is currently provided for.
51. It is agreed that this is not a new power, and that it is appropriate that the courts have the power to prescribe the manner jurors are to be chosen, subject to the limitation that they are chosen in open court by ballot from the list of persons summoned. It is also standard practice that Acts of Adjournal are laid before the Parliament but are not subject to any further parliamentary procedure.



- 52. The Committee finds the power acceptable in principle and is content that an Act of Adjournal made under it would be laid before the Parliament but not subject to any further parliamentary procedure.**

**Section 39(6): Sexual Offences Court – Jurisdiction: sexual offences**

**Power conferred on: The Scottish Ministers**

**Power exercisable by: Regulations made by Scottish statutory instrument**

**Parliamentary procedure: Affirmative procedure**

*Provision*

53. Section 39 makes provision for the jurisdiction of the Sexual Offences Court, providing that the Sexual Offences Court may try any sexual offence which is triable on indictment in any place in Scotland. It may also try other offences on the indictment, other than the offence of treason and breach of duty by magistrates. Section 39(5) provides that “sexual offence” means an offence listed in schedule 3. Section 39(6) provides that the Scottish Ministers may by regulations modify the definition in subsection (5) and the list in schedule 3.
54. Regulations made under this power would be subject to the affirmative procedure.

*Committee consideration*

55. The Scottish Government explains in its DPM that the power is taken in order that changes can be made because of, for example, the creation of new statutory offences, or to respond to emerging trends in sexual offending which occur for time to time.
56. It is common for Bills which include lists of offences to also include a power to update that list for the reasons outlined above. The affirmative procedure will allow appropriate scrutiny of the exercise of this power.

- 57. The Committee accepts the power in principle, and is content that it is subject to the affirmative procedure.**

**Section 44(3): Sittings of Sexual Offences Court**

**Power conferred on: President of the Sexual Offences Court**

**Power exercisable by: Order**

**Parliamentary procedure: None**

*Provision*

58. Section 44 confers a power on the President of the Sexual Offences Court to make provision for scheduling sittings of the Sexual Offences Court. In scheduling such sittings, the President of the Sexual Offences Court may prescribe the number of

sittings of the Court and the dates and times of those sittings. The power is subject to the Lord Justice General's overall responsibility for ensuring efficient disposal of business within the Scottish Courts.

59. Before exercising the power, the President must consult the Lord Justice General and the Lord Advocate.
60. The power is exercised by Order, which will not be laid before the Parliament.

*Committee consideration*

61. The Scottish Government states in its DPM that the power to schedule sittings supports the President in fulfilling their responsibility to ensure efficient disposal of business. It explains that the power mirrors that granted to the principal judicial officers responsible for efficient disposal of business in other criminal courts including the High Court, sheriff courts and the Sheriff Appeal Court.
62. The Committee accepts the reasons set out in the DPM as regards the need for this power in principle and the choice of procedure applicable to its exercise.

63. **The Committee accepts the power in principle and is content that it is not subject to any procedure.**

**Section 53(2): Sexual Offences Court records**

**Power conferred on: High Court of Justiciary**

**Power exercisable by: Act of Adjournal**

**Parliamentary procedure: Laid, no procedure**

*Provision*

64. Section 53(2) inserts a new section 1ZA into the Public Records (Scotland) Act 1937 which provides for the transfer of records from and to the Sexual Offences Court. The provision allows the High Court of Justiciary to prescribe the times and conditions under which the records of the Sexual Offence Court will be transmitted to and from the Keeper of Records of Scotland.
65. The power will be exercised by the High Court of Justiciary by Act of Adjournal. It will be laid before the Parliament but will not be subject to further procedure.

*Committee consideration*

66. The Scottish Government explains in its DPM that it will be necessary, when the Sexual Offences Court is established, to have rules in place regarding its records and when they are to be transmitted to and from the Keeper. It explains that this is a procedural matter which is best determined by the High Court. It also notes that the procedure attached to this power is consistent with the procedures in place regarding other types of court records, including those of the High Court and the Court of Session.

67. The Committee accepts the reasons set out in the DPM as regards the need for this

power in principle and the choice of procedure applicable to its exercise.

- 68. The Committee accepts the power in principle, and is content that an Act of Adjournal made under it would be laid before the Parliament but would not be subject to further parliamentary procedure.**

**Section 54(4)(b): Sexual Offences Court records: authentication and electronic form**

**Power conferred on: High Court of Justiciary**

**Power exercisable: Act of Adjournal**

**Parliamentary procedure: Laid, no procedure**

*Provision*

69. Section 54 makes provision for the authentication, keeping and producing of records generated by the Sexual Offences Court. It permits records of the Sexual Offences Court to be authenticated by being signed by a Judge of the Sexual Offences Court, or the Clerk of the Sexual Offences Court. The Sexual Offences Court may keep (and produce) records in electronic form. Section 54(4)(b) enables the High Court of Justiciary, through an Act of Adjournal, to specify the types of authentication that may be used for record keeping. The High Court must consult the Keeper of the Records of Scotland before making such an Act of Adjournal.
70. An Act of Adjournal made under this power would be laid before the Parliament, but would not be subject to further procedure.

*Committee consideration*

71. The Scottish Government states in its DPM that the power ensures that the Court has flexibility to determine how it manages records and ensures alignment with other criminal courts.
72. The Committee accepts the reasons set out in the DPM as regards the need for this power in principle and the choice of procedure applicable to its exercise.

- 73. The Committee accepts the power in principle and is content that an Act of Adjournal made under it would be laid before the Parliament but would not be subject to any further procedure.**

**Section 55(2): Sexual Offence Court procedure**

**Power conferred on: The Scottish Ministers**

**Power exercisable by: Regulations made by Scottish statutory instrument**

**Parliamentary procedure: Affirmative procedure**

*Provision*

74. Section 55(1) applies the procedure of the High Court of Justiciary, as set out in

Criminal Procedure (Scotland) Act 1995, to proceedings in the Sexual Offences Court, but this will not apply where such procedure is inconsistent with other provision contained in the Bill or made using a power in the Bill. Section 55(2) provides that the Scottish Ministers may, by regulations, make further provision for the procedure which applies to proceedings in the Sexual Offences Court. Before making such regulations, the Scottish Ministers must consult the Lord Justice General. Regulations made under this power may modify any enactment, including the Act that flows from this Bill.

75. Regulations made under section 55(1) would be subject to the affirmative procedure.

#### *Committee consideration*

76. The Committee considered that the power being conferred on the Scottish Ministers appeared to be broad, and noted that it could be used to modify any enactment, including the Act flowing from this Bill. It acknowledged the justification in the DPM, which stated that the power was required in order that further provision about procedure can be made where any inconsistencies or ambiguities arise. In correspondence with the Scottish Government, the Committee therefore asked whether any consideration had been given to alternative drafting which would limit the use of the power to provision dealing only with ‘inconsistencies and ambiguities’ rather than making any substantive change to procedure.

77. In her response, the Cabinet Secretary reiterated that the power in section 55(2) is needed because it is possible that unforeseen difficulties may arise from the approach taken in section 55(1) that need to be rectified. She said that:

” the details of these unanticipated issues are by their very nature unknown, and at this stage I do not think it prudent to restrict the regulation making power only to ‘inconsistencies or ambiguities’, recognising that there is a degree of subjectivity inherent in those terms. As we don’t yet know what changes might be needed, we cannot with confidence characterise these as ‘inconsistencies or ambiguities’. Ultimately, my goal is to support the operation of the Court by ensuring that the Scottish Ministers have a clear and effective regulation making power to quickly rectify matters should that be required; one that is balanced with an appropriate level of parliamentary oversight given it is subject to the affirmative procedure. Amending the power in subsection (2), to restrict it to only being used to remedy inconsistencies and ambiguities, may mean that there will be changes and improvements identified during implementation which cannot be put in place without further primary legislation, which would lead to significant delays in establishing the Court.

78. It is acknowledged that inconsistencies and ambiguities could arise as a result of the general provision in section 55(1) applying the procedure of the High Court of Judiciary to proceedings in the Sexual Offences Court, subject to such modification provided by this Bill or any provision made under this Bill. The Committee considers that it would be desirable to have a regulation making power to correct or clarify such inconsistencies or ambiguities. However, criminal procedure can affect sensitive and important matters such as the rights of the accused, victims and witnesses. Provision about criminal procedure has therefore been legislated for via primary legislation in the Criminal Procedure (Scotland) Act 1995, and modifications have been made, where necessary, in relation to the Sexual Offences Court by this

Bill. Furthermore, the Committee considers it would be inappropriate that any substantive change to criminal procedure could be made by secondary legislation. Therefore, the Committee considers it would be appropriate if the power was limited in such a way that substantive changes to criminal procedure could not be made using this power.

79. **The Committee acknowledges that it may be helpful to have a power to make further provision about criminal procedure in order to deal with unforeseen inconsistencies and ambiguities. However, it considers that the power, as currently drafted, is broader than necessary and therefore calls on the Scottish Government to bring forward an amendment at Stage 2 which would limit the scope of the power.**

### **Section 55(5): Sexual Offence Court procedure**

**Power conferred on: High Court of Justiciary**

**Power exercisable by: Regulations made by Act of Adjournal**

**Parliamentary procedure: Laid, no procedure**

#### *Provision*

80. Section 55(5) enables the High Court to, by Act of Adjournal, make any incidental, supplementary, consequential, transitional, transitory or saving provision it considers appropriate, including the Act that flows from this Bill, for the purposes of, in connection with or for giving full effect to this Part and any provision made under it.

#### *Committee consideration*

81. Whereas the Committee considers the power, as currently drafted in relation to section 55(2), is broader than necessary, it does not have the same concerns with the power conferred on the High Court of Justiciary given that it is limited to making ancillary provision for the purposes of the Part.

82. **The Committee accepts the power conferred on the High Court of Justiciary, and is content that an Act of Adjournal made under it would be laid before the Parliament but not subject to any further procedure.**

### **Section 63: Sexual offences: anonymity and restriction on publications**

**Power conferred on: The Scottish Ministers**

**Power exercisable by: Regulations made by Scottish statutory instrument**

**Parliamentary procedure: Affirmative**

#### *Provision*

83. Section 63 inserts a new section 106C into the Criminal Justice (Scotland) Act 2016

which prohibits the publication of information likely to lead to the identification of a person as a victim of an offence listed in section 106(5). New section 106C(6) includes a power for the Scottish Ministers to modify, by regulations, the list of offences set out at section 106(5).

84. Regulations made under this power are subject to the affirmative procedure.

*Committee consideration*

85. The Scottish Government states in its DPM that the power will enable the Scottish Ministers to make changes on account of, for example, the creation of new statutory offences or to adapt the scope of offences covered by a right of anonymity over time. It states that this will provide the flexibility to ensure that the anonymity framework can be applied to all sexual offences and offences where it is deemed appropriate that the benefits of a right of anonymity should be provided.
86. As is stated elsewhere in this report, it is common for Bills which include a list of offences to also include a power to amend that list for the reasons outlined above. The affirmative procedure provides an adequate level of scrutiny to ensure that the power is used appropriately.

- 87. The Committee accepts the power in principle, and is content that it is subject to the affirmative procedure.**

**Section 65(1): Pilot of single judge rape trials**

**Power conferred on: The Scottish Ministers**

**Power exercisable by: Regulations made by Scottish statutory instrument**

**Parliamentary procedure: Affirmative**

*Provision*

88. Section 65(1) enables the Scottish Ministers to make regulations to allow a time-limited pilot of single judge rape and attempted rape trials, which meet specified criteria, to be conducted. The specified criteria and the duration of the pilot will be set out in such regulations.
89. Before making such regulations, the Scottish Ministers must consult with various parties including, but not limited to, the Lord Justice General, the Lord Advocate and the Scottish Courts and Tribunals Service.
90. Regulations made under this power would be subject to the affirmative procedure.

*Committee consideration*

91. In its correspondence to the Scottish Government, the Committee noted that MSPs may consider the power itself too broad, and that more limitations should be set out on the face of the Bill, such as specified criteria and the time period of the pilot. The Committee also questioned whether this power had been drafted in such a way that it could be exercised more than once and asked whether this had been the intention of the Scottish Government in its drafting.



92. The Cabinet Secretary acknowledged in her response that there is an appetite for more information on how the pilot will operate and noted that she is keen to provide that where it is possible during the timescales of the parliamentary process, without overly restricting the scope for key stakeholders to influence the content of regulations under section 65(1). She said it is her intention to propose amendments to the Bill at Stage 2 to set out additional key information on the operational parameters of the pilot, providing MSPs with more clarity.
93. The Cabinet Secretary also confirmed that the power has intentionally been drafted to allow it to be exercised more than once. She said that it would be possible for it to be used to run more than one pilot, but that is not the intention of the Scottish Government. The Cabinet Secretary explained that the Scottish Government is mindful that procedural reasons might arise that mean new regulations are needed to support the operation of the pilot. She gave the example of where there are technical issues with the regulations that establish the pilot, or if there is a desire to conclude the pilot earlier than originally planned. In these scenarios, she said, it is likely that new regulations would be needed, and that is why the power has been intentionally drafted so that it may be used more than once.
94. Given the significance of this policy, it would be appropriate that the Parliament has as much information as possible about how such a pilot is to operate before agreeing to the delegation of the power. As the Cabinet Secretary has suggested it is possible to set out additional key information on the operational parameters of the pilot, the Committee therefore encourages the limitation of the power by calling on the Scottish Government to bring forward such amendments.
95. The Cabinet Secretary's explanation regarding whether the power is capable of being exercised more than once suggests that this would only be done where there are technical reasons for doing so. This appears appropriate and the Committee is content that the Scottish Government has put on record that it is not intended that more than one pilot is run.

**96. The Committee calls on the Scottish Government to bring forward amendments at Stage 2 which would limit the scope of the power, particularly regarding the "specified criteria" to which a trial must meet to fall under the scope of the pilot, and the time period of the pilot.**

**97. The Committee also calls on the Scottish Government to bring forward amendments at Stage 2 which would make clear that the pilot can only run once, without limiting its ability to bring forward additional technical regulations in relation to the pilot should this be necessary.**

### **Section 65(5): Pilot of single judge rape trials**

**Power conferred on: High Court of Justiciary**

**Power exercisable by: Act of Adjournal**

**Parliamentary procedure: Laid, no procedure**

*Provision*

98. Section 65(6) enables the High Court of Justiciary to make any incidental, supplementary, consequential, transitional, transitory or saving provision which it considers appropriate for giving full effect to section 65 or any regulations made under it which make provision for certain cases to be conducted by a court sitting without a jury.
99. The power is conferred on the High Court of Justiciary and would be exercised through an Act of Adjournal, which would be laid before the Parliament but would not be subject to any further parliamentary procedure.

*Committee consideration*

100. The Scottish Government states in its DPM that the power enables the High Court to make any changes to criminal procedure which it considers appropriate for the purpose of piloting single judge rape trials. The power cannot be used to introduce new general procedure rules, it is limited by contents of the Bill and provision made under it.
101. The Committee accepts the reasons set out in the DPM as regards the need for this power in principle and the choice of procedure applicable to its exercise.

**102. The Committee accepts the power conferred on the High Court of Justiciary, and is content that an Act of Adjournal made under it would be laid before the Parliament but not subject to any further procedure.**

**Section 68(1): Ancillary provision**

**Power conferred on: The Scottish Ministers**

**Power exercisable by: Regulations made by Scottish statutory instrument**

**Parliamentary procedure: Affirmative if textually amending primary legislation, otherwise negative procedure**

*Provision*

103. Section 68 makes standard ancillary provision, giving the Scottish Ministers the power to make any incidental, supplementary, consequential, transitional, transitory or saving provision they consider appropriate for the purposes of, in connection with, or for giving full effect to the Act flowing from the Bill.
104. Regulations made under section 68 may modify any enactment, including the Act flowing from this Bill.

*Committee consideration*

105. The power to make standalone ancillary provision by regulations is common in modern primary legislation. The power is limited to the extent that it can only be used if the Scottish Ministers consider it appropriate for the purposes of, in connection with, or for giving full effect to the Bill or any provision made under it.
106. The power allows issues of an ancillary nature which may arise to be dealt with effectively by the Scottish Ministers. Without such a power, any changes would



require to be made by primary legislation, which would not be an effective use of either the Parliament's or the Scottish Government's resources.

107. **In light of the above, the Committee is content with the power to make ancillary provision in regulations under section 68 of the Bill. The Committee is also content that the affirmative procedure applies to any provision made which modifies primary legislation, and that otherwise the negative procedure applies.**

### **Section 71(2): Commencement**

**Power conferred on: The Scottish Ministers**

**Power exercisable by: Regulations made by Scottish statutory instrument**

**Parliamentary procedure: Laid, no procedure**

#### *Provision*

108. Section 71(2) confers a regulation making power on the Scottish Ministers which will be used to determine the commencement dates of all provisions on the Bill other than sections 67, 68, 69, 71 and 72.
109. Such regulations are to be laid before the Parliament but are not subject to any parliamentary procedure.

#### *Committee consideration*

110. It is standard to take a power at the end of a Bill to commence those sections of the Bill that are not commenced by the Bill itself. This allows the Scottish Ministers to appoint the day on which those sections are to be commenced.
111. It is also standard that commencement regulations are laid before the Parliament but are not subject to further parliamentary procedure.

112. **In light of the above, the Committee is content with the power to make such commencement regulations in section 71(2).**

