

Emails between 05/05/23 and 11/05/23 discussing response to query about terminology used in the VWJR Bill on introduction

From: [Redacted S.38(1)(b)]
Sent: 11 May 2023 09:55
To: [Redacted S.38(1)(b)]
Cc: [Redacted S.38(1)(b)]
Subject: RE: Victims, Witness and Justice Reform (Sc) Bill

Thanks [Redacted S.38(1)(b)], I think your explanation is very clear as to why victim is the most appropriate word to use for sexual offence anonymity policy.

[Redacted S.30(b)(ii)]

Cheers

[Redacted S.38(1)(b)],

From: [Redacted S.38(1)(b)]
Sent: 11 May 2023 09:43
To: [Redacted S.38(1)(b)]
Cc: [Redacted S.38(1)(b)]
Subject: RE: Victims, Witness and Justice Reform (Sc) Bill

Hi [Redacted S.38(1)(b)]

Thanks for flagging. [Redacted S.38(1)(b)] will have views but for me, as the definition of 'victim' makes clear it that it covers suspected offences, I don't think I would agree the use of the word creates an assumption of guilt.

As Anna has said, due to the early start point for anonymity, I don't think 'complainer' works alongside the policy coverage of the anonymity protections, where 'complainer' is a specific term used in criminal cases from report to police onwards. Whereas the anonymity protections in the Bill take effect from the moment a relevant offence is committed, with no positive action required by the 'victim' to engage the right. So a 'victim' is not required to enter the criminal justice process at all to gain anonymity and it covers people ("victims") who do not report to police, those who opt to use the civil law process instead of the criminal one (where 'complainer' is not a term used), and victims who don't make any formal disclosures at all. Instead, any third party publication of identifying information about a victim of a qualifying offence is simply prohibited during the lifetime of the victim, (unless that third party has written consent or in the case of children court agreement.) This includes publication by individuals on social media (as well more traditional media outlets).

More generally, it seems to be quite common to refer to 'victim' even in the criminal justice context when talking about anonymity (where I know 'complainer' is strictly the correct terminology) [Redacted S.36(1)]. To flag, the UK legislation also adopts terminology of 'victim' for their anonymity provisions - [Sexual Offences \(Amendment\) Act 1992 \(legislation.gov.uk\)](#)

Just also in a more general sense, I think 'victim' is the more accessible term to use, particularly as the offence of breaching anonymity would apply to any person with a smart phone on social media who identifies someone, for example. Where the term 'complainer' may not mean much and its use could create confusion for the reasons above.

Hope that helps, let me know if you need anything else from me

Thanks

[Redacted S.38(1)(b)]

From: [Redacted S.38(1)(b)]

Sent: 11 May 2023 08:09

To: [Redacted S.38(1)(b)]

Cc: [Redacted S.38(1)(b)]

Subject: FW: Victims, Witness and Justice Reform (Sc) Bill

Morning all

Following last week's meeting of the LJC Governance Group, [Redacted S.38(1)(b)] (who represents the FoA on the group) has raised some questions about terminology used in the Bill, specifically the use of the words victim and complainer. The attached doc sets out [Redacted S.38(1)(b)] thinking, which is focused on the wording of the provisions on anonymity and for the establishment of the VWC. As you'll see below, Anna sought to explain at the meeting that drafting has been informed by the policy context but she's asked us to do a check.

I'm sending this initially to policy leads [Redacted S.36(1)] responsible for the provisions that [Redacted S.38(1)(b)] highlights. [Redacted S.36(1)]

[Redacted – material out of scope]

Cheers

[Redacted S.38(1)(b)]

[Redacted S.38(1)(b)]

Criminal Law, Practice and Licensing Unit - Criminal Justice Division

[Redacted S.38(1)(b)]

From: Donald AE (Anna) [Redacted S.38(1)(b)]

Sent: 05 May 2023 14:31

To: [Redacted S.38(1)(b)]

Cc: [Redacted S.38(1)(b)]

Subject: FW: Victims, Witness and Justice Reform (Sc) Bill

[Redacted S.38(1)(b)]

Grateful if you could raise with policy leads, for awareness and sense checking. [Redacted S.38(1)(b)] raised this at the GG and I countered that we use the words differently often depending on context (i.e. where we want anonymity to apply regardless of whether the person make a formal report). The 2014 Act also (I think universally) uses victim rather than complainer for example. However it would be

useful to check through in case there are any where we might wish to revise. [Redacted – material out of scope]

Thanks

Anna

From: [Redacted S.38(1)(b)]

Sent: 05 May 2023 14:11

To: Donald AE (Anna) [Redacted S.38(1)(b)]

Subject: Victims, Witness and Justice Reform (Sc) Bill

Dear Anna, (I've included you in this too, [Redacted S.38(1)(b)]),

As I mentioned in the meeting on Wednesday, there is a confusing mix of the use of "victim/s" and "complainer" in the Bill. Attached are my comments. I may well have missed some other inappropriate uses of "victim" but they may be picked up by others. I know this perhaps seems like real nit-picking but I can't overestimate how the misuse of "victim" presupposes the clear perception of guilt and that the right to a fair trial no longer exists.

[Redacted – material out of scope]

Kind regards,

[Redacted S.38(1)(b)]

ATTACHED DOCUMENT:

Victims, Witnesses and Justice Reform (Scotland) Bill

- In the Index, under Part 6, "Anonymity for victims": Under reference to Section 63, to which this part of the Bill refers and which has the same heading, **Section 106C** of the Criminal Justice (Scotland) Act 2016 concerns "a victim of an offence listed in subsection 5". However, in subsection (8), "offence" includes any offence "regardless of whether it is committed **or suspected to have been committed** (*my emphasis*) before this section comes into force."
 - **Section 106D's heading is "Power to dispense with restriction; child victims"**. The word "complainer" should be added for the same reason as above.
 - **Comment:** The use of "victim" presupposes guilt. I appreciate that this section refers to an Act already passed but surely now is the time, when changes are being made, to correct this terminology by including reference to "complainer".

- In contrast to the examples of “victim” which I have highlighted above, I note (with approval) that **Section 64** of the Bill relates to “**Rights of complainers**” in respect of independent legal representation and seeks to amend parts of Section 275 of the 1995 Act. “Complainer” continues to be defined, as in section 274 of the 1995 Act, as “the person against whom the offence...is alleged to have been committed” which is exactly the correct terminology. This is not the only use of “complainer” in the Bill so its significance pre-conviction has clearly been noted by those drafting the Bill, but not universally applied or included elsewhere in the Bill where it ought to be. The prevalence of the misuse of “victim” both in legislation, other writings and orally clearly indicates assumption of an accused’s guilt just because an allegation has been made and before a word of evidence has been heard, and cannot sit alongside the presumption of innocence which still applies to every accused nor the right to a fair trial.
- Section 23 of the Bill – “Interpretation of Part...”, subsection 1(b), defines “victim” as “a person against or in respect of whom (a) an offence..has been **or is suspected to have been, committed or carried out.**”
 - Comment: Same as above. The word “complainer” should be used until the point of conviction, if one ensues.
 - [Redacted – material out of scope]

Emails dated 28/06/23 and 29/06/23 relating to response to query about terminology used in the VWJR Bill on introduction

From: [Redacted S.38(1)(b)]

Sent: 29 June 2023 09:02

To: [Redacted S.38(1)(b)]

Cc: Donald AE (Anna) [Redacted S.38(1)(b)]

Subject: FW: Victims, Witness and Justice Reform (Sc) Bill

Colleagues – With thanks, please find below email issued yesterday. Regards – [Redacted S.38(1)(b)]

From: [Redacted S.38(1)(b)]> On Behalf Of Donald AE (Anna)
Sent: Wednesday, June 28, 2023 5:28 PM
To: [Redacted S.38(1)(b)]
Cc: Donald AE (Anna) [Redacted S.38(1)(b)]
Subject: Victims, Witness and Justice Reform (Sc) Bill

Dear [Redacted S.38(1)(b)]

Further to your email below, Anna has asked me to contact you on her behalf.

Firstly, please accept our sincere apologies for the delay in replying to your email.

In response to the points you have raised, Anna has asked me to advise as follows:

Terminology

For the provisions in Section 64 (or any of the other sections where ‘complainer’ is used) to apply there has to be live criminal proceedings in which there will be a ‘complainer’, the specific term that is used in criminal cases from report to police onwards. The anonymity protections in Section 63, however, take effect from the moment a relevant offence is committed, with no positive action required by the ‘victim’ to engage the right. Therefore, a ‘victim’ is not required to enter the criminal justice process at all to gain anonymity and it covers those who do not report to police, those who opt to use the civil law process instead of the criminal one (where ‘complainer’ is not a term used), and those who don’t make any formal disclosures at all. Instead, any third party publication of identifying information about a victim of a qualifying offence is simply prohibited during the lifetime of the victim. In this context, the right to anonymity is not dependent on criminal proceedings taking place and is triggered by the offence and, in that respect, there is arguably a presumption that the offence happened – because to provide otherwise would render the right to anonymity as redundant.

As highlighted, Section 23 of the Bill defines ‘victim’ and this definition encompasses offences which are suspected to have been carried out. The term ‘complainer’ would be wrong here – partly because that is almost always reserved for the context of criminal court proceedings, as set out above, and partly because the definition also covers people who have been adversely affected by harmful behaviour by children under the age of criminal responsibility, so no crime has been committed and there can be no criminal proceedings.

[Redacted – material out of scope]

I do hope that this is helpful but would ask, should you have any questions or queries, that you please do not hesitate to contact us.

Regards

[Redacted S.38(1)(b)]

[Redacted S.38(1)(b)]

Business Manager

[Redacted S.38(1)(b)]



From: [Redacted S.38(1)(b)]

Sent: 05 May 2023 14:11

To: Donald AE [Redacted S.38(1)(b)]

Subject: Victims, Witness and Justice Reform (Sc) Bill

Dear Anna, (I've included you in this too, [Redacted S.38(1)(b)]),

As I mentioned in the meeting on Wednesday, there is a confusing mix of the use of "victim/s" and "complainer" in the Bill. Attached are my comments. I may well have missed some other inappropriate uses of "victim" but they may be picked up by others. I know this perhaps seems like real nit-picking but I can't overestimate how the misuse of "victim" presupposes the clear perception of guilt and that the right to a fair trial no longer exists.

[Redacted – material out of scope]

Kind regards,

[Redacted S.38(1)(b)]

Extract within scope from note of Lady Dorrian Governance Group meeting on 03/05/23

Victims, Witnesses and Justice Reform (Scotland) Bill

Representatives of the defence bar raised a concern with the use of the term 'victim' within specific parts of the Bill. They indicated that the recognised terminology for a person against whom it has been alleged that a crime had been committed is 'complainer'. The defence sector felt that the use of the term 'victim' in relation to court proceedings which occurred prior to a verdict being returned or a guilty plea being tendered had the effect of presupposing that a crime had taken place and therefore interfered with the presumption that an accused is innocent until proven guilty and their right to a fair trial. Accordingly they felt the term 'victim' had been used inappropriately within certain parts of the Bill. The Chair responded by advising that the rationale for the use of the term 'victim' was set out in the Policy Memorandum and which highlighted that it was intended to recognise that not all victims of crime have a case which comes to trial and that whether an offence has been perpetrated against an individual is not always an issue that is in dispute during a criminal trial. The Chair indicated that if the defence bar had concerns about specific instances of the use of 'victim' within the Bill then the Scottish Government would be happy to look at these to identify where alternative terminology might be more appropriate.

Extracts within scope from briefing in relation to Stage 2 amendments to the VWJR Bill

[Redacted – material out of scope]

The rest of the amendments are from Liam Kerr.

Amendments 94 to 103, 107 to 109 and 111 to 117 seek to amend the title of the Victims and Witnesses Commissioner to include the term “complainer”, thus making the title, “Victims, Complainers and Witnesses Commissioner”. This change is carried through to Schedule 2 (in **amendments 112-116**).

Amendment 118 seeks to add a definition of the term “complainer” to section 23, which is the interpretation section in relation to Part 1 of the Bill only.

Amendment 119 is a technical amendment which creates a new paragraph within the definition of “victim”, with the current definition forming that paragraph,

Amendment 120 removes from the definition of “victim” the wording around offences “suspected” of having been committed against the “victim”. This may have the effect of limiting “victim” to persons who investigations have shown are the victims of crime, and where criminal proceedings have resulted in a conviction, so removing coverage for victims where an offence is suspected to have been committed against them but investigations (by the police or the Crown) and/or criminal proceedings have not concluded.

Amendment 121 inserts a further new paragraph to the definition of victim, which covers persons who have been the subject of harmful behaviour in respect of which civil proceedings have been brought.

Amendment 134 seeks to alter the long title of the Bill, to make the same change to the title of the Victims and Witnesses Commissioner.

Background note(s)

Mr Kerr's amendments appear to come from the Law Society of Scotland's proposed amendments, which were published in December 2024. In that, the Law Society set out that although they are in favour of a Victims and Witnesses Commissioner, they are concerned about the difference in the legal setting in the definition of the terms 'victim' and 'complainer'. They were concerned that "categorising a complainer as 'victim' prior to any conviction runs the risk of dismissing the presumption of innocence and conveys the message that an allegation equates to guilt." The Society is of the view that the name of the Commissioner's office should reflect that distinction. It should be noted, contrary to the Law Society's view, that "complainer" is actually used routinely in legislation (for instance in the Criminal Procedure (Scotland) Act 1995) to describe victims in relation to whom criminal proceedings have begun, and not just those where the accused has been convicted.

The term "victim" is defined in section 23 of the Bill for the purposes of Part 1 and Schedule 1 only. [Redacted – material out of scope]

Currently, the definition in section 23 includes persons against or in respect of whom offences are only suspected to have been carried out. This means that scenarios / offences in relation to a complainer (i.e. which are not proven yet), are **already** covered by the definition – but the definition is wider than just complainers.

The term "complainer" is used elsewhere in the Bill. The choice as to the term "victim" or "complainer" in different provisions in the Bill is deliberate and intentional, based on the different stages of proceedings where the relevant provisions apply, and the persons intended to be caught by the term.

The remit of the Commissioner would not change by adding the term "complainer" to the title, since the definition as currently set out in section 23 already incorporates complainers. We think this is generally understood, as amendment 120 seeks to remove from the original definition of 'victim' persons that would fall within a definition of 'complainer', so leaving "victim" to cover just those where the accused has been convicted, and amendment 118 adds a discrete definition of 'complainer'.

Amendment 121 aims to include in the definition of victim persons who have suffered from a delict or civil wrong in respect of which proceedings have been brought. As such, it aims to extend the definition in relation to section 3.

On introduction, the remit of the Victims and Witnesses Commissioner is limited to the criminal justice system. Section 3 of the Bill provides for the Commissioner's remit to be extended to the civil function. This is the long-term policy intention. Section 3 would only be commenced following additional work / consultation.

Section 23(2) provides Scottish Ministers with regulation-making powers to modify the definition of "victim" and "witness". We would intend to use this power as and when s3 is commenced, to ensure that persons who would fall within the ambit of the Commissioner's civil function are included within the definition. As such, we consider that amendment 121 is not required.

[Redacted – material out of scope]

Consultation

We have sought advice from Victim Support Scotland (VSS) on the term 'complainer'. *"Whilst the term is used within a court environment and around court processes, it is contested and has no application outwith the court environment. Victims of very serious offences may feel the term trivialises their experience as a mere 'complaint'."*

VSS also referred to the most recent publication of the Scottish Crime and Justice Survey (published in November 2023 for the years 2021/22). The survey reported that 29% of all property and violent crime in 2021/22 came to the attention of the police. This proportion has fallen from 38% in 2008/09 and 40% in 2019/20. VSS is concerned that most people who are victims of crime do not go through any formal process, and the term 'complainer', which is a specific legal term with specific meaning, would not apply to them.

It should also be noted that "victim" is already used extensively (without issue) in the same wide sense as it is used in Part 1 of the Bill in the Victims and Witnesses (Scotland) Act 2014. There it is used to cover victims in relation to both criminal investigations and in relation to criminal proceedings.

This is in line with Directive 2012/29/EU of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime. The 2014 Act was enacted to give effect to the Directive and amended in 2015 to further reflect it.

Contact – [Redacted S.38(1)(b)]

Speaking Note

[Redacted – material out of scope]

I will now address the rest of the amendments in the group from Liam Kerr.

I understand that the intention of this group of amendments is to establish the difference between the legal meanings of the terms 'victim' and 'complainer' within the title of the Victims and Witnesses Commissioner.

I cannot support any of these amendments for a number of reasons. Most importantly, the Commissioner is a champion for all victims and survivors of crime. Many of those who are victims of crime may not report it, or may not pursue it beyond an initial report. One of the main drivers of this Bill is to improve the experiences of all victims and survivors, to ensure that they do come forward, that they do seek justice and that they are supported to do so. Sending a message that the Commissioner distinguishes between victims is deeply unhelpful and goes against the aims of both the role and the Bill.

I do of course recognise the legitimacy of the term and indeed the Bill uses the term where legally required, for example at

section 64 in relation to Independent Legal Representation. In fact, members will note that the terms 'victim' and 'complainer' are used during different Parts of this Bill. These words are used deliberately and intentionally, befitting the legal status of the individual being referred to.

I disagree with any sentiment that suggests that a victim is not a victim unless a person has been tried in a court of law. I also refute any suggestion that using the term victim is prejudicial in terms of assuming guilt, the term attaches to the individual who has been harmed rather than inferring anything about who has caused the harm

Victim Support Scotland has told us that the term 'complainer' is particularly problematic for a large number of victims and survivors. It makes them feel like they are seen as 'complaining' in the ordinary sense of the term, rather than having a legitimate right to seek justice. It makes them feel as if their experience is being trivialised as a complaint, rather than what could be a life-changing event.

It is important therefore for us to acknowledge that victims do not need to have gone through a formal legal process to have been harmed and to be victims and to know the Commissioner has regard to them also.

So I urge the committee to oppose these unnecessary amendments and agree with me there should be no change in the name of the Commissioner.

[Redacted – material out of scope]