CJ/S6/25/7/1

Criminal Justice Committee
Wednesday 26 February 2025
7th Meeting, 2025 (Session 6)

Victims, Witnesses, and Justice Reform (Scotland) Bill

Note by the clerk

1. The Cabinet Secretary for Justice and Home Affairs wrote to the Committee in October 2024 to outline the Scottish Government's intentions in relation to Stage 2 amendments to the above bill.

2. A copy of the letter reproduced is at the Annex. It includes a full list of the issues the Scottish Government intends to address at Stage 2.

3. The Committee made recommendations on a number of these topics in its Stage 1 report on the Bill.

Evidence ahead of Stage 2

4. The Committee agreed to take some evidence ahead of Stage 2, given the importance of the proposed changes to the Bill.

5. At a committee meeting on 4 December 2024, the Committee took evidence from—

    - Sandy Brindley, Chief Executive, Rape Crisis Scotland
    - Kate Wallace, Chief Executive, Victim Support Scotland
    - Simon Brown, President, Scottish Solicitors Bar Association
    - Michael Meehan KC, Faculty of Advocates
    - Stuart Munro, Convener of the Criminal Law Committee, Law Society of Scotland

6. At a committee meeting on 11 December, the Committee took evidence from the Minister for Victims and Community Safety on the Scottish Government's plans to amend the Bill to deliver further reforms to the Victim Notification Scheme.

7. **At today's meeting, the Committee will take evidence from Angela Constance MSP, Cabinet Secretary for Justice and Home Affairs, and her officials on the Scottish Government's intentions for Stage 2 in relation to the rest of the Bill**.

8. The Committee will begin its consideration of the Bill at Stage 2 on Wednesday 12 March. The deadline for amendments is therefore midday on Thursday 6 March.

Action/decisions

9. The Committee is invited to question the Cabinet Secretary on the Scottish Government's intentions in relation to Stage 2 amendments on the Victims, Witnesses, and Justice Reform (Scotland) Bill.

Clerks to the Committee
February 2025

Annex A

Cabinet Secretary for Justice and Home Affairs
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Ms Audrey Nicoll MSP
Convener
Criminal Justice Committee
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31 October 2024

Dear Convener

Further to my response to the Committee's constructive Stage 1 report, I am writing to update you on amendments I intend to lodge at Stage 2 of the Victims, Witnesses, and Justice Reform (Scotland) Bill.

I have noted the views expressed in the Committee's report and reflected on contributions made during the Stage 1 debate and throughout the Stage 1 sessions. While I am pleased that there is significant support for much of the Bill, I accept that it does not extend to the full package of policy measures included at introduction.

I therefore intend to bring forward amendments at Stage 2 to address matters raised at Stage 1 in relation to the single judge pilot, jury reforms and the Sexual Offences Court. I am doing so in the spirit of seeking to work across all parties to reform by consensus on this important bill. Below is full detail of my planned changes and thinking and there is a summary of the planned policy and technical amendments at Annex A.

You will be aware that on 9 October we published our response to the independent review of the Victim Notification Scheme (VNS), which reported in May 2023.

The Scottish Government wants to ensure this work on VNS reform takes place as quickly as possible, but we are aware that legislation can often take much time to develop and introduce. Therefore, we intend to use the Victims, Witnesses, and Justice Reform (Scotland) Bill to deliver the recommendations that need primary legislation. The fact that this Bill is still within Parliament presents an opportunity we must grasp so we can deliver at pace the benefits of VNS reform we all want to see, and I would hope the Committee would support that aim.

Rape trials pilot

In my response to your Stage 1 Report and during the Stage 1 debate, I indicated my willingness to amend the Bill to change the model proposed for the pilot so that decisions were made by a panel rather than a single judge – addressing a key concern that had been raised. However, with regret, and acknowledging the significant evidence heard on these issues and support from many campaigners, I recognise there is not enough cross-party support at this time for the pilot of single judge rape trials to progress. In the interests of building as much consensus as possible around the Bill, I will no longer pursue this policy and bring forward relevant amendments to remove it from the Bill.

I wish to stress, however, that I, like many, remain legitimately concerned by the substantial evidence that the current approach to decision-making in rape trials is denying women justice. Whilst I recognise there is not sufficient support for the pilot at this time, the Scottish Government remains committed to exploring how we can improve access to justice for rape victims. Data published by Justice Analytical Services on 16 April shows that for the kind of cases the pilot was intending to focus on – single charge, single complainer rape and attempted rape cases – the five-year average conviction rate is just 24%. This is a stark symptom of a system which is not operating effectively for these most serious and heinous crimes.

I am working on a range of legislative and non-legislative measures to explore and address the underlying issues the pilot was seeking to address. Legislatively, I will bring forward amendments to allow for research to be carried out into jury deliberations which is currently heavily restricted by the Contempt of Court Act 1981. This would pave the way for further development of the evidence base on whether and how rape myths affect the verdicts juries reach in rape and attempted rape cases, to help us all understand if these myths are a barrier to the proper administration of justice and if that is the case, to inform debate on how that could best be addressed.

I will also work with partners from across the justice system to agree non-legislative actions to effectively challenge and reduce the impact of rape myths. This might include, for example, the development of interventions or educational resources for jurors, and the wider public.

Jury Reforms

The Stage 1 report indicates that while the Committee considers the Government should proceed with the abolition of the not proven verdict, members do not support the proposed changes to jury size and majority.

The reason the Bill proposed to reduce the jury size to 12 was that independent evidence suggested that would improve the effectiveness of jury deliberations. However, I accept that this is a largely separate issue from the other jury reforms in the Bill, and that abolishing the not proven verdict does not, in itself, necessitate

reducing jury size. Having reflected on the Committee's position, I can confirm that I will bring forward amendments at Stage 2 so that Scotland retains a 15 person jury in criminal trials.

The Committee also recommended moving to two verdicts without making accompanying reforms to the majority required for conviction. I have reflected on this position but remain deeply concerned that it could increase the risk of miscarriages of justice. Of all comparable two verdict jury systems, Scotland would be the only jurisdiction that considered the simple majority to be appropriate.

After careful consideration, I believe that the most prudent approach, best able to maintain balance and confidence in our system, is to seek support for a model with two verdicts, fifteen jurors, and a two thirds majority requirement for conviction. This is the model that the majority of Senators preferred if Scotland changes to a two verdict system.

Sexual Offences Court

As I have made clear, I believe passionately in the potential of the proposed Sexual Offences Court to transform the experiences of victims of sexual offences in their interactions with our court system and remain resolute in my commitment to proceed with the creation of this new court. It is vital that we reform the way in which victims and witnesses are treated in our justice system both to improve their experience and to support them in providing their best evidence.

In common with many of those who gave evidence to the Committee, it is my view that to be effective, it must be a standalone court that has the freedom to operate in a manner that enables it to both identify and develop changes in practice and procedure that will deliver meaningful improvements to the experience of sexual offence victims.

It is simply unrealistic, and contrary to the available evidence, to expect that the profound reforms which are necessary to the culture, processes and procedures which govern the management of sexual offence cases, can be achieved within existing structures. As I said in the Debating Chamber on 23 April "If not this, what? If not now, when?".

I have reflected on the recommendations made by the Committee in relation to this part of the Bill and can also confirm my intention to bring forward a number of amendments at Stage 2 to address the matters raised. Specifically, in line with the commitment that I gave to the Committee in April, we have engaged extensively with justice partners on the issue of legal representation for accused in the Sexual Offences Court. Stemming from this engagement, I will bring forward amendments at Stage 2 that introduce a mechanism designed to address concerns that accused prosecuted in the Sexual Offences Court should be able to access the same level of legal representation to that which they are entitled under existing structures.

I have also already committed to lodging amendments to the Bill at Stage 2 intended to enhance security of tenure for Judges of the Sexual Offences Court and safeguard the independence of judicial decision-making in the new court. These will be accompanied by amendments to the appointment process to ensure equilibrium across the appointment and removal processes.

I can also confirm that I am exploring amendments to embed choice for adults who are deemed vulnerable witnesses as to whether they pre-record their evidence or give their evidence at trial. This follows the Committee's recommendation, after hearing from a range of witnesses, that provisions should be amended to allow complainers more choice in the matter of how they give their evidence.

The expanded use of pre-recorded evidence remains a fundamental bedrock of the Sexual Offences Court as it can bring significant benefits to many victims and witnesses and support them to give their best evidence. I will bring forward other amendments to ensure that where it is used, it is used as effectively as possible.

Collectively, I hope these amendments will address the Committee's concerns about the Sexual Offences Court and, in doing so, will create a model for the Sexual Offences Court that will enjoy broad support.

Finally, I would like to provide an update on another matter that may be of interest to members. As the Committee is aware, after concerns were raised by families bereaved by crime about the traumatic impact of ongoing press and social media coverage of the death of their loved one - particularly where the victim was a child - we ran a public consultation on this issue. The consultation closed on 1 October. The responses are now being analysed, and an analysis report will be published and shared with you once that process is complete. This is a complex and emotive topic, and I will carefully consider all the responses, and the evidence base, before making any decisions on future developments. I will keep the Committee updated on my plans in this area, including whether I intend to take forward any measures that would require legislation.

I look forward to continuing constructive work with the Committee and the wider Parliament on the Victims, Witnesses and Justice Reform Bill as we deliver our shared ambition to put victims at the heart of the justice system.

Yours sincerely

ANGELA CONSTANCE

Annex A

Scottish Government proposed amendments at Stage 2

Part 1 – Victims and Witnesses Commissioner

- expanding the definition of 'victim', to ensure that the Commissioner can engage with as wide a group of people as possible
- strengthening the powers of the Commissioner in the event of a criminal justice agency failing to comply with a request for information
- providing criminal justice organisations the opportunity to review any recommendations included in any report from the Commissioner, prior to publication
- technical amendments in relation to how criminal justice organisations are collectively referred to, making clear that decisions made by the Parole Board for Scotland remain independent of the Scottish Ministers.

Part 2 – Trauma-informed practice

- expanding the definition of trauma-informed practice in the Bill.

Part 3 – Special measures in civil cases to protect vulnerable witnesses and parties

These cover three areas.

- The first area is to extend who is deemed vulnerable when involved in a civil court case. The amendments would extend who is deemed vulnerable to include:
    - persons who provide evidence from a reputable source (e.g. health practitioner) of domestic abuse or sexual assault committed by a party to the case
    - persons applying for a civil protection order against domestic abuse or for damages following a sexual assault

- The second area is on what the courts should do when a person is deemed vulnerable.

- The third area is miscellaneous:
    - an amendment to a presumption on taking the views of a potential child witness into account to be more in line with the UN Convention on the Rights of the Child
    - a potential amendment so "parties" includes persons who are participants in inquiries, such as Fatal Accident Inquiries

Part 4 – Criminal verdicts and juries

- remove the provisions which reduce the number of jurors serving on a jury to 12.

Part 5 – Sexual Offences Court

- amending the legislative framework for appointing and removing Judges of the Sexual Offences Court to enhance their security of tenure and safeguard the independence of judicial decision-making in the new court
- enabling bespoke arrangements to be made for the payment of remuneration and expenses to Judges of the SOC
- applying the new evidence exception as set out in the Double Jeopardy (Scotland) Act 2011 to cases that are prosecuted in the SOC - this will make it possible to re-indict an accused in relation to the same crime that they had previously been acquitted of where new evidence comes to light which was not available at their original trial
- introducing a mechanism to address concerns over the level of legal representation that accused in the SOC will be entitled to.

Part 6 – Anonymity for victims

- providing for the primacy of the VWJR statutory right of anonymity for child victims of sexual offences over the existing more general provision in the 1995 Act for children
- technical amendments to clarify points of detail including
  - to put beyond doubt that the right to anonymity does not terminate after an acquittal in a criminal case
  - to make clear the operation of the public domain defence excludes protections for people who share publicly a child victim's identifying information, even where the child has self-published their own story
  - to ensure the provisions as drafted do not create a loophole for a journalist (or anyone) to publish legally the identity of a child victim of a sexual offence because the person who carried out the 'offence' was a child under 12 years old and so below the age of criminal responsibility.

Part 6 – Independent legal representation

- simplifying the process for disclosure of evidence to the independent legal representative
- placing a duty on the independent legal representative to notify COPFS and the court when appointed by the complainer
- ensuring the independent legal representative is subject to a duty of confidentiality
- a consequential amendment to ensure that complainers have the same amount of time in which to instruct an independent legal representative when they are giving their evidence by commissioner
- extending the restrictions in section 274 so that they apply to docket witnesses and complainers in all cases which involve offences under section 1 of the Domestic Abuse (Scotland) Act 2018, where the behaviour includes a sexual element.

Part 6 – Pilot of single judge rape trials

- removing the pilot from the Bill amending the Contempt of Court Act 1981 to allow research into jury deliberations.