The Scottish Parliament
Pàrlamaid na h-Alba

SPICe The Information Centre
An t-Ionad Fiosrachaidh

SPICe Briefing
Pàipear-ullachaidh SPICe

Victims, Witnesses, and Justice Reform (Scotland) Bill

Frazer McCallum and Sarah Harvie-Clark

The Victims, Witnesses, and Justice Reform (Scotland) Bill sets out provisions seeking to reform aspects of the justice system. Whilst much of the Bill focuses on criminal justice issues, it also deals with some civil justice matters.

14 June 2023
SB 23-24

Contents

Summary

The main provisions of the Bill are set out in six parts:

Part 1 - Victims and Witnesses Commissioner for Scotland

Measures seeking to establish a new office of Victims and Witnesses Commissioner for Scotland, including the functions, powers and duties of the Commissioner.

The Commissioner would be tasked with supporting the rights and interests of victims and witnesses within the criminal justice system; with the possibility of this being extended to cover people involved in civil proceedings.

Part 2 - Trauma-informed practice

Measures aimed at better supporting vulnerable victims and witnesses by seeking to embed the use of trauma-informed practice across the justice system, including civil as well as criminal proceedings.

Section 69 of the Bill defines trauma-informed practice as a means of operating that:

- recognises that a person may have experienced trauma
- understands the effects which trauma may have on the person
- involves adapting processes and practices, based on that understanding of the effects of trauma, to seek to avoid, or minimise the risk of, exposing the person to any recurrence of past trauma or further trauma.

Part 3 - Special measures in civil cases

Measures aimed at better supporting vulnerable witnesses and vulnerable parties by expanding the availability of special measures in civil cases.

Vulnerable witnesses participate in court hearings where evidence is being taken, vulnerable parties take part in other types of court hearings.

Special measures are a range of practical steps aimed at making it easier for vulnerable witnesses to give their evidence to a court or vulnerable parties to appear at court hearings (e.g. by video link outside the court room or from behind a screen in the court).

Part 4 - Criminal juries and verdicts

Measures seeking to reform the conduct of criminal trials by:

- reducing the size of criminal juries (from 15 to 12 jurors) and providing for the minimum number of jurors required for a guilty verdict
- abolishing the not proven verdict (leaving verdicts of guilty and not guilty).

Part 5 - Sexual Offences Court

Measures aimed at improving the prosecution of serious sexual offences by establishing a specialist court to deal with serious sexual offences.

Where the accused is charged with such an offence, the court would also be able to deal with any non-sexual offences forming part of the case. The sentencing powers of the court would include custodial sentences up to life imprisonment.

Part 6 - Sexual offences cases: further reform

Measures to:

- establish legislative protection for the anonymity of victims of sexual (and certain other) offences
- provide independent legal representation (ILR) for complainers in sexual offence cases where there is an application to use evidence relating to the sexual history or character of the complainer
- allow for the running of a pilot of rape trials before a judge without a jury.

Introduction

The Bill

The Scottish Government introduced the Victims, Witnesses, and Justice Reform (Scotland) Bill (the Bill) in the Scottish Parliament on 25 April 2023. [1]

Documents published with the Bill include Explanatory Notes, [2] a Policy Memorandum [3] and a Financial Memorandum. [4]

The main provisions of the Bill are set out in six parts:

1. Victims and Witnesses Commissioner for Scotland - to establish a new Commissioner and make provision for their functions, powers and duties.
2. Trauma-informed practice - aimed at better supporting vulnerable victims and witnesses by seeking to embed the use of trauma-informed practice across the justice system.
3. Special measures in civil cases - aimed at better supporting vulnerable witnesses and vulnerable parties by expanding the availability of special measures in civil cases.
4. Criminal juries and verdicts - to reduce the size of criminal juries, provide for the minimum number of jurors needed for a guilty verdict, and abolish the not proven verdict.
5. Sexual Offences Court - to establish a specialist court dealing with sexual offences prosecuted under solemn procedure (the procedure used for more serious cases).
6. Sexual offences cases: further reform - to protect the anonymity of victims, provide for legal representation for complainers, and allow for a pilot of rape trials without a jury.

In broad terms, the aims of the Scottish Government in introducing the Bill may be described as seeking to improve/reform:

- the treatment of victims and witnesses within the criminal and civil justice systems
- the prosecution of sexual offences
- the rules relating to juries and the range of verdicts in criminal cases.

Whilst some of the provisions of the Bill might be closely connected to just one of these aims, for others more than one aim could be considered relevant. For example, establishing a specialist sexual offences court might be seen as a way of trying to ensure that victims receive better treatment, as well as improving the prosecution of such offences more generally.

In relation to the language used in discussing issues relevant to the Bill, which may differ from the terminology used in the Bill itself, the Policy Memorandum states (para 4):

> “ The Scottish Government acknowledges that there are different words to describe those who have experienced crime, particularly sexual offences. Views on which terms are used can be strongly held. Some terms, for example 'complainer', are used when describing a person in a legal setting; 'victim' or 'survivor' are more commonly used when referring to a person in a broader context not restricted to the legal system.”

It goes on to note that a mix of these terms are used, with the choice influenced by the context. A similar approach is taken in this briefing.

Research, reviews and consultations

Development of the provisions set out in the Bill has been informed by a range of research, reviews and consultations. This includes:

Victims and Witnesses Commissioner for Scotland

In May 2022, the Scottish Government published a consultation on improving victims' experiences of the justice system. [5] The website provides links to responses and a consultation analysis, as well as to the consultation paper itself. Issues covered by the consultation included proposals for establishing a victims' commissioner.

The issue was also considered as part of the work of a Victims Taskforce which was established in December 2018, and is chaired by the Cabinet Secretary for Justice and Lord Advocate. [6]

The membership of the Victims Taskforce includes representatives from justice agencies, the legal profession, academia and the voluntary sector. It has been tasked with co-ordinating and driving forward action to improve the experience of victims and witnesses within the criminal justice system, whilst still ensuring a fair justice system for those accused of crime.

Trauma-informed practice

The consultation on improving victims' experiences included proposals on having statutory requirements in support of a trauma-informed approach within the justice system.

Other work in this area has included that of the Victims Taskforce, and in May 2023 there was a Scottish Parliament debate on trauma-informed justice for victims and witnesses. [7]

Special measures in civil cases

The consultation on improving victims' experiences included proposals on special measures to assist vulnerable witnesses and vulnerable parties in civil cases.

Criminal juries and verdicts

In 2017, the Scottish Government announced that there would be research into how criminal juries reach decisions involving 'mock juries'. These were to be used to explore jury size, decision making processes, majorities needed and the three verdict system. A research report was published in 2019 - Scottish Jury Research: Findings from a Large

Scale Mock Jury Study. [8] It included consideration of the implications of:

- reducing the size of juries from 15 to 12
- asking juries to reach a unanimous or near unanimous verdict (rather than a simple majority verdict)
- removing the not proven verdict.

Following the research, the Scottish Government published a consultation on the not proven verdict and related reforms [9] in December 2021. The website provides links to responses and a consultation analysis, as well as to the consultation paper itself. The issues consulted on included jury size, jury majorities and whether there should be just two verdicts.

Sexual offences court and further reform of sexual offence cases

A review group, chaired by the senior judge Lady Dorrian, was established in 2019 to develop proposals for improving the way in which serious sexual offence cases are dealt with (Lady Dorrian's review). Its report was published in March 2021 - Improving the Management of Sexual Offence Cases. [10]

Earlier work informing the work of the review included findings of the above mentioned Scottish Jury Research, in relation to decision making in sexual offence cases.

The review's 2021 report included various recommendations relevant to provisions of the Bill:

- a sexual offences court - recommended the creation of a specialist court to deal with serious sexual offences, with features including pre-recording of complainers' evidence and trauma-informed training for all personnel
- anonymity for victims of sexual offences - recommended express legislative protection of anonymity
- independent legal representation (ILR) for complainers in sexual offence cases - recommended that ILR should be available where there is an application to use evidence relating to the sexual history or character of the complainer
- the piloting of rape trials without a jury - whilst noting that the review group was divided on the continued use of juries, recommended that consideration should be given to developing a time-limited pilot of judge-only rape trials.

The 2022 consultation on improving victims' experiences of the justice system sought views on all four of the above issues.

Part 1: Victims and Witnesses Commissioner for Scotland

Background

The possibility of establishing a victims' commissioner was one of the issues looked at by the Victims Taskforce [6] (e.g. see the minutes of its meeting on 9 December 2020). [11]

Earlier work in this area has included the introduction of a Member's bill in 2010 by the then MSP David Stewart - Commissioner for Victims and Witnesses (Scotland) Bill. [12] Insufficient committee time to carry out the necessary Stage 1 scrutiny meant that the bill fell at the end of the parliamentary session.

Existing commissioners / commissions in Scotland include:

- the Children and Young People's Commissioner Scotland [13] (created by the Commissioner for Children and Young People (Scotland) Act 2003)
- the Scottish Human Rights Commission [14] (created by the Scottish Commission for Human Rights Act 2006).

In May 2023, the Scottish Government published research findings exploring the role of commissions and commissioners in supporting rights in Scotland and the UK. [15]

Victims' commissioners in other countries include the following within the UK:

- the Victims' Commissioner for England and Wales [16]
- the Northern Ireland Commissioner for Victims of Crime [17] (a separate body, the Commission for Victims and Survivors, deals with victims of the Troubles in Northern Ireland).

The Scottish Government's 2022 consultation on improving victims' experiences of the justice system [5] proposed the creation of a victims' commissioner. Suggested elements of this included:

- that the office of commissioner should be established in legislation and be independent from the Scottish Government
- that the role of the commissioner should include the promotion of victims' interests and good practice, engagement with victims and those who support them, research and the ability to make recommendations.

The consultation also sought views on what powers of investigation the commissioner should have. It stated that the commissioner would need appropriate powers to carry out investigations into systemic issues affecting victims. However, it did not propose that the role of the commissioner would extend to intervention in individual cases. This would be left to established complaints procedures.

An analysis of the consultation [18] noted that there was considerable support for the establishment of a victims' commissioner. This included agreement that it should have a statutory basis and be independent of the Scottish Government.

In terms of potential reservations about the proposals, the consultation analysis report noted concerns amongst some organisations that a victims' commissioner should not duplicate the work already being done by others. This was also an issue considered by the Victims Taskforce, which additionally highlighted a concern that funding for a victims' commissioner should not divert resources away from supporting victims and witnesses directly.

Provisions in the Bill

Part 1 of the Bill provides for the creation of the office of Victims and Witnesses Commissioner for Scotland (the Commissioner).

The Commissioner would be independent of the Scottish Government and criminal justice agencies (e.g. the Lord Advocate, Police Scotland and the Scottish Courts & Tribunals Service).

The Commissioner would be accountable to the Scottish Parliament, with ongoing funding provided by the Parliament. Initial funding would be provided by the Scottish Government. Estimated costs are provided in the Bill's Financial Memorandum.

The Bill's Policy Memorandum (para 76) states that:

> “ The Commissioner will provide an independent voice for victims and witnesses, champion their views and encourage policy makers and criminal justice agencies to put victims' rights at the heart of the justice system. The role will benefit victims and witnesses of crime by providing an additional, statutory mechanism for their voices and experiences to be heard. It will also help raise awareness and monitoring of the rights of victims and witnesses. A key part of the role will be to engage with victims and organisations who support them.”

And that (para 77):

> “ Whilst early policy thinking was that the Commissioner would only focus on victims' experiences, the Bill provides that the Commissioner will also have a role in relation to witnesses, for example in monitoring compliance with the Standards of Service for Victims and Witnesses. Providing for a Victims and Witnesses Commissioner ensures that an artificial line is not drawn between a person who is a complainer and someone who is not a complainer, in order for their experience to be considered by the Commissioner.”

The proposals in the Bill include the following key elements:

1. Appointment and tenure - the Commissioner would be appointed by the King, following nomination by the Scottish Parliament, for a single term only of up to eight years.

2. Functions - in general terms, the purpose of the Commissioner would be to promote and support the rights and interests of victims and witnesses. In order to achieve this,

the Commissioner would be required to carry out a range of activities. These would include: engagement with victims, witnesses and victim support services; monitoring compliance with statutory duties; promoting best practice; producing research and making recommendations.

3. Investigations - the Commissioner would be able to conduct investigation into whether the Scottish Government and other criminal justice agencies have had regard to the interests of victims and witnesses in carrying out their functions. This power would be subject to a restriction preventing the Commissioner from directly intervening in individual cases.

4. Plans, reports and budgets - the Commissioner would need to produce three-year strategic plans, annual reports and annual budgets.

5. Scottish Parliamentary Corporate Body (SPCB) - the SPCB would perform a number of functions in relation to the Commissioner, including approval of the Commissioner's annual budget. (The SPCB is chaired by the Presiding Officer of the Scottish Parliament and includes four elected members. It seeks to ensure that resources are available to allow the Parliament to operate and for individual MSPs to carry out their parliamentary duties.)

6. Staff - the Commissioner would be able to appoint staff, subject to approval by the SPCB of their numbers and terms and conditions.

In relation to the restriction on directly intervening in individual cases, the Policy Memorandum (para 82) states that:

> “ This approach does not preclude the Commissioner from considering individual cases in order to understand the national picture, and reflects what can be seen in other jurisdictions, where commissioners do not provide direct support to victims (though they can signpost or refer to services), offer legal advice, influence or interfere in criminal investigations or proceedings, or become involved in decisions around compensation for victims. They do not champion individual cases, rather they listen to victims in order to identify common issues and advocate for victims' rights within the justice system.”

At least initially, the Commissioner's remit would be limited to the criminal justice system. However, the Policy Memorandum (para 83) notes that the:

> “ Scottish Government has a long-term ambition to extend the Commissioner's functions to the civil justice system so they have a role in promoting and supporting the rights and interests of people involved in civil proceedings, and also to victims of harm caused by children who have been referred to the Children's Hearings system.”

The Bill would allow the Scottish Government, through secondary legislation, to extend the Commissioner's remit in this way.

Part 2: Trauma-informed practice

Background

Chapter 2 of the Scottish Government's 2022 consultation on improving victims' experiences of the justice system [5] looked at a range of proposals aimed at supporting a trauma-informed approach to victims and witnesses within the justice system. This included consideration of some issues now taken forward in Part 2 of the Bill. For example, the consultation included questions on:

- question 15 - whether the general principles guiding the work of certain justice agencies should be supplemented by reference to trauma-informed practice
- question 18 - whether the courts should have a duty to take measures to direct legal professionals to consider a trauma-informed approach
- question 25 - whether the current legislative basis for court scheduling is sufficient to inform trauma-informed practice.

In relation to question 15, an analysis of the consultation [18] noted that (p 33):

> " Almost all who answered this question either strongly agreed (76%) or somewhat agreed (16%) that a specific legislative reference to 'trauma-informed practice' as an additional general principle would be helpful and meaningful."

And on question 18, that (p 38):

> " No respondent who answered this question disagreed with the proposal, and only two offered neutral responses (one legal organisation and one law enforcement organisation)."

Responses to question 25 were more divided, but with a majority (55%) of responses disagreeing with the proposition that the current legislative basis for court scheduling is sufficient to inform trauma-informed practice. The consultation analysis reported that (p 50):

> " The main sentiment expressed by individuals and organisations representing a variety of different sectors was that the current system of court scheduling was not adequate, with significant delays which impacted negatively on all parties involved in cases. Consistent with responses to earlier questions, respondents stressed that unpredictability, both around what cases would be heard and what they would entail, was a significant existing source of trauma for victims and witnesses (...)."

Provisions in the Bill

Part 2 of the Bill seeks to improve the experience which those who become involved in the justice system (e.g. victims and witnesses) have, by embedding the use of trauma-informed practice. Some of the measures would cover civil as well as criminal cases.

Whilst acknowledging that non-legislative measures are important (e.g. relevant training for staff), the Bill's Policy Memorandum argues that legislation is also a powerful tool for promoting change. It states that (para 145):

> " The Bill aims to embed trauma-informed practice across the justice system, providing a legislative underpinning for both necessary cultural and procedural change."

Section 69 of the Bill defines trauma-informed practice as a means of operating that:

- recognises that a person may have experienced trauma
- understands the effects which trauma may have on the person
- involves adapting processes and practices, based on that understanding of the effects of trauma, to seek to avoid, or minimise the risk of, exposing the person to any recurrence of past trauma or further trauma.

Justice agencies

Section 24 of the Bill seeks to amend the Victims and Witnesses (Scotland) Act 2014 in relation to victims and witnesses in criminal cases.

Section 1 of the Victims and Witnesses (Scotland) Act 2014 states that certain justice agencies must have regard to a list of principles in carrying out their functions relating to victims and witnesses in criminal cases. Those principles currently cover:

- the ability of victims and witnesses to obtain information about and effectively participate in cases
- the safety of and support for victims and witnesses.

The Bill would add to these, so that relevant justice agencies must also have regard to the principle that victims and witnesses should be treated in a way that accords with trauma-informed practice (as defined in section 69 of the Bill).

The justice agencies covered by section 1 of the Victims and Witnesses (Scotland) Act 2014 are (and would remain):

- Crown Office & Procurator Fiscal Service
- Scottish Prison Service (via the Scottish Ministers)
- Police Scotland
- Scottish Courts & Tribunals Service
- Parole Board for Scotland.

Section 2 of the Victims and Witnesses (Scotland) Act 2014 requires the same justice agencies to publish standards of service for victims and witnesses. The Bill would add that these standards must state how services will be carried out in a way which accords with trauma-informed practice.

Court rules

The courts already have powers to set out rules regulating practice and procedure in court proceedings. These powers are exercised by the High Court for criminal cases and the Court of Session for civil cases (see section 305 of the Criminal Procedure (Scotland) Act 1995 and sections 103 to 104 of the Courts Reform (Scotland) Act 2014).

Sections 25 and 26 of the Bill seek to make clear that the above powers include the ability to regulate proceedings to promote trauma-informed practice.

Such rules could affect a range of people working in the courts, including defence lawyers who would not be covered by the provisions relating to justice agencies discussed above. The Policy Memorandum (para 155) argues that:

> “ This is significant, because the way in which a defence is conducted is often highlighted by victims as one of the most distressing aspects of the justice process, and can contribute to their re-traumatisation.”

Scheduling of court business

Certain members of the judiciary (e.g. the Lord President and sheriffs principal) have responsibilities for ensuring arrangements are in place to secure the efficient disposal of court business. These responsibilities apply to both civil and criminal proceedings.

Relevant provisions are currently set out in the Criminal Proceedings etc. (Reform) (Scotland) Act 2007; the Judiciary and Courts (Scotland) Act 2008; and the Courts Reform (Scotland) Act 2014.

Sections 27-29 of the Bill would amend existing provisions to state that, in carrying out their responsibilities in this area, the judiciary must have regard to the desirability of doing so in a way that accords with trauma-informed practice.

The Policy Memorandum (para 169) notes that:

> “ Operational decisions on scheduling are properly an independent function of the judiciary, and often arrived at in consultation with other justice agencies to take account of operational realities elsewhere in the system. However, issues around court scheduling highlight that operational practices need to be reconsidered to help achieve an optimum balance between efficiency, flexibility, and the aspiration for a compassionate, person-centred justice system that minimises the re-traumatisation of those who need to use it.”

And that (para 170):

> “ Currently, the judiciary's statutory duties in relation to programming court business are framed around 'ensuring the efficient disposal' of business. That will continue to be the primary consideration. However, sections 27 - 29 add an additional requirement to take trauma-informed practice into account when programming court business, in both the civil and criminal courts.”

Part 3: Special measures in civil cases

Part 3 of the Bill proposes reforms to special measures in civil cases.

Special measures are practical things a court does to help vulnerable people appear in court with as little fear and distress as possible.

Current provisions

At present, special measures in civil cases are covered by two key pieces of existing legislation.

Vulnerable Witnesses (Scotland) Act 2004

Part 2 of the Vulnerable Witnesses (Scotland) Act 2004 (the 2004 Act) introduced the original legislative scheme for special measures in civil cases in Scotland.

Special measures under this Act include, for example, evidence by video link, from behind a screen or with a supportive person sitting next to the witness.[i]

Special measures can apply to a 'party to proceedings' (i.e. the person raising or defending a civil court action) at the point when they are giving evidence. They can also apply to other vulnerable witnesses giving evidence in such court actions.

Adult witnesses

Unlike special measures in criminal cases,[ii] no category of adult witness in a civil case is automatically a vulnerable witness under the 2004 Act, with a right to special measures.

Instead, whether someone is a vulnerable witness, with a need for special measures, is decided by the court applying certain statutory tests in an individual case.[iii]

Child witnesses

Child witnesses (currently defined as under 18s in the 2004 Act) are automatically vulnerable witnesses for the purposes of civil cases under the 2004 Act.

Furthermore, there is a presumption (i.e. a starting point for the court) in favour of of special measures for child witnesses, unless the child does not want such measures.[iv]

The Scottish Government believes that the 2004 Act has two key limitations in its scope

---

i Vulnerable Witnesses (Scotland) Act 2004, Part 2, section 18.
ii Criminal Procedure (Scotland) Act 1995, sections 271-271M; Victims and Witnesses (Scotland) Act 2014, sections 10-22.
iii Vulnerable Witnesses (Scotland) Act 2004, Part 2, sections 11(1) and (2) and 12(5), (6) and (7).
iv Vulnerable Witnesses (Scotland) Act 2004, section 11(1)(a) (as amended by the Victims and Witnesses (Scotland) Act 2014, section 22(a)) and section 12.

(Policy Memorandum, para 179-181):

1. It only covers the situation where vulnerable witnesses give evidence and are cross-examined on it. However, there are other types of court hearing where vulnerable people may have to attend the court in person. These situations are not covered by the 2004 Act.

2. It does not cover the situation where a person wants to conduct their own case, rather than have a lawyer to represent them. A policy issue arises in this situation when the person cross-examining a witness is a perpetrator, or alleged perpetrator, of abuse of the person they are cross-examining.

Children (Scotland) Act 2020

Sections 4 to 8 of the Children (Scotland) Act 2020 (the 2020 Act) aim to address some of the weaknesses of the 2004 Act, by making changes to the 2004 Act. However, these provisions are not yet in force.

The 2020 Act also covers only two types of case in the civil courts:

1. A parenting dispute under the Children (Scotland) Act 1995. These are court disputes of the type that can arise after parents separate or divorce, on issues such as where a child should live or with whom they have contact (a parenting dispute case).[v]

2. An application to the sheriff court under the children's hearing system (a children's hearing system case).[vi]

> The changes provided for in the 2020 Act only cover sheriff court proceedings under the children's hearings system, not cases before a children's hearing itself.

The combined effect of the 2004 Act and the 2020 Act is a complex legislative scheme.

Key changes in the 2020 Act

The schemes for parenting disputes cases and children's hearing system cases in the 2020 Act are not identical. However, they have common elements:

1. An adult witness would be a deemed vulnerable witness where certain specified circumstances exist.[vii] In other words, they would automatically have that status.

2. A ban on a personal cross-examination of a vulnerable witness is introduced as a possible special measure. For some situations the ban is mandatory, whilst in others it is presumed (it is the court's starting point but can be overturned by evidence in the individual case).[viii]

---

v Children (Scotland) Act 1995, section 11.

vi Children's Hearings (Scotland) Act 2011, Part 10 and section 154.

vii Children (Scotland) Act 2020, section 4(3), inserting sections 11A and 11B into the Vulnerable Witnesses (Scotland) Act 2004.

viii Children (Scotland) Act 2020, sections 4(5) and 7. Section 4(5) inserts sections 22A-D into the Vulnerable Witnesses (Scotland) Act 2004.

Separately, in parenting dispute cases, the 2020 Act also contains powers for the court to order special measures for 'vulnerable parties' in court hearings where evidence is not being taken.[ix]

Proposed approach to special measures

This part of the briefing considers the proposed approach to special measures in civil cases, including significant changes which would be introduced by Part 3 of the Bill.

Main policy ideas in Part 3 of the Bill

The key policy aim of Part 3 is to extend the changes in the 2020 Act applying to parenting dispute cases to most types of civil case.

The provisions in the 2020 Act would be repealed or amended as part of the process of applying the legislative approach for parenting dispute cases to civil cases more generally.

Should Part 3 of the Bill be enacted, a new version of the 2004 Act, as amended by the Bill and earlier legislation, would then apply to these civil cases.

Significantly, the Bill does not alter the somewhat distinct approach created by the 2020 Act for children's hearing system cases. This would remain.

Overall, the level of legislative complexity associated with special measures would be reduced after any reforms but would still be considerable.

The general approach to (most) civil cases, found in Part 3 of the Bill, would have a number of key features.

First, possible special measures, by virtue of the 2004 Act, would still include, for example, giving evidence by video link, from behind a screen or with a supportive person sitting next to the vulnerable person. As is the case at present, the Scottish Government could add other approaches by secondary legislation.[x]

As with the 2020 Act, under the Bill, certain categories of adult witnesses in civil cases are deemed vulnerable witnesses (so their vulnerability does not have to be assessed by the court). However, as with the 2020 Act, such witnesses would not have an absolute right to special measures. The need for special measures must still be assessed by the court applying certain statutory tests.[xi]

Following the approach in the 2020 Act, the prohibition on personal conduct of a case is a key special measure for vulnerable witnesses in the Bill. There is a presumption in favour of this prohibition for deemed vulnerable witnesses, but it is not an absolute requirement (section 31).

The concept of a register of solicitors, introduced by the 2020 Act,[xii] would also remain,

ix Children (Scotland) Act 2020, section 8, inserting sections 11B and 11C into the Children (Scotland) Act 1995.
x Vulnerable Witnesses (Scotland) Act 2004, section 18.
xi Vulnerable Witnesses (Scotland) Act 2004, section 12(5),(6) and (7).

although new provisions would determine its operation (section 32, which would insert section 22E into the 2004 Act). The policy idea here is that if a person subject to the prohibition fails to appoint a solicitor, a solicitor can be appointed by the court from the register.

As under the 2020 Act, there are provisions empowering the court to impose special measures for 'vulnerable parties' in hearings where evidence is not being taken.

Note that, in the 2020 Act, children's hearing system cases are referred to using a term 'relevant proceedings'. Consequently, the general scheme for vulnerable witnesses in civil cases created by the Bill applies to 'proceedings other than relevant proceedings' (section 30).

What the new system for civil cases would look like

The proposed new system for civil cases is set out in Table 1 below.

As discussed earlier, it comprises the general scheme in Part 3 of the Bill for special measures in (most) civil cases. It also includes the particular approach from the 2020 Act which would be retained for children's hearings system cases, unaltered by the Bill.

Note that the term civil protection order appears in Table 1 below, although not directly in the Bill or the 2004 Act. This convenient term refers to a group of civil court orders which aim to offer protection from abuse, including domestic abuse, and other forms of harm.

Table 1 also uses the statutory term, 'party to proceedings', which, as a reminder, is the person raising or defending a civil court action.

xii Children (Scotland) Act 2020, section 7.

Table 1: Special measures in civil cases and children's hearing system cases

Type of case	Description
Civil cases - apart from children's hearings cases (Various existing statutory provisions, which would be amended by sections 30 to 33 of the Bill.)	The Bill proposes an extension of the approach in the 2020 Act to parenting dispute cases to most types of civil case. Under this approach, a person will be a 'deemed vulnerable witness':[xiii] (i) if the person is protected by a civil protection order prohibiting certain conduct towards the person by a party to the proceedings; or (ii) a party to the proceedings has been convicted of committing, or is being prosecuted for committing, certain offences against the witness (including domestic abuse and sexual offences). Where a party to the proceedings is intending to examine or cross-examine a vulnerable witness, there would be a presumption that prohibiting that party from conducting their own case is the most appropriate special measure. This presumption could be overturned in certain circumstances.[xiv] If a ban on personal conduct of a case is in place, the court can appoint a solicitor from a register of solicitors if a person subject to the ban fails to appoint a solicitor.[xv] Separately, the court can order special measures for 'vulnerable parties' in court hearings where evidence is not being taken. There is a strong direction in the Bill in favour of special measures for those vulnerable parties who would have been deemed vulnerable witnesses (had these been evidence-taking proceedings). There is more discretion for the court for other categories of vulnerable party.[xvi]
Children's hearing system cases[xvii] (The 2004 Act, as amended by the 2020 Act.)	For children's hearing system cases, a person will be a 'deemed vulnerable witness' if it is alleged in the statement of grounds that the person is a victim of certain offences, including domestic abuse and sexual offences. Where a person is: (i) a deemed vulnerable witness because of conduct perpetrated, or alleged to have been perpetrated by a party to proceedings; and (ii) that party intends to examine or cross-examine the witness; then the court *must* prohibit that party from personally conducting their case. There is also a presumption prohibiting every party who intends to examine or cross-examine a vulnerable witness, or deemed vulnerable witness, from personally conducting their own case is the most appropriate special measure. As with civil cases, the presumption can be overturned in certain circumstances.

Presumption against personal conduct of cases

As noted in Table 1, under the Bill, for civil cases, the presumption against the personal

xiii Children (Scotland) Act 2020, section 4(3), inserting section 11B into the Vulnerable Witnesses (Scotland) Act 2004. Section 11B, in turn, would be amended by the Victims, Witnesses, and Justice Reform (Scotland) Bill, section 30.

xiv Vulnerable Witnesses (Scotland) Act 2004, section 18 (which would be amended by Victims, Witnesses, and Justice Reform (Scotland) Bill, section 31(1)(2)); the Children (Scotland) Act 2020, section 4(5). Section 4(5) inserts sections 22A-D into the Vulnerable Witnesses (Scotland) Act 2004. Sections 22B and 22D, in turn, would be amended by the Victims, Witnesses, and Justice Reform (Scotland) Bill, section 31 (3)(4).

xv Victims, Witnesses, and Justice Reform (Scotland) Bill, section 32, which would, among other things, repeal section 7 of the Children (Scotland) Act 2020.

xvi Victims, Witnesses, and Justice Reform (Scotland) Bill, section 33, which would repeal section 8 of the Children (Scotland) Act 2020 and insert sections 22F-G into the Vulnerable Witnesses (Scotland) Act 2004.

xvii Children (Scotland) Act 2020, section 4, which inserts section 11A into the Vulnerable Witnesses (Scotland) Act 2004.

conduct of a case could be overturned in specific circumstances. This contrasts with the outright ban which applies in relation to certain key categories of vulnerable witness in children's hearings cases under the 2020 Act.

According to the Bill, the presumption for civil cases could be overturned in two situations. First, this can happen where the witness has expressed a wish to give evidence without the benefit of the ban on the personal conduct of the case, and it is appropriate for them to do so.

Second, the presumption can be overturned where applying the prohibition would give rise to a significant risk of prejudice to the fairness of the proceedings. Furthermore, that risk significantly outweighs any risk of prejudice to the interests of the witness if the special measure is not applied.[xviii] SPICe asked the Scottish Government to give examples of the type of circumstances which would be covered by these statutory conditions. The Government has said that it was not possible to give such examples as it "very much turns on the facts and circumstances of the [individual] case". [19]

Scottish Government consultation

The Scottish Government's 2022 consultation on improving victims' experiences of the justice system [5] found strong support for the proposals in Part 3 of the Bill. However, some of those responding went further to suggest that special measures should be automatic when a party to a civil case had been subjected to domestic abuse or sexual assault.

The main reservation relating to Part 3 was that it may raise issues in terms of resources and equipment. It was suggested that civil cases are often lengthy and prolonged. Any lack of availability in equipment (due to increased demand) could then impact on case progress and cause delays (unless additional funding for equipment was put in place). [20]

xviii Children (Scotland) Act 2020, section 4, which inserts Vulnerable Witnesses (Scotland) Act 2004, section 22D(6). This, in turn, would be amended by the Victims, Witnesses, and Justice Reform (Scotland) Bill, section 31(4).

Part 4: Criminal juries and verdicts

Background

Previous proposals for reform

It has been observed that some aspects of the arrangements for criminal juries and verdicts in Scotland are unusual when compared with other legal systems:

- jury size and majority - juries are relatively large in having 15 members and can return a verdict by a simple majority of those 15 members (rather than requiring unanimity or some form of qualified majority)
- verdicts - there are three possible verdicts (guilty, not guilty and not proven); two of which result in the acquittal of the accused (not guilty and not proven).

These arrangements have both supporters and critics. Whilst debate on their merits goes back much further, they have attracted more attention as a result of proposals in:

- the Criminal Justice (Scotland) Bill [21] introduced by the Scottish Government in June 2013
- the Criminal Verdicts (Scotland) Bill, [22] a Member's bill introduced by the then MSP Michael McMahon in November 2013. (Michael McMahon had previously consulted on a proposal for a two verdict system in 2007, but a bill was not introduced during that parliamentary session.)

On introduction, the Criminal Justice (Scotland) Bill included provisions seeking to:

- remove the general legal requirement for corroboration in criminal cases
- introduce a system under which a guilty verdict in a jury trial would require the support of at least two-thirds of the jurors.

The Scottish Government's proposals on the required jury majority were developed in the context of seeking to ensure that criminal proceedings were still subject to a robust system of checks and balances following its proposed abolition of the legal requirement for corroboration. That requirement is seen by some as an important safeguard against wrongful conviction. So, requiring more than a simple majority of jurors for a guilty verdict might be seen as a way of rebalancing the system if corroboration is no longer required.

Broadly speaking, the current requirement for corroboration means that proof of a criminal offence needs at least two sources of evidence. (There are some limited statutory exceptions to this requirement.) The requirement applies to the 'essential' or 'crucial' facts of the case - generally that the offence was committed and that the accused committed it.

There was strong opposition to abolishing the requirement for corroboration amongst some stakeholders, with Stage 2 consideration of the Criminal Justice (Scotland) Bill being postponed. During that postponement, an independent review led by Lord Bonomy (Post-corroboration Safeguards Review) [23] was conducted into what further measures might be needed in light of the planned abolition. The review report was published in 2015. [24] One

of its recommendations was that research should be undertaken into jury reasoning and decision-making.

When parliamentary consideration recommenced, the Scottish Government supported Stage 2 amendments removing the provisions relating to both corroboration and jury majorities. Thus, the resulting Criminal Justice (Scotland) Act 2016 did not reform the law in either of these areas.

The Criminal Verdicts (Scotland) Bill included provisions seeking to:

- remove the not proven verdict, leaving two possible verdicts of guilty and not guilty
- introduce a system under which a guilty verdict in a jury trial would require the support of at least two-thirds of the jurors.

These proposals were not linked to any proposals affecting the requirement for corroboration. Removal of the not proven verdict was put forward on the basis that having three possible verdicts is undesirable. The proposal on jury majorities was advanced as a way of ensuring that abolition of the not proven verdict did not heighten the risk of wrongful convictions.

Given that there was some overlap in the provisions of the two bills, Stage 1 scrutiny of the Criminal Verdicts (Scotland) Bill was postponed whilst the Criminal Justice (Scotland) Bill completed its passage through the Parliament.

When scrutiny of the Criminal Verdicts (Scotland) Bill did begin, the Scottish Government indicated that, whilst it was open to the possibility of the not proven verdict being removed in the future, it favoured retaining current arrangements until the jury research recommended by the Post-corroboration Safeguards Review had been carried out. The desirability of having the findings of this research before making reforms in this area was also reflected in the Stage 1 report of the lead committee. The Criminal Verdicts (Scotland) Bill fell at Stage 1 after a majority of MSPs voted against a motion seeking agreement to its general principles.

Jury research

In 2017, the Scottish Government announced that there would be research into how criminal juries reach decisions [25] involving 'mock juries'. These were to be used to explore jury size, decision- making processes, majorities needed and the three verdict system. A research report was published in 2019 - Scottish Jury Research: Findings from a Large Scale Mock Jury Study, [8] along with a summary of findings. [26] Key findings included that:

- reducing the jury size from 15 to 12 might in some cases lead to more individual jurors switching their position towards the majority view (whether to acquit or convict) to facilitate a verdict
- asking juries to reach a unanimous or near unanimous verdict (rather than a simple majority verdict) might in some cases incline more jurors in favour of acquittal
- removing the not proven verdict might in some cases incline more jurors towards a guilty verdict.

Scottish Government consultation

Following publication of the jury research, the Scottish Government held engagement events with a range of stakeholders, before publishing a consultation on the not proven verdict and related reforms [9] in December 2021. The website provides links to responses and a consultation analysis, as well as to the consultation paper itself. The consultation sought views on:

- verdicts - e.g. whether there should be just two verdicts and, if so, what these should be (e.g. guilty and not guilty, or proven and not proven)
- jury size - how many jurors should there be in a jury if there is a change to a two verdict system
- jury majority - e.g. whether a qualified majority should be required for a guilty verdict if there is a change to a two verdict system
- the requirement for corroboration - e.g. whether the requirement for corroboration should be abolished or reformed.

The current Bill does not seek to make any changes to corroboration.

The proposals in the Bill relating to jury size, jury majority and verdicts are outlined below.

It is also worth noting that a draft proposal for a Member's bill, lodged by Jamie Greene MSP in December 2021, includes a proposal to remove the not proven verdict. [27]

Juries

Current provisions

The current rules relating to criminal juries provide that:

1. Jury size - a jury is formed with 15 jurors. This number may be reduced if one or more jurors are discharged during the trial (e.g. due to illness) but the jury must retain at least 12 to continue hearing the case.
2. Jury majority - a jury returns a verdict of guilty where at least eight of its jurors support that verdict. This level of support is required whether the jury has a full complement of 15 jurors (in which case eight jurors represent a simple majority) or is reduced in numbers because one or more jurors have been excused. Where a guilty verdict does not attract the support of at least eight jurors the accused is acquitted. There is no potential for a hung jury (i.e. the only possible outcomes are a finding of guilt or an acquittal).

The above rules are provided for by a mix of common law and legislation.

Civil juries in Scotland are formed with 12 jurors.

Consultation

As noted above, the Scottish Government's consultation on the not proven verdict and

related reforms [9] sought views on:

- jury size - how many jurors should there be in a criminal jury if there is a change to a two verdict system
- jury majority - e.g. whether a qualified majority should be required for a guilty verdict if there is a change to a two verdict system.

The consultation analysis [28] noted that:

- jury size - 58% of respondents supported retention of 15 person juries
- jury majority - 52% of respondents supported a change to some kind of qualified majority and that the accused should be acquitted where the level of support for a guilty verdict is not achieved (and so still no potential for a hung jury).

It also highlighted the main arguments advanced by those supporting different positions. For example:

- current rules on jury size and/or majority verdicts - the arrangements work well and so no need to change them
- reduction to 12 person juries - would bring Scotland into line with other countries and may encourage greater participation of all jurors in the decision making of a jury
- new qualified majority verdict arrangements - would provide additional reassurance that a conviction has been proven beyond reasonable doubt.

Provisions in the Bill

Sections 34 and 35 of the Bill provide for changes to both jury size and the majority required for a guilty verdict. (Section 35 also provides for the two verdicts of guilty and not guilty being the only options in jury trials - discussed below.)

Jury size

A jury would be formed with 12 jurors. This number could be reduced if one or more jurors were discharged during the trial (e.g. due to illness) but the jury would need to retain at least nine members to continue hearing the case.

The Bill's Policy Memorandum (para 230) states that:

> “ The policy objective is to ensure that Scotland's jury system facilitates the effective participation of jurors and maximises the opportunity for meaningful and robust deliberations. Reducing the size of the jury will help individual members of juries to participate more fully and result in fewer dominant or minimally contributing jurors.”

In support of this position, the Policy Memorandum refers to the findings of the Scottish jury research [8] and experience in countries with 12-person juries.

Under the provisions of the Bill, continuing a trial with fewer than the initial 12 jurors would be a decision for the judge. This decision would be based on the interests of justice after

giving the prosecution and defence an opportunity to make representations. The Policy Memorandum (para 241) argues that:

> “ This provides flexibility for the court to take particular considerations into account (e.g. a potentially lengthy fraud trial in its early stages which the court might consider could be restarted without retraumatising participants or causing much inconvenience; as opposed to the late stages of a rape trial in which most of the evidence has been given, potentially including the evidence of vulnerable witnesses, where the court might consider the case should continue).”

Jury majority

A jury would return a verdict of guilty where:

- in the case of a jury consisting of 11 or 12 jurors, at least eight favour a guilty verdict
- in the case of a jury consisting of nine or 10 jurors, at least seven favour a guilty verdict.

Where a guilty verdict does not attract the above level of support, the jury must return a verdict of not guilty. Similar to the current situation, there is no potential for a hung jury (i.e. the only possible outcomes are guilty or not guilty).

The Scottish Government's reasons for wanting to remove the possibility of a guilty verdict based on a simple majority (i.e. the current situation where an accused can be found guilty if eight out of 15 jurors favour that verdict) reflect a wish to maintain a balanced approach if the not proven verdict is abolished. The Policy Memorandum (para 256) notes:

> “ At present, the simple majority is balanced by the other safeguards of the current system including the availability of two verdicts of acquittal. Having considered the evidence, the Scottish Government is persuaded that removal of the not proven verdict requires associated reforms to jury majority to maintain balance and confidence in the system”

Verdicts

Current provisions

Under current common law rules, three verdicts are available in a criminal trial – guilty, not guilty and not proven. In legal terms, the implications of a not proven verdict are exactly the same as a not guilty verdict in that the accused is acquitted.

Much of the debate on whether there should be a move to a two verdict system has focused on the use of the not proven verdict in jury cases. However, all three verdicts are also available to judges (sheriffs and justices of the peace) in non-jury trials.

The Bill's Policy Memorandum notes that (para 211): [3]

> “ There is nothing in legislation or case law to define the not proven verdict and no generally accepted legal definition. Similarly, there is nothing in law which defines the difference between the not proven and not guilty verdicts. There have been occasions where judges have attempted to explain the significance of the two acquittals, but this has resulted in appeals on the grounds of misdirection. Jurors therefore receive no instruction on the meaning of the not proven verdict or how it differs from not guilty.”

The following looks at statistics on the outcomes of cases which have been prosecuted in the criminal courts – including those concluded with a not proven verdict. Figures are taken from the Scottish Government's criminal proceedings bulletins, [29] along with some additional statistical breakdown provided by Scottish Government officials.

Table 2 provides figures for the number of people proceeded against by the various possible outcomes. These include prosecutions ended without a trial (e.g. where a charge is proved as a result of a guilty plea), as well as those where a judge or jury delivers a verdict following a trial. Table 3 shows the proportion of people proceeded against accounted for by each outcome.

The significant drop in the number of people proceeded against in 2020-21 reflects the impact of Covid-19 on court business during that year.

Table 2: people proceeded against in court by outcome

Year	PNGA* or deserted	Acquitted – not guilty	Acquitted – not proven	Charge proved	Total
2020-21	2,300	1,309	356	42,531	46,496
2019-20	5,376	4,053	1,044	75,668	86,141
2018-19	5,649	4,548	1,040	78,488	89,725
2017-18	6,528	4,826	1,024	83,175	95,553
2016-17	7,879	5,899	1,234	92,328	107,340

* plea of not guilty accepted

Table 3: people proceeded against in court by percentage outcome

Year	PNGA* or deserted	Acquitted – not guilty	Acquitted – not proven	Charge proved	Total
2020-21	5	3	1	91	100
2019-20	6	5	1	88	100
2018-19	6	5	1	87	100
2017-18	7	5	1	87	100
2016-17	7	5	1	86	100

* plea of not guilty accepted

Table 4 shows the distribution of not proven verdicts by type of court:

- High Court and solemn sheriff courts – cases dealt with under solemn procedure, including a jury where there is a trial
- summary sheriff courts and justice of the peace courts – cases dealt with under summary procedure without any involvement of a jury.

Table 4: use of not proven verdict by court

Year	High Court	Sheriff – solemn	Sheriff – summary	Justice of the peace
2020-21	62	40	237	17
2019-20	113	257	632	42
2018-19	120	206	650	64
2017-18	109	198	637	79
2016-17	99	260	773	89

Although there were more instances of the not proven verdict being used in the summary courts, this is a product of the larger number of cases dealt with by those courts rather than the likelihood of the verdict being employed. For example, during each of the four years 2016-17 to 2019-20, the proportion of people proceeded against who were acquitted with a not proven verdict was around:

- 5% under solemn procedure
- 1% under summary procedure.

(Figures for 2020-21 have been excluded from this analysis given the impact of Covid-19 on court business during that year.)

As well as there being variation in the use of the not proven verdict by court, the not proven verdict represents a significantly higher proportion of outcomes in relation to some offences – especially some sexual offences.

The category of offence which consistently had the highest proportion of not proven outcomes during the five years 2016-17 to 2020-21 was rape and attempted rape – ranging between 17% and 28% of all outcomes. These figures are considerably higher than the average for all offences, even if one only considers cases dealt with under solemn procedure.

However, the category of rape and attempted rape also has a high level of people proceeded against resulting in a not guilty verdict (between 20% and 42% during the five-year period). Thus, the high level of use of the not proven verdict may to some extent simply reflect the high proportion of acquittals.

Table 5 provides figures for the number of people proceeded against for rape and attempted rape by the various possible outcomes. Table 6 shows the proportion of people proceeded against accounted for by each outcome.

Table 5: rape and attempted rape proceedings by outcome

Year	PNGA* or deserted	Acquitted – not guilty	Acquitted – not proven	Charge proved	Total
2020-21	1	31	42	78	152
2019-20	1	94	74	130	299
2018-19	4	97	70	142	313
2017-18	5	87	48	106	246
2016-17	4	106	42	99	251

* plea of not guilty accepted

Table 6: rape and attempted rape proceedings by percentage outcome

Year	PNGA* or deserted	Acquitted – not guilty	Acquitted – not proven	Charge proved	Total
2020-21	1	20	28	51	100
2019-20	-	31	25	43	100
2018-19	1	31	22	45	100
2017-18	2	35	20	43	100
2016-17	2	42	17	39	100

* plea of not guilty accepted

Consultation

As noted above, the Scottish Government's consultation on the not proven verdict and related reforms [9] sought views on whether there should be just two verdicts and, if so, what these should be (e.g. guilty and not guilty, or proven and not proven).

The consultation analysis [28] noted that:

- number of verdicts - 62% of respondents supported a change to a two verdict system, although the response was different amongst some groups (e.g. seven out of eight legal organisations supported retention of the current three verdicts)
- verdicts under a two verdict system - 50% of respondents favoured guilty and not guilty (compared to 41% favouring proven and not proven), although there was again different responses from some groups.

It also highlighted the main arguments advanced by those supporting different positions. For example:

- two verdict system - avoids the current uncertainty in the distinction between not guilty and not proven, and so is more straightforward and easier to understand
- three verdict system - the availability of the not proven verdict, in addition to not guilty, is useful where the prosecution has not proven its case beyond reasonable doubt but the evidence does suggest that the accused may have committed the crime
- guilty and not guilty - easier to understand and more commonly used
- proven and not proven - more accurately reflects what happens in the criminal justice system.

Other points covered by the consultation analysis included a range of issues relating to the not proven verdict. For example:

- whether the option of not proven, as a third verdict, acts as a safeguard against wrongful conviction or increases the risk of wrongful acquittal
- how complainers and accused persons feel, or are perceived by others, following a not proven verdict.

Provisions in the Bill

As noted above, under current common law rules, three verdicts are available in a criminal trial – guilty, not guilty and not proven. Both not guilty and not proven mean that the accused is acquitted.

Sections 35 (for jury trials) and 36 (for summary trials) would restrict available verdicts to guilty and not guilty. The not proven verdict would no longer be an option.

In setting out the case for abolishing the not proven verdict, the Bill's Policy Memorandum (para 216) states that:

> “ The Scottish Government considers the evidence overwhelming: that the existence of a verdict that people do not understand, that can stigmatise the acquitted and may cause additional trauma to victims, does not serve the interests of justice or the people of Scotland.”

Part 5: Sexual Offences Court

Background

Lady Dorrian's review

A review group, chaired by the senior judge Lady Dorrian, was established in 2019 to develop proposals for improving the way in which serious sexual offence cases are dealt with (Lady Dorrian's review). Its report was published in March 2021 - Improving the Management of Sexual Offence Cases. [10]

In the foreword to the report, Lady Dorrian commented that:

> " The prosecution of sexual cases in the High Court has significantly increased in recent years, such cases now constituting the vast majority of High Court trials. The number of cases under Sheriff Court solemn procedure is equally significant (...). As the number of cases has risen, they have often become more serious or complex. This pattern of growth, both as to volume and complexity, is likely to continue. Allied to this is an anticipated rise in High Court prosecutions relating to serious and organised crime."

She went on to note that she believed it to be:

> " essential to meet the increased workload with a modern sustainable system promoting the efficient disposal of business with fair, and just outcomes delivered at the earliest opportunities and as locally as possible."

One of the proposals in the report was the creation of a specialist court to deal with serious sexual offences. Recommended features of the court included that it should:

- be presided over by a combination of High Court judges and sheriffs
- deal with all prosecutions under solemn procedure where the primary charges are serious sexual offences (but not where other very serious charges such as murder are part of the case)
- have sentencing powers of up to 10 years imprisonment, coupled with the ability to remit a case to the High Court for sentencing where 10 years is considered insufficient
- have pre-recording of the whole of a complainer's evidence as the default approach
- use trauma-informed practices and procedures, with appropriate training for personnel.

In outlining the case for a specialist court, the report argued that a combination of good practice and specific training for personnel (including judges, prosecutors and defence lawyers) would see real benefits for witnesses, complainers and accused.

In terms of dealing with cases more locally, the report said that the specialist court should be able to use facilities set up for dealing with sheriff and jury trials, as well as existing High Court venues.

Lady Dorrian Review Governance Group

Following publication of Lady Dorrian's review report, the Scottish Government established a Governance Group [30] to further consider some of the recommendations.

The Governance Group set up three working groups, including one looking at the creation of a specialist sexual offences court. That working group's report [31] was published in December 2022.

The Law Society of Scotland was one of the organisations represented on the Governance Group. It did not support the creation of a specialist court separate from existing structures.

Scottish Government consultation

The creation of a sexual offences court was covered by the Scottish Government's 2022 consultation on improving victims' experiences of the justice system. [5] It outlined a range of arguments for and against establishing a new specialist court (p 74-77). For example:

> Arguments for
>
> - easier to target relevant training to the judiciary, staff and practitioners involved
> - experience of other specialist courts (e.g. a specialist sexual offences court in New Zealand).
>
> Arguments against
>
> - perception of downgrading the prosecution of very serious sexual offences such as rape if no longer prosecuted in the High Court
> - better to focus on improving how the existing courts deal with sexual offence cases.

The consultation set out a series of questions in the following areas:

- whether a specialist sexual offences court should be established
- what relationship it should have to existing criminal courts
- jurisdiction and sentencing powers of the court
- criteria for judges and lawyers involved in the court.

In relation to the basic question of whether a specialist court dealing with serious sexual offences should be created, the analysis of the consultation [18] noted (p 99):

> “ Just over two thirds of respondents who answered this question (69%) strongly agreed with this proposal and a further 13% somewhat agreed.”

However, the suggestion (based on Lady Dorrian's review) that any custodial sentence imposed by the court should be limited to 10 years was not supported by most respondents, with the analysis stating that (p 105):

> “ Almost two thirds of those who provided a response (62%) disagreed that the court should have maximum sentencing powers of 10 years imprisonment. This was because they felt that the court should have access to the full range of sentencing powers that might be appropriate in the context of the cases that the court would hear. ”

Provisions in the Bill

Part 5 of the Bill provides for the creation of a Sexual Offences Court.

The Bill's Policy Memorandum (para 272) states that:

> “ The objective is to establish the Sexual Offences Court as a new court for Scotland, distinct from existing structures to maximise its ability to deliver targeted, meaningful and enduring improvements in a consistent manner to cases involving serious sexual offences. By seeking to gather together all solemn level sexual offence cases in one court, the Sexual Offences Court will allow a specialist approach to apply consistently across these cases and provide for the flexible use of resources (including court and judicial resources which are currently restricted by distinctions drawn between the sheriff courts and the High Court).”

Although building on the ideas set out in Lady Dorrian's report, the Bill departs from these in some important respects (e.g. in relation to sentencing powers). Some significant differences are highlighted below when looking at the key proposals in the Bill.

Jurisdiction

The Sexual Offences Court would have the power to deal with sexual offences prosecuted under solemn procedure.

Solemn procedure (also referred to as prosecution on indictment) is used for more serious offences - not just sexual ones - with any trial being heard before a jury.[xix] In effect, part of the current caseload of solemn sheriff courts and the High Court could instead be dealt with by the Sexual Offences Court.

'Sexual offence' is defined in the Bill by way of an extensive list set out in schedule 3 and includes attempts to commit those offences. The list does not cover all sexual offences (see para 288 of the Policy Memorandum) but goes beyond those suggested in Lady Dorrian's review.

The Sexual Offences Court would not be limited to dealing with cases which consist of sexual offences only. Where a prosecution involves a mix of non-sexual offences and relevant sexual offences, it would be able to deal with both. Lady Dorrian's review had recommended a similar approach but with more limitations than are proposed in the Bill. For example, contrary to the position taken in the review, the Bill would allow it to deal with a charge of murder where it forms part of a case also involving sexual offences. The Policy Memorandum (para 280) explains that:

---

xix Part 6 of the Bill includes provisions which would allow the Scottish Government to establish a pilot scheme for rape trials under solemn procedure without a jury.

> “ There are known cases in which sexual abuse perpetrated by an accused is alleged to have escalated over time, against multiple complainers, ultimately leading to a murder. Given the experience of the surviving complainers and the nature of their evidence (where historical sexual offending is libeled alongside a murder charge), the policy objective is to afford those complainers the benefits of the case being prosecuted in the Sexual Offences Court.”

The Sexual Offences Court would have the power to deal with the types of cases outlined above. This does not necessarily mean that it would in practice deal with all such cases. The Policy Memorandum (para 282) notes:

> “ For the avoidance of doubt, the decision as to whether any individual case, including those involving rape or murder, is to be prosecuted in the Sexual Offences Court, will be a decision for independent prosecutors acting on behalf of the Lord Advocate. The Bill permits, rather than requires, cases under its jurisdiction to be heard in the Sexual Offences Court.”

Judges

The judiciary of the Sexual Offences Court would consist of:

- the Lord Justice General and Lord Justice Clerk - the two most senior judges in Scotland[xx]
- other judges appointed by the Lord Justice General.

People would be eligible for appointment as a judge of the Sexual Offences Court where they meet all of the following requirements:

- they already hold a relevant judicial office - High Court judge (including temporary judge) or sheriff (including sheriff principal)
- they have completed approved training on trauma-informed practice in sexual offence cases
- they have the skills and experience which the Lord Justice General considers necessary.

In relation to the potential for appointing sheriffs as judges of the Sexual Offences Court, the Policy Memorandum (para 297) says that:

> “ The Bill allows appropriately trained sheriffs and sheriffs principal, with the necessary skills and experience, to be appointed to the role of Judge of the Sexual Offences Court and in that capacity to be able to hear cases of rape and murder and sit with unlimited custodial sentencing powers. This arises from a recognition that it is largely the knowledge, experience and training of a judge, rather than which judicial office they currently hold that ought to determine their suitability to hear these cases. It is also consistent with the current and commonplace practice of sheriffs being appointed as temporary judges and presiding over these cases in the High Court.”

---

xx When dealing with civil law matters, the Lord Justice General is referred to as the Lord President.

Judges of the Sexual Offences Court would:

- be appointed for such period as the Lord Justice General specifies when making the appointment
- retain their other judicial role and could continue to deal with cases in that capacity (e.g. a High Court judge appointed as a judge of the Sexual Offences Court could still deal with cases in the High Court).

The Lord Justice General would have the power to remove a judge appointed to the Sexual Offences Court. The Bill does not seek to outline the possible reasons for doing so. It is left to the Lord Justice General to determine when it might be appropriate.

Any removal under the above power would not affect the person's other judicial office (i.e. High Court judge or sheriff) unless separately removed from that office.

Sentencing powers

Section 62 of the Bill provides that the Sexual Offences Court would be able to impose any sentence which the High Court could impose for the same offence. Thus, the powers of the Sexual Offences Court would, for some offences, include the ability to impose a sentence of life imprisonment.

The sentencing powers of the High Court are more limited in relation to a wide range of statutory offences which set lesser maximum sentences (e.g. see the maximum penalties for conviction on indictment set out in schedule 2 of the Sexual Offences (Scotland) Act 2009). The powers of the Sexual Offences Court would be restricted in the same way.

Lady Dorrian's review had recommended that a Sexual Offences Court should have sentencing powers of up to 10 years' imprisonment, coupled with the ability to remit a case to the High Court for sentencing where 10 years is considered insufficient.

The more extensive sentencing powers provided for in the Bill partly reflect the fact that the new court would be able to deal with some of the most serious cases, including ones with a murder charge. The approach in the Bill also seeks to respond to concerns that moving the prosecution of very serious sexual offences (such as rape) from the High Court to a Sexual Offences Court with more limited powers might be seen as downgrading the approach to such cases. The Policy Memorandum (para 306) argues that:

> “ The sentencing powers of the Sexual Offences Court must ensure that it is equipped with the tools it needs to deal with the most serious cases and in doing so is perceived as being of equivalent stature as the High Court when it sits as a court of first instance, which currently has exclusive jurisdiction over rape and murder. It is important that in establishing the Sexual Offences Court and allowing cases involving rape to be heard by a court other than the High Court, there is no perception that those cases are being ‘downgraded’.”

As discussed above, the intention is that judges of the Sexual Offences Court would be appointed from the existing pool of judicial office holders, including sheriffs as well as High Court judges. The sentencing powers of the sheriff solemn courts are much more limited than those proposed for the Sexual Offences Court (e.g. the maximum custodial sentence is limited to 5 years). However, the Policy Memorandum notes that sheriffs sometimes sit

as temporary judges in the High Court with the same sentencing powers as permanent High Court judges. It also explains that (para 309):

> “ The ambition of the Sexual Offences Court is to bring together all solemn level sexual offence cases into one unified court, removing the existing distinctions between those cases tried in the sheriff court and the High Court. This recognises the common challenges faced by all complainers in serious sexual offence cases regardless of the forum their case is prosecuted in. A unified court requires rationalising the sentencing powers of the Court to ensure that tiers are not created within the Court and that all cases are treated consistently.”

Lawyers' rights of audience

Defence

The term 'rights of audience' refers to who is able to represent a person in court proceedings.

Which types of lawyer are able to represent an accused person in the current criminal courts depends on the court. For example:

- sheriff courts (summary and solemn procedure) - solicitors, solicitor advocates and advocates
- High Court (solemn procedure) - solicitor advocates and advocates.

The Bill (sections 47-48) would allow solicitors, solicitor advocates and advocates to represent an accused in the Sexual Offences Court. But, where a case includes a charge of rape or murder (always prosecuted in the High Court under current arrangements) only solicitor advocates and advocates would be able to do so.

Despite the restriction in relation to rape and murder, the types of cases where a solicitor would be able to represent the accused in the Sexual Offences Court could include ones which are currently prosecuted in the High Court. Thus allowing solicitors to represent an accused in a broader range of serious cases.

Lady Dorrian's review had recommended that rights of audience in the Sexual Offences Court should be limited to advocates and solicitor advocates. On this point, the Bill's Policy Memorandum (para 327) states that:

> “ Consideration was given to limiting rights of audience to the court to advocates and solicitor advocates. This was recommended by Lady Dorrian's Review on the basis that it reflected the serious nature of the offences heard by the Court. This proposal was explored by the Working Group and discounted on the basis that it would require advocates and solicitor advocates to take on a significant number of additional cases by virtue of the redistribution of sheriff solemn court cases into the Sexual Offences Court and was therefore unachievable given existing pressures on advocates and solicitor advocates. The proposal was also considered to be undesirable in that it would prevent solicitors from gaining experience in appearing in solemn level sexual offence cases.”

In addition to specifying which types of lawyer would be able to represent an accused

person in the Sexual Offences Court, the Bill provides that they must have completed an approved course of training on trauma-informed practice in sexual offence cases. The Policy Memorandum (para 316) explains that:

> “ This requirement seeks to deliver on the ambition for a specialist and trauma-informed approach. It ensures that those with a role in questioning the complainer will have a grounding in understanding trauma before doing so, the giving of evidence frequently being identified as the most difficult part of the trial process for complainers. ”

Prosecution

The Bill (sections 47(6) and 48(4)) states that the above provisions relating to types of lawyer and approved training would not apply to prosecutors appearing in the Sexual Offences Court. The Policy Memorandum (para 321) notes that:

> “ The Bill does not make any provision regarding rights of audience for prosecutors as their appointment is a decision for the Lord Advocate, acting independently of any other person, as provided for under section 48(5) of the Scotland Act 1998.”

However, the Bill (section 49) would require the Lord Advocate to publish information setting out any training on trauma-informed practice in sexual offence cases which prosecutors would be required to complete if appearing in the Sexual Offences Court.

Procedural matters

The Bill's Policy Memorandum (para 330) explains that:

> “ The primary objectives of rules and procedures for the Sexual Offences Court is to ensure that there is clarity in the procedure that is to apply to individual cases and capability for the Court to develop and embed trauma-informed processes to effectively and efficiently manage the cases it will hear.”

And that:

> “ Following the recommendation of Lady Dorrian's Review, the procedure in the Sexual Offences Court is intended to mirror that of the High Court other than where the Bill makes provision to the contrary or when bespoke court rules and procedures are made in future under the relevant powers contained in the Bill.”

Areas where the Bill does set out specific procedural rules for the Sexual Offences Court include:

- prohibition on personal conduct of defence - accused would not be able to represent themselves in any court hearing where a witness is to give evidence (in relation to other courts an existing rule prohibits self-representation for the majority of sexual offences)
- pre-recorded evidence - there would be a presumption in favour of vulnerable complainers being able to provide their evidence in advance of the trial.

In relation to the pre-recording of evidence, the Policy Memorandum (para 336) notes that:

> “ Introducing a presumption towards the pre-recording of evidence for complainers was a core tenet of the Sexual Offences Court as envisioned by Lady Dorrian's Review. In support of this recommendation, the Review drew particular attention to the experience of complainers in sexual offence cases, highlighting that they will often be required to recount events that were 'particularly traumatic, threatening or harmful; with the accused often representing a figure of fear for the witness'. The result of this is that complainers are at a significantly increased risk of re-traumatisation where they are required to give evidence in a courtroom environment.”

It may be noted that existing legislation (the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019) currently provides a presumption that the evidence of child witnesses should be pre-recorded where it relates to certain very serious cases prosecuted in the High Court. Further information on this is available on the Scottish Government's website - see Pre-recording of evidence by witnesses. [32]

Part 6: Sexual offences cases - further reform

Background

In addition to recommending the creation of a specialist sexual offences court, Lady Dorrian's review considered various other measures, including those covered by the provisions now set out in Part 6 of the Bill.

The review's 2021 report (Improving the Management of Sexual Offence Cases) recommended that there should be: [10]

- legislative protection for the anonymity of people complaining of sexual offences
- independent legal representation (ILR) for complainers in sexual offence cases where there is an application to use evidence relating to the sexual history or character of the complainer.

The report also recommended that consideration should be given to developing a time-limited pilot of judge-only rape trials. On this issue, it noted that the review group was divided on the continued use of juries in rape cases.

The above issues were covered by the Scottish Government's 2022 consultation on improving victims' experiences of the justice system. [5]

Additional background information is provided below when looking at each of the three issues.

Anonymity for victims

Review and consultation

Lady Dorrian's review

The report of Lady Dorrian's review noted that current arrangements in Scotland, for protecting the anonymity of complainers in sexual offence cases, largely rely upon convention and the responsibility of the press. It explained that (p 79):

> “ there is no statutory protection for complainers in Scottish cases against publication within Scotland of their identities or material likely to lead to their identification by the public as a complainer in a sexual offence. There is, however, a convention (...) that the identity of complainers is withheld from publication. This is fortified by the Editor's Code published by the Independent Press Standards Organisation (...).”

Paragraph 11 of the Editors' Code of Practice [33] states that:

> “ The press must not identify or publish material likely to lead to the identification of a victim of sexual assault unless there is adequate justification and they are legally free to do so. Journalists are entitled to make enquiries but must take care and exercise discretion to avoid the unjustified disclosure of the identity of a victim of sexual assault.”

The report of Lady Dorrian's review highlighted existing powers of the courts (under section 11 of the Contempt of Court Act 1981) to prohibit publication of a person's identity. However, it noted that these do not provide automatic protection to complainers.

It concluded that current arrangements in Scotland are not satisfactory, particularly with the growth in sources of information which are not regulated by the Independent Press Standards Organisation (p 81):

> “ The rise of 'new' or 'citizen' journalists, and the vast increase in the use of social media, suggest that the tools hitherto relied upon in Scotland are no longer adequate and that legislation is required to ensure the adequate protection of the identities of complainers making allegations of rape and sexual assault. The introduction of legislation providing anonymity to such individuals is accordingly recommended.”

By way of comparison, the Sexual Offences (Amendment) Act 1992 protects the anonymity of complainers in sexual offences cases in England and Wales. Although that legislation does extend to Scotland, the review report pointed out that this is only for the purposes of preventing publication in Scotland of information relating to offences in England and Wales. The legislation does not apply to complaints of sexual offences in Scotland.

Scottish Government consultation

The Scottish Government's 2022 consultation on improving victims' experiences of the justice system [5] included questions on protecting the anonymity of victims in sexual offence cases.(e.g. which offences should be covered, penalties for breaching anonymity and the power of a victim to waive the right). It also outlined approaches in a range of other countries (see Annex B of the consultation paper).

Provisions in the Bill

Section 63 of the Bill provides automatic statutory protection for the anonymity of victims of a wide range of sexual and related offences (e.g. human trafficking).

In setting out the Scottish Government's reasons for proposing additional protection for anonymity, the Bill's Policy Memorandum (para 366) argues that:

> “ The benefits of this change will be to maintain as best as possible the dignity and privacy of a person when they are a victim of a qualifying offence during their lifetime, which is helpful to the well-being of the individual in itself. This may also, as a secondary benefit, help increase the confidence of victims to report offending behaviour to the police through certainty of their legal right to anonymity.”

The Bill would generally prevent any publication from including information likely to lead to the identification of a person as being a victim of a relevant offence. The protection would continue to apply during a victim's lifetime.

The right to protection would not be dependent upon any proactive steps by the victim (e.g. reporting the matter to the police or making a disclosure to a specialist support service). Nor on any formal action being taken in a case (e.g. a suspect being charged, prosecuted or convicted). Section 63 defines 'victim of an offence' as meaning:

> “ a person against or in respect of whom an offence has been, or is suspected to have been, committed.”

The meaning of 'publication' is broadly defined in the section as including:

> “ any speech, writing, relevant programme or other communication in whatever form, which is addressed or accessible to the public at large or any section of the public (whether on registration, payment, subscription or otherwise)”

A failure to comply with the restrictions on publishing information would be a criminal offence. This would be subject to certain defences (e.g. based on the information already being in the public domain).

An adult victim would be able to give others permission to publish information. Where the victim is still a child (under 18), the victim's consent would not be sufficient - the matter would have to be considered by a court.

However, the restrictions on publication would not prevent a victim of any age publishing information likely to identify themselves (e.g. on social media). In this context, the Policy Memorandum (para 428) notes that:

> “ While it is acknowledged children may spontaneously or without a full appreciation of the implications of doing so, decide to publish their own story on social media, the Scottish Government does not consider the appropriate response to prevent online child disclosures is to prohibit this through criminalisation. Instead, the policy underpinning this aspect of the Bill is to respect a child's autonomy and to encourage through non-legislative means children to engage with specialist support services if they are considering making their experiences public.”

Independent legal representation for complainers

Sexual history and character evidence

In 2007, the Scottish Law Commission noted that (p 113): [34]

> “ It is a striking feature of sexual offence trials, and rape trials in particular, that there is often a sense of the victim being on trial as much as the accused. If the accused claims in defence that the complainer consented to the act, then questioning in court is focussed upon whether the complainer was likely to have consented. The complainer may face cross-examination aimed at showing that although she claims she did not consent, she did in fact consent or her behaviour was such that it was reasonable for the accused to believe that she consented. This is likely to involve adducing evidence which intrudes upon the complainer's private life.”

Legislation has sought to restrict evidence being led about the sexual history and character of complainers in sexual offence trials. Arguments for restrictions on this type of

evidence generally fall within two main categories:

- that such evidence is often of little (if any) true value in determining what occurred and can, if produced in court, divert attention from the real issues in the case
- that the use of such evidence can amount to an unwarranted invasion of the privacy and dignity of a victim, effectively putting the victim on trial and discouraging other victims of sexual offences from reporting those offences and giving evidence in court.

There can however be competing interests which should be considered. In particular, the need to protect an accused person's right to a fair trial – which might be adversely affected by overly strict limitations on the leading of evidence.

The main provisions restricting the use of sexual history and character evidence are set out in sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995. The current provisions are the result of reforms set out in the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002. The changes made by the latter were in response to concerns that existing restrictions did not provide adequate protection for complainers.

In relation to sexual offence trials, section 274 of the Criminal Procedure (Scotland) Act 1995 currently provides that the court shall not allow evidence which shows or tends to show that the complainer:

> (a) is not of good character (whether in relation to sexual matters or otherwise);
>
> (b) has, at any time, engaged in sexual behaviour not forming part of the subject matter of the charge;
>
> (c) has, at any time (other than shortly before, at the same time as or shortly after the acts which form part of the subject matter of the charge), engaged in such behaviour, not being sexual behaviour, as might found the inference that the complainer - (i) is likely to have consented to those acts; or (ii) is not a credible or reliable witness; or
>
> (d) has, at any time, been subject to any such condition or predisposition as might found the inference referred to in sub-paragraph (c) above.

These restrictions apply to the prosecution as well as the defence.

Section 275 of the Criminal Procedure (Scotland) Act 1995 gives the court the power to allow evidence covered by the above restrictions if satisfied that:

> (a) the evidence or questioning will relate only to a specific occurrence or occurrences of sexual or other behaviour or to specific facts demonstrating - (i) the complainer's character; or (ii) any condition or predisposition to which the complainer is or has been subject;
>
> (b) that occurrence or those occurrences of behaviour or facts are relevant to establishing whether the accused is guilty of the offence with which he is charged; and
>
> (c) the probative value of the evidence sought to be admitted or elicited is significant and is likely to outweigh any risk of prejudice to the proper administration of justice arising from its being admitted or elicited.

For evidence to be allowed under section 275, the party wishing to lead that evidence must apply in writing to the court. Where a case involves a jury, the court's consideration of

any application under section 275 is not carried out in front of the jury.

The Bill's Financial Memorandum (paras 208-209) provides some data on the number of applications made under section 275.

Despite legislative reform and other steps aimed at ensuring the restrictions are applied effectively, concerns about the use of sexual history and character evidence have remained. Recent reports looking at the area include:

- HM Inspectorate of Prosecution in Scotland – Inspection of COPFS practice in relation to sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995 [35]
- Equality and Human Rights Commission – The use of sexual history and bad character evidence in Scottish sexual offences trials. [36]

As things currently stand, the Criminal Procedure (Scotland) Act 1995 does not give a complainer a statutory right to be notified of an application under section 275 or to have their views on the application presented to the court. Following recent court judgements on the rights of complainers where there is an application to lead evidence on sexual history or character (see the Bill's Policy Memorandum at paras 484-486), prosecutors do now obtain information on the views of complainers and present this to the court. However, the role of prosecution lawyers is to act in the public interest. This will not necessarily align with the private interests of individual complainers.

Providing a complainer with independent legal representation (ILR), where there is an application under section 275 to lead evidence, has been put forward as a way of strengthening the application of the restrictions on sexual history and character evidence. This was one of the recommendations put forward by Lady Dorrian's review.

Review and consultation

Lady Dorrian's review

The report of Lady Dorrian's review noted that (p 81):

> “ Whether sexual offence complainers should be afforded independent legal representation (ILR) and what it should cover, if provided, are questions which have caused much discussion and debate in recent years. In the context of section 275 applications the current position in Scotland is that a complainer has no statutory right to oppose or present their response to the court. A complainer is not entitled to notification of the application and should one be made in the course of the trial, the statutory provisions provide that they must not be present during its consideration.”

As well as looking at the approach to sexual history and character evidence in Scotland and relevant research, the review report highlighted that independent legal representation is currently available to complainers in the Republic of Ireland and had been considered in Northern Ireland. In 2021, the Department of Justice in Northern Ireland announced the launch of a pilot scheme to provide independent legal advice to victims of sexual offences. [37]

Suggested benefits of independent legal representation for complainers, where there is an

application to lead evidence about their sexual history and character, include:

- the nature of the evidence involved in such applications, meaning that a complainer's rights under Article 8 (right to respect for private and family life) of the European Convention on Human Rights are likely to be relevant
- supporting complainers in having their views heard by the courts (within a system in which the role of the prosecution is to represent the public interest rather than the particular interests of the complainer)
- helping to ensure that the courts have relevant information when taking decisions on applications.

The Lady Dorrian's review report recommended that (p 87):

> " Independent legal representation (ILR) should be made available to complainers, with appropriate public funding, in connection with section 275 applications and any appeals therefrom."

Scottish Government consultation

The Scottish Government's 2022 consultation on improving victims' experiences of the justice system [5] included consideration of:

- whether complainers in sexual offence cases should have a right to independent legal representation (ILR), what that right should cover and whether it should be publicly funded
- rights of appeal against decisions of a court to allow evidence on the sexual history or character of the complainer.

It noted that, in this context, ILR meant the right of a complainer to seek independent legal advice and to appoint an independent legal representative who could represent the complainer at relevant court hearings.

An analysis of the consultation [18] noted that there was strong support for complainers having:

- a right to ILR in sexual offence cases where there is an application to lead sexual history or character evidence, with funding from legal aid
- a right to appeal the decision of the court in relation to such an application, also with the support of ILR.

Provisions in the Bill

Section 64 of the Bill contains provisions relating to sexual offence cases where there is an application under section 275 of the Criminal Procedure (Scotland) Act 1995 to allow evidence concerning the sexual history or character of the complainer.

In such circumstances, the Bill would give the complainer a right to independent legal representation (ILR). Specifically, it would:

- require the prosecution to provide the complainer with information on the application to allow sexual history and character evidence
- allow the complainer to be represented by a lawyer in relation to that application
- provide for the disclosure of relevant evidence to that lawyer (this would be disclosed by the prosecution following approval by the court)
- allow the lawyer to make representations to the court on the application
- allow the lawyer to appeal a court decision, made in advance of the trial, to grant an application.

The Bill would also make changes to the deadline for applications under section 275, providing more time for complainers to exercise their new rights.

In relation to the costs of obtaining ILR, the Bill's Policy Memorandum (para 493) states that complainers will be entitled to publicly funded ILR, on a non-income assessed basis, and that legal aid regulations will be amended to make provision for this. This is not covered in the provisions of the Bill.

Rape trial pilot

Review and consultation

Under current arrangements, rape is always prosecuted in the High Court.

All High Court cases, along with more serious cases dealt with by the sheriff courts, are prosecuted under solemn procedure. This involves a jury where there is a trial.

Less serious sheriff court cases, and all justice of the peace court cases, are dealt with under summary procedure. There is no involvement of a jury in summary cases.

Lady Dorrian's review

The use of juries in serious cases was one of the issues considered by Lady Dorrian's review, with its 2021 report noting that their use in sexual offences trials is a subject of debate (p 89):

> “ Trial by jury is long established for serious crimes in Scotland and seems to have the general support of the public, prosecution, defence lawyers and the Judiciary. The accumulation of knowledge and experience of life across wide sections of the community in the jury as the decision-making body is seen as one of the main advantages of trial by jury. In general it was felt that for almost all types of crime, trial by jury generally works well in Scotland with verdicts almost always having a reasonably obvious and logically justifiable basis. That general public confidence, however, would seem to be lower in respect of sexual offences. This may be the result of the lower number of convictions for sexual offences obtained in contrast to almost all other crime prosecutions in Scotland. Such concerns and statistics are not unique to Scotland with all corners of the UK experiencing a similar phenomenon to one degree or another. Concerns - whether justifiable or not - repeatedly surface about the role of the jury in sexual offence cases.”

The following table sets out some statistics on the proportion of people with a charge proved in the criminal courts. It provides information for a selection of crimes, including rape and attempted rape, as well as for all crimes and offences. The figures are taken from the Scottish Government's criminal proceedings bulletins. [29]

Table 7: percentage of people proceeded against with charge proved

Crime / offence	2016-17	2017-18	2018-19	2019-20	2020-21
Homicide etc.	83	79	81	82	86
Attempted murder and serious assault	66	68	66	66	82
Rape and attempted rape	39	43	47	43	51
Sexual assault	60	63	56	64	66
All crimes and offences	86	87	87	88	91

Note on data:

- there was a significant drop in the number of cases concluded in 2020-21 due to the impact of Covid-19 on court business during that year - it is possible that this may have also affected some data on outcomes during that year
- for statistical purposes, criminal offences are sometimes separated into 'crimes' and 'offences' to broadly reflect a distinction between more and less serious matters.

Lady Dorrian's review report highlighted some of the main arguments in the debate on the use of juries in sexual offence trials. For example:

Arguments for not using juries

- it is easier to educate judges about common prejudices, sometimes referred to as 'rape myths', than it is in relation to members of a jury selected for a single trial
- evidence from some judges that they have been involved in sexual offence cases where a conviction would be justified but the jury acquits
- jury trials tend to take more time and the presence of a jury may encourage a more confrontational approach to the questioning of witnesses.

Arguments for juries

- juries allow decisions to be taken by a group of people with a broader experience of life than is the case where a judge sits alone
- jury service is an example of participatory democracy and may enhance public understanding of, and respect for, the administration of criminal justice.

(The Scottish Government's consultation paper (p 87-92) on improving victims' experiences of the justice system provides a fuller list of arguments.)

The review report looked at a range of research, including the Scottish mock jury research, [8] noting that (p 95):

> “ Indications from the 2019 Scottish Mock Jury Trial research are that that rape myths may intrude on deliberations despite the giving of directions designed to counter them. This accorded with the view of many Review Group members that rape myths remain prevalent amongst jurors and are very difficult to displace.”

It also highlighted some examples of potential rape myths:

- that a person who is sexually assaulted will always fight back, scream or shout for help
- that a sexual assault would be immediately reported
- that a genuine rape victim will always show emotion in the aftermath or on giving evidence
- that false accusations are commonly made.

The review report (p 118) went on to recommend consideration of piloting rape trials without juries:

> “ Consideration should be given to developing a time-limited pilot of single judge rape trials to ascertain their effectiveness and how they are perceived by complainers, accused and lawyers, and to enable the issues to be assessed in a practical rather than a theoretical way. How such a pilot would be implemented, the cases and circumstances to which it would apply to and such other important matters should form part of that further consideration.”

It noted that the review group was divided on the continued use of juries in rape cases and that (p 107):

> “ It was understood by the entire Review Group that the option of withdrawing sexual offences from the consideration of juries would be controversial and unpopular with many people.”

In relation to the use of juries, Lady Dorrian's review also looked at ways in which jurors might be better supported/informed. The report stated that (p 108):

> “ Whatever view is ultimately reached in this jurisdiction in relation to the use of juries there is no doubt that as long as they are retained in sexual offence cases there is a pressing need for reform in relation both to the information provided to jurors and the means by which it is provided. On the assumption that in the meantime juries will continue to be used, the Review Group turned to consider what changes might be effected in order to guard against reliance on rape myths, and to improve juror understanding of the process upon which they were engaged.”

Recommendations for improvements included providing more information for juries in relation to common rape myths and stereotypes.

Lady Dorrian Review Governance Group

Following publication of Lady Dorrian's review report, the Scottish Government established a Governance Group [30] to further consider some of the recommendations.

The Governance Group set up three working groups, including one looking at the

possibility of piloting rape trials without juries. That working group's report [38] was published in December 2022. To assist it in considering the issue, the working group commissioned a briefing from the Scottish Government's Justice Analytical Services. This briefing has also been published - Alternatives to Jury Trials: an evidence briefing. [39] The evidence briefing includes:

- consideration of evidence on the impact of alternatives to jury trials in sexual offence cases
- some information on modes of trial in a range of countries (including on the use of juries).

However, it states that (p 5):

> " The research available is limited, and the briefing draws on 24 studies, with most of them not specifically focusing on rape cases. The briefing therefore does not allow for robust conclusions to be drawn on the impact of single judge trials in rape cases."

Scottish Government consultation

The Scottish Government's 2022 consultation on improving victims' experiences of the justice system [5] included questions about the use of juries in serious sexual offence cases and the possibility of piloting rape trials without a jury.

In relation to a question seeking views on the continued suitability of trial by jury in serious sexual offence cases, including rape and attempted rape, an analysis of the consultation [18] noted that views were divided (p 112):

> " All victim/witness support organisations who answered the question disagreed that juries continued to be suitable for the prosecution of serious sexual offences, while all legal organisations who answered the question agreed."

The consultation noted that proposals for criminal trials under solemn procedure without a jury were previously considered as a temporary emergency measure to help ensure the continued operation of the criminal court system during the COVID-19 pandemic. The proposals proved to be controversial and were removed during parliamentary scrutiny. However, the consultation paper sought to highlight the different justification for, and scope of, the pilot considered by Lady Dorrian (p 87):

> " The context in which Lady Dorrian's Review considered this matter was entirely different. The Review Group was established in early 2019 so did not look at single judge trials as a general measure to address concerns over the ability of jury trials to continue to safely operate throughout a pandemic, or as a way to mitigate the impact of the pandemic on the administration of justice. Rather, the model was considered as a potential and profound reform to improve the way in which a particular type of case, serious sexual offences, is dealt with in Scotland, irrespective of the pandemic."

Provisions in the Bill

As already noted, under current arrangements, rape is prosecuted in the High Court, which includes the involvement of a jury where the case goes to trial.

Sections 65 of the Bill would allow the Scottish Government to establish, by secondary legislation, a pilot scheme for criminal trials of rape or attempted rape without a jury.

In setting out the Scottish Government's reasons for wanting to have a pilot, the Policy Memorandum (para 565) notes that:

> " While important research into single judge rape trials has been conducted in other jurisdictions as identified by an international evidence briefing on alternatives to jury trials commissioned by the working group,[xxi] the Scottish Government shares the ultimate conclusion of Lady Dorrian's Review that it is only by studying these in the context of our justice system that we can form an objective and informed understanding of their impact in Scotland."

The Bill provides that the pilot would:

- take place within the High Court and/or the proposed Sexual Offences Court (as provided for in Part 5 of the Bill)
- involve a single judge delivering the verdict following a trial and providing written reasons for that verdict
- be followed by a review and publication of a report on how it operated.

Further legal provision would be set out in secondary legislation, which would be preceded by consultation with various people/organisations and subject to affirmative procedure in the Scottish Parliament. The secondary legislation would:

- set out the length of the pilot
- provide more detailed criteria for the types of cases which the pilot would deal with (e.g. whether the pilot should be restricted to single complainer cases)
- include provision allowing the defence to make representations on whether those criteria are met in a particular case.

The Policy Memorandum (para 575) provides the following explanation for leaving some elements to secondary legislation:

> " The approach set out in the Bill is to provide an appropriate level of detail to the Parliament to allow meaningful scrutiny and consideration of the principle of the proposal to enable a pilot, whilst allowing for the operational detail of the pilot including case criteria and duration of the pilot, to be set out in regulations. Principally, this is to allow for the necessary further collaborative work on design and development to be carried out with justice partners to shape the model of the pilot."

xxi See Alternatives to Jury Trials: an evidence briefing (mentioned above when discussing the Lady Dorrian Review Governance Group).

Bibliography

1 Scottish Parliament. (2023, April 25). Victims, Witnesses, and Justice Reform (Scotland) Bill [as introduced] Session 6 (2023) SP Bill 26. Retrieved from https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/victims-witnesses-and-justice-reform-scotland-bill/introduced/bill-as-introduced.pdf

2 Scottish Parliament. (2023, April 25). Victims, Witnesses, and Justice Reform (Scotland) Bill: Explanatory Notes Session 6 (2023) SP Bill 26-EN. Retrieved from https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/victims-witnesses-and-justice-reform-scotland-bill/introduced/explanatory-notes-accessible.pdf

3 Scottish Parliament. (2023, April 25). Victims, Witnesses, and Justice Reform (Scotland) Bill: Policy Memorandum Session 6 (2023) SP Bill 26-PM. Retrieved from https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/victims-witnesses-and-justice-reform-scotland-bill/introduced/policy-memorandum-accessible.pdf

4 Scottish Parliament. (2023, April 25). Victims, Witnesses, and Justice Reform (Scotland) Bill: Financial Memorandum Session 6 (2023) SP Bill 26-FM. Retrieved from https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/victims-witnesses-and-justice-reform-scotland-bill/introduced/financial-memorandum-accessible.pdf

5 Scottish Government. (n.d.) Improving victims' experiences of the justice system: consultation. Retrieved from https://consult.gov.scot/justice/victimsconsultation/

6 Scottish Government. (n.d.) Victims Taskforce. Retrieved from https://www.gov.scot/groups/victims-taskforce/

7 Scottish Parliament. (2023, May 9). Scottish Parliament Official Report, Trauma-informed Justice for Victims and Witnesses. Retrieved from https://www.parliament.scot/chamber-and-committees/official-report/search-what-was-said-in-parliament/meeting-of-parliament-09-05-2023?meeting=15293&iob=130417

8 Scottish Government. (2019, October 9). Scottish Jury Research: Findings from a Large Scale Mock Jury Study. Retrieved from https://www.gov.scot/publications/scottish-jury-research-fingings-large-mock-jury-study-2/

9 Scottish Government. (n.d.) The not proven verdict and related reforms. Retrieved from https://consult.gov.scot/justice/not-proven-verdict/

10 Scottish Courts & Tribunals Service. (2021, March). Improving the Management of Sexual Offence Cases - Final Report from the Lord Justice Clerk's Review Group. Retrieved from https://www.scotcourts.gov.uk/docs/default-source/default-document-library/reports-and-data/Improving-the-management-of-Sexual-Offence-Cases.pdf?sfvrsn=6

11 Scottish Government. (2021, January 18). Victims Taskforce papers: December 2020. Retrieved from https://www.gov.scot/publications/victims-taskforce-papers-december-2020/

12 Scottish Parliament. (2010, May 27). Commissioner for Victims and Witnesses (Scotland) Bill [as introduced] Session 3 (2010) SP Bill 46. Retrieved from https://archive2021.parliament.scot/parliamentarybusiness/Bills/17994.aspx

13 Children and Young People's Commissioner Scotland. (n.d.) No title Retrieved from https://www.cypcs.org.uk/

14 Scottish Human Rights Commission. (n.d.) No title Retrieved from https://www.scottishhumanrights.com/

15 Scottish Government. (2023, May 15). The role of commissions and commissioners in Scotland and the UK. Retrieved from https://www.gov.scot/publications/role-commissions-commissioners-scotland-uk-final-report-march-2023/documents/

16 Victims' Commissioner for England and Wales. (n.d.) No title Retrieved from https://victimscommissioner.org.uk/

17 Commissioner for Victims of Crime. (n.d.) No title Retrieved from https://www.cvocni.org/

18 Scottish Government. (2022, December 12). Improving Victims' Experiences of the Justice System: Consultation Analysis. Retrieved from https://www.gov.scot/publications/improving-victims-experiences-justice-system-consultation-analysis/

19 Scottish Government. (2023, June 9). Email from the Scottish Government to SPICe.

20 Scottish Government. (2022, December 12). Improving victims' experiences of the justice system: consultation analysis - final report, pages 57-59. Retrieved from https://www.gov.scot/publications/improving-victims-experiences-justice-system-consultation-analysis/

21 Scottish Parliament. (2013, June 20). Criminal Justice (Scotland) Bill [as introduced] Session 4 (2013) SP Bill 35. Retrieved from https://archive2021.parliament.scot/parliamentarybusiness/bills/65155.aspx

22 Scottish Parliament. (2013, November 27). Criminal Verdicts (Scotland) Bill [as introduced] Session 4 (2013) SP Bill 42. Retrieved from https://archive2021.parliament.scot/parliamentarybusiness/bills/70453.aspx

23 Scottish Government. (n.d.) Post-corroboration Safeguards Review. Retrieved from https://webarchive.nrscotland.gov.uk/3000/https://www.gov.scot/About/Review/post-corroboration-safeguards

24 Post-corroboration Safeguards Review. (2015, April). Final Report. Retrieved from https://webarchive.nrscotland.gov.uk/3000mp_/http://www.gov.scot/Resource/0047/00475400.pdf

25 Scottish Government. (2017, September 24). Jury research . Retrieved from https://www.gov.scot/news/jury-research/

26 Scottish Government. (2019, October 9). Scottish Jury Research: findings from a large-scale mock jury study - Research Findings. Retrieved from https://www.gov.scot/publications/scottish-jury-research-fingings-large-mock-jury-study/documents/

27 Scottish Parliament. (2021, December 15). Proposed Victims, Criminal Justice and Fatal Accident Inquiries (Scotland) Bill. Retrieved from https://www.parliament.scot/bills-and-laws/proposals-for-bills/proposed-victims-scotland-bill

28 Scottish Government. (2022, July 12). The Not Proven Verdict and Related Reforms: Analysis of Responses to Consultation. Retrieved from https://www.gov.scot/publications/not-proven-verdict-related-reforms-consultation-analysis/

29 Scottish Government. (n.d.) Criminal Proceedings in Scotland statistics. Retrieved from https://www.gov.scot/collections/criminal-proceedings-in-scotland/

30 Scottish Government. (n.d.) Lady Dorrian Review Governance Group. Retrieved from https://www.gov.scot/groups/lady-dorrian-review-governance-group/

31 Scottish Government. (2022, December 12). Lady Dorrian Review Governance Group: Specialist Sexual Offences Court Working Group Report. Retrieved from https://www.gov.scot/publications/lady-dorrian-review-governance-group-specialist-sexual-offences-court-working-group-report/

32 Scottish Government. (n.d.) Pre-recording of evidence by witnesses. Retrieved from https://www.gov.scot/policies/victims-and-witnesses/pre-recording-of-evidence-criminal-trials/

33 Independent Press Standards Organisation. (n.d.) Editors' Code of Practice. Retrieved from https://www.ipso.co.uk/editors-code-of-practice/

34 Scottish Law Commission. (2007, December 19). Report on Rape and Other Sexual Offences. Retrieved from https://www.scotlawcom.gov.uk/files/4712/7989/6877/rep209.pdf

35 HM Inspectorate of Prosecution in Scotland. (2022, October 19). Inspection of COPFS practice in relation to sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995. Retrieved from https://www.gov.scot/publications/inspection-copfs-practice-relation-sections-274-275-criminal-procedure-scotland-act-1995/pages/1/

36 Equality and Human Rights Commission. (2020, August 18). The use of sexual history and bad character evidence in Scottish sexual offences trials. Retrieved from https://www.equalityhumanrights.com/en/publication-download/use-sexual-history-and-bad-character-evidence-scottish-sexual-offences-trials

37 Department of Justice. (2021, March 31). Justice Minister launches scheme to provide free legal advice to victims of sexual offences. Retrieved from https://www.justice-ni.gov.uk/news/justice-minister-launches-scheme-provide-free-legal-advice-victims-sexual-offences

38 Scottish Government. (2022, December 12). Lady Dorrian Review Governance Group: Consideration of a TimeLimited Pilot of Single Judge Rape Trials Working Group Report. Retrieved from https://www.gov.scot/publications/lady-dorrian-review-governance-group-consideration-time-limited-pilot-single-judge-rape-trials-working-group-report/

39 Scottish Government. (2023, January 9). Alternatives to Jury Trials: an evidence briefing for the Consideration of a Time-Limited Pilot of Single Judge Rape Trials Working Group. Retrieved from https://www.gov.scot/publications/alternatives-jury-trials-evidence-briefing-consideration-time-limited-pilot-single-judge-rape-trials-working-group/documents/

SPICe The Information Centre
An t-Ionad Fiosrachaidh