

Victims, Witnesses and Justice Reform (Scotland) Bill

Criminal Justice Committee –
Proposed amendments
for Stage 2

December 2024



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Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

As indicated in the Stage 1 report of the Criminal Justice Committee, the Victims, Witnesses and Justice Reform (Scotland) Bill (“the Bill”) aims to improve the experience of victims and witnesses in the criminal justice system and “the fairness, clarity and transparency of the framework within which decisions in criminal cases are made”¹.

Following the decision of the Scottish Parliament to support the principles of the Bill at Stage 1, there is now an opportunity to improve the legislation in two ways: Firstly, clarifying and strengthening provisions that can impact positively the experiences of witnesses, complainers and victims. Secondly, amending and removing certain provisions that may pose potential risks to judicial independence and the rights of the accused.

This paper contains a range of suggested amendments for members of the Criminal Justice Committee to consider at Stage 2.

We welcome the Scottish Government’s announcement that it intends to introduce amendments which will remove the single judge trials pilot for rape and attempted rape cases, contained in Part 6 of the Bill. As we have repeatedly stressed, juries for serious crimes are a cornerstone of the criminal justice system.

We acknowledge that the Scottish Government is aiming to amend Parts 4 and 5 of the Bill, introducing important changes to the verdicts available, jury system and the creation of the new Sexual Offences Court. We have opposed the changes proposed to the jury system and courts structure at Stage 1. Our proposed amendments to Part 4 and 5 reflect that position.

¹ Criminal Justice Committee of the Scottish Parliament. [Victims, Witnesses and Justice Reform \(Scotland\) Bill Stage 1 Report](#).



Our approach to amendments for Stage 2

We have set out our suggested amendments to the Bill as appendix 1 which accompanies this paper. All amendments include effects and reasons to explain the impacts of the changes and their justification.

All these amendments reflect issues that we raised in our written response to the call for views of the Criminal Justice Committee, in the Stage 1 and 2 oral evidence sessions, and through the Stage 1 briefing we provided to all MSPs.

Proposed amendments to Parts 1 and 3

We have previously expressed our support for the establishment of the Victims and Witnesses Commissioner for Scotland. Accordingly, amendments to Part 1 are aimed at enhancing clarity regarding the terminology and powers of the Commissioner.

Amendments to Part 3 aim to clarify the provisions regarding the register and remuneration of solicitors in cases where the conduct of personal defence is prohibited under the section 22B of the Vulnerable Witnesses (Scotland) Act 2004.

Proposed amendments to Part 4

The Cabinet Secretary for Justice and Home Affairs indicated in a letter to the Convener of the Criminal Justice Committee on 31 October 2024² that she is planning to introduce amendments that reflect “a model with two verdicts, fifteen jurors, and two thirds majority requirement for conviction”.

The Scottish criminal justice system has unique safeguards to ensure fairness and guard against unsafe convictions. Two of those safeguards are the three verdicts system and the requirement of corroboration.

We opposed the abolition of the not proven verdict as proposed in the Bill. We have indicated that moving to a two verdicts system could create a profound change in the balance of criminal trials.

We have also noted the significant change in the application of the rule of corroboration introduced in the recent case [HMA vs PG and JM](#).

With that in mind, we consider that Scotland should move to the approach established in all other comparable jurisdictions in which super majority requirements for reaching verdicts is the rule. We are of the view that juries should operate as a single unit and not as sum of votes. The qualified majority proposed

² [Letter from the Cabinet Secretary for Justice and Home Affairs to the Convener of the Criminal Justice Committee \(31 October 2024\)](#)



by the Cabinet Secretary continues to view the jury as a collection of individual decisions, permitting a substantial proportion of dissenting jurors.

Our proposed amendments to Part 4 provisions are focused on maintaining the not proven verdict and introducing a system of 12 jurors and a super majority requirement for reaching a verdict.

Proposed amendment to Part 5

We noted that the Cabinet Secretary of Justice and Home Affairs indicated in her letter to the Convener of the Criminal Justice Committee that she plans to introduce amendments “that introduce a mechanism designed to address concerns that accused prosecuted in the Sexual Offences Court should be able to access the same level of representation to that which they are entitled under existing structures” and “intended to enhance security of tenure for Judges of the Sexual Offences Court and safeguard the independence of judicial decision-making in the new court”.

While the amendments announced by the Cabinet Secretary could address some of the concerns that we expressed at Stage 1, we oppose, as a matter of principle, to the creation of a new Sexual Offences Court separate from the High Court of Justiciary. Our proposed amendment reflects that position.

Proposed amendment to Part 6

We have proposed an amendment to the provision contained in section 63 related to the right to anonymity for victims of sexual offences, aiming to enhance victims’ dignity beyond their death.

As indicated in the introduction, we welcome the announcement made by the Cabinet Secretary for Justice and Home Affairs that confirmed the removal of the single judge pilot for rape and attempted rape cases. Nonetheless, we have designed an amendment that reflects our strong opposition to the original proposal.

For further information, please contact:

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Appendix

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VICTIMS, WITNESSES, AND JUSTICE REFORM (SCOTLAND) BILL

AMENDMENTS TO BE MOVED AT STAGE 2

In section 1, page 1, line 15

after <Victims>
<Complainers>

insert

Effect

This amends section 1 of the bill.

Reason

This amendment aims to change the name of the Commissioner's office established under Part 1 of the bill.

The amendment reflects the difference in the legal setting in the definition of the terms 'victim' and 'complainer'. The differentiation between both terms has a close relationship with the presumption of innocence. We have indicated that "categorising a complainer as a 'victim' prior to any conviction runs the risk of dismissing the presumption of innocence and conveys the message that an allegation equates to guilt". We are of the view that the name of the Commissioner's office should reflect that difference as, according to the definitions provided in section 23, it is expected that the Commissioner will engage with people against of whom an offence is suspected to have been committed.

In section 1, page 1, line 16

after <Victims> insert
<Complainers>

Effect

This amends section 1(1) of the bill.

Reason

This is a consequential amendment.

In section 12, page 6, line 31

at the end of the line insert-

< ()A solicitor, solicitor advocate or advocate who has accepted instructions for defending an accused person in a criminal proceeding is not obliged under this section to answer any question or produce any document concerning the accused's case, if it is considered:

- (a) that answering the question or producing the document may affect the duty of confidentiality, and
- (b) the accused has not waived the right of confidentiality.

Effect

This inserts a new subsection into section 12 of the bill.

Reason

This amendment will introduce an exception to the obligation to answer questions and produce documents in relation to the investigative powers provided to the Victims and Witnesses Commissioner for Scotland.

Section 12 indicates that the Commissioner may require any person to give evidence and produce documents within the terms of reference of an investigation made under the Commissioner's investigative powers contained in Section 10.

Subsection (4) clarifies that representatives of the Crown Office and Procurator Fiscal Service need not provide the information required by the Commissioner if according to the Lord Advocate this could prejudice criminal proceedings in a particular case or be contrary to the public interest.

This amendment provides a similar exception to defence practitioners that are bound by the duty of confidentiality regarding their client's matters. We consider it important that the Bill clarifies that the Commissioner's investigative powers do not override the duty of confidentiality.

This amendment also reflects the principle of equality of arms between the prosecution and the defence as it brings a similar exception to the duty of

providing information to the Commissioner that was granted to Crown agents, but focused on the accused's interest.

In section 14, page 8, line 4

at the end of the line insert-

<() The Scottish Ministers may by regulations provide enforcement mechanisms for the exercise of the Commissioner's power to gather information.>

Effect

This inserts a new subsection to section 14 of the bill.

Reason

We consider that the Commissioner should be provided with enforcement mechanisms for exercising the power to gather information.

The Scottish Parliament is currently discussing other bills that provide to the Scottish Ministers the faculty to regulate on enforcement powers when information is required by public agencies for different purposes. For example, Section 36 of the National Care Service (Scotland) Bill allows to the Scottish Ministers to provide by regulations "a scheme that allows information to be shared in order that services can be provided efficiently and effectively by and on behalf of-

- (a) the National Care Service,
- (b) the National Health Service."

Section 36(2) of the National Care Service (Scotland) Bill indicates that the Scottish Ministers can create by regulations sanctions (civil or criminal) for those who fail to comply with the information requirements.

While we do not consider that we are in a position to propose any particular enforcement power, we are of the view that the Scottish Ministers should be able to regulate on the matter.

In section 21, page 11, line 19

at the end of the line insert-

<() The Scottish Ministers may by regulations provide enforcement mechanisms for the exercise of the Commissioner's power to request co-operation from a specified criminal justice agency.>

Effect

This inserts a new subsection to section 21 of the bill.

Reason

Section 21 provides to the Victims and Witnesses Commissioner for Scotland the power to request the co-operation of specific criminal justice agencies for the purposes of the Commissioner's functions.

We are of the view that the Commissioner should have enforcement powers when requiring the cooperation of criminal justice agencies. With the proposed amendment, the Scottish Ministers will be able to provide those enforcement mechanism by regulations.

In section 23, page 12, line 14

delete <or is suspected to have been>

Effect

This amends section 23(1) of the bill.

Reason

This amendment will modify the definition of ‘victim’ for the purpose of Part 1 of the bill, reflecting the legal distinction between a ‘complainer’ and a ‘victim’.

As originally drafted, section 23 includes in the definition of ‘victim’ a person against of whom an offence is suspected to have been committed. In our view, this is the definition of a ‘complainer’. For that reason, we believe it is more appropriate to remove from the original definition of ‘victim’ any elements that we perceive as reflective of the definition of ‘complainer’.

In section 23, page 12, line 14

and at the end of the line insert –

<or,

(a person against or in respect of whom harmful behaviour has been, or is suspected to have been, committed or carried out when a civil action was followed, notwithstanding the perpetrator was not convicted in a criminal court>.

Effect

This amendment introduces a new subsection into section 23(1).

Reason

This amendment includes in the definition of victim those who have suffered from a delict or civil wrong. This is important as section 3 allows the Scottish Ministers to amend the Commissioner's general function to include a civil function focused on promoting and support the rights and interest of persons involved in proceedings other than criminal proceedings. Consequently, the proposed amendment reflects that the definition of victims and, accordingly, the scope of the Commissioner's functions extends to civil matters.

In section 23, page 12, line 18

at the end of the line insert –

<“complainer” means a person
against or in respect of whom

(a) an offence, or

(b) harmful behaviour by a child

is suspected to have been
committed or carried out>

Effect

This introduces a new paragraph to Section 23(1).

Reason

This is a consequential amendment.

In section 32, page 16, line 22

at the end of the line insert-

<() provide for the remuneration by the Scottish Ministers of solicitors appointed under section 22B(6), including expenses and outlays (such as counsel's fees), and

() confer the duty of maintaining the register on a person>

Effect

This introduces two new subsections to section 32.

Reason

As originally drafted, the Scottish Ministers will have the discretion to regulate about the remuneration of solicitors appointed for cases in which the personal conduct of defence is prohibited in terms of section 22B of the Vulnerable Witnesses (Scotland) Act 2004 and to delegate the duty of maintaining the register of solicitors in terms of section 22E of the 2004 Act.

We are of the view that the Scottish Ministers should be obliged to regulate about both aspects. Consequently, the amendment includes them in the list of topics that must be regulated.

In section 32, page 16, line 25

leave out paragraph (2c)

Effect

This deletes paragraph (2c) section 32 (4) of the bill.

Reason

This is a consequential amendment.

In section 32, page 16, line 29

leave out paragraph (i)

Effect

This deletes paragraph (2ci) of section 32 (4) of the bill.

Reason

This is a consequential amendment.

In section 32, page 16, line 37

at the end of line insert-

<() The Scottish Ministers must publish a report and the reasoning on the outcome of the consultation under subsection (3).>

Effect:

This inserts a new paragraph to section 32(4) of the bill.

Reason

This amendment will make it mandatory for the Scottish Minister to publish a report and the reasoning on the outcome of consulting the Faculty of Advocates and the Law Society of Scotland before making regulations related to the register of solicitors in cases in which it is prohibited to conduct personal defence in terms of section 22B of the Vulnerable Witnesses (Scotland) Act 2004.

While we support the duty to consult with the Faculty of Advocates and the Law Society of Scotland before making regulations on the register of solicitors in terms of section 32 of the bill, we are of the view that the outcome of that consultation should be available. This will ensure that the Society and Faculty of Advocate's views are considered before an eventual regulation that could affect access to the legal professions in cases that involve vulnerable people.

In section 35, page 20, line 31

leave out subsection (2)

Effect

This deletes section 35(2) of the bill.

Reason

This amendment will delete the proposed changes in the verdicts available for solemn cases, maintaining the not proven verdict.

The Final Report of the Post-corroboration Safeguards Review, published in April 2015 -and mentioned in our Stage 2 oral evidence session-, indicated that the unique features of the Scottish criminal justice system form “important parts of a balanced system which, until now, has included the corroboration requirement, a 15 person jury, three verdicts, and the possibility of conviction by simple majority”.

We have indicated that the criminal justice system is complex. We have also highlighted that the not proven verdict is an important safeguard that reduces the risk of unsafe convictions, and its potential abolition would upset a balanced system. Accordingly, the proposed amendment maintains the current three verdicts available for solemn cases. In the event that Parliament considers further evidence is required before making changes to the jury system, that evidence should be ingathered and considered before any decision is made to remove the not proven verdict. Fundamental changes to the criminal justice system cannot be made on a piecemeal basis.

In section 35, page 20, line 36

leave out paragraph (2) and insert -

<() The verdict of the jury subject to subsection () below shall be unanimous.

() The verdict of a jury need not be unanimous if-

(a) in the case of a jury consisting of 11 or 12 jurors, 10 of them agree on the verdict; and

(b) in a case where there are 10 jurors, 9 of them agree on the verdict.

() The Court should not accept a verdict by virtue of subsection () and () above unless it appears to the Court that the jury have had such period of time for deliberation as the Court thinks reasonable having regard to the nature and complexity of the case.>

Effect

This deletes paragraph (2) of section 35(2) and inserts three new paragraphs.

Reason

This amendment introduces a supermajority requirement for reaching a verdict in solemn cases.

We have indicated at Stages 1 and 2 that the unique features of the criminal justice system have justified the existence of the simple majority verdicts. However, other proposals in the bill aim to abolish the not proven verdict that serves as a unique safeguard in criminal cases. In addition, the current practice in the criminal courts has also modified the rules about the corroboration requirement.

With that in mind, we consider that the introduction of supermajority verdicts are capable of rebalancing the system in the context of the changes mentioned earlier. Supermajority verdicts are required in England and Wales and its

introduction to Scotland would bring our legal system closer to comparable jurisdictions.

If foundational changes are enacted to verdicts available and majorities, we consider it appropriate to adopt the approach taken in other comparable jurisdictions.

We acknowledge that this amendment could produce situations in which juries will not reach a verdict. This situation is known as 'hung juries'. Research in England and Wales, in which supermajority majority is required, indicate that hung juries occurs in around 1% of the cases. According to the legal guidance about retrials of the Crown Prosecution Service "there is a presumption that the prosecution will seek a re-trial where a jury fails to agree on a verdict at the first trial".

We want to highlight that retrials are possible in jurisdictions with unanimity or supermajority requirements. However, we note the comments of the Criminal Justice Committee in the Stage 1 report that indicate that further evidence and a full consultation is critical to consider a proposal for retrials. This seems to be shared by the Scottish Government response to the Stage 1 report that indicated: "[i]f the Scottish Government were to progress any retrial proposal further, we agree that further evidence is vital and would engage appropriately with a broad range of stakeholders".

Considering the comments below, we did not propose any amendment related to the possibility of re-trials for hung juries cases at this stage. We will be happy to engage in wider discussions that may take place on this topic.

In section 36, page 21, line 10

leave out section 36.

Effect

This deletes section 36 of the bill.

Reason

This amendment will delete the proposed changes in the verdicts available for summary cases, maintaining the not proven verdict.

Effect

This deletes part 5 of the bill.

Reason

While we recognise the value in the principle of specialisation, we oppose the creation of a new Sexual Offences Court outside the current court structure. We have indicated that some consideration should be given to establishing specialist divisions of existing courts following the examples of the Domestic Abuse Court in Edinburgh and Glasgow Sheriff Courts and the Court of Session Commercial Court.

The creation of a new Sexual Offences Court will involve an overcomplication of the current criminal justice system. Some of the aspects that will be affected by the current Part 5 are the following:

1. It is expected that rights of audience will be determined by the offence, the possible sentence, and the gravity of the particular case. While some possibilities have been explored to define as tightly as possible the right of audience in the new court, we still anticipate some confusion in the solicitor's right of audience.
2. It is not clear how it is expected that the division of cases that will be heard before sheriff and before high court judges will operate, as both categories were merged as "judges of the Sexual Offences Court". This could impact the sentencing process, increasing the sentencing power of sheriffs that will sit in the new court.
3. As drafted, the bill provides that the Lord Justice General will have the power to remove judges from the new Court without providing reasons. We reiterate that these provisions are a risk to judicial independence. This was a concern raised by some of the members of the Criminal Justice Committee.
4. As the new court has national jurisdiction and can sit at any place in Scotland, we also anticipate issues with the travel and availability of defence practitioners, who are struggling to cope with current demands.

We are of the view that the structural points set out above cannot be fixed with amendments of the current bill as they involve a matter of principle.

In section 63, page 40, line 3

at the end of the line insert-

<() will not end with the death of the person to whom the information relates.

() If another person wishes to name a complainer of sexual offence after the complainer's death, an application shall be made to the court outlining the justification for setting aside the right to anonymity in terms of subsection ()>

Effect

This inserts two paragraphs to section 63.

Reason

This amendment will extend the right of anonymity for complainers of offences listed in section 106C(5) of the Criminal Justice (Scotland) Act 2016 perpetually. It also includes the possibility of making an application to the court to stop the restriction after the complainer's death.

Extending the restriction after the complainer's death can ensure greater respect for complainers' dignity. We are aware that some cases could require identification of some of the information protected for public interest reasons. Because of that, we consider it important to provide the option for those interested in setting aside the right to complainer's anonymity after the complainer's death to make an application to the court.

In section 63, page 40, line 4

leave out subsection (3b)

Effect

This amendment deletes subsection (3b) of section 63 of the bill.

Reason

This is a consequential amendment.

In section 65, page 46, line 31

leave out section 65

Effect

This deletes section 65 of the bill.

Reason

This amendment removes the pilot of single judge rape trials.

We consider that trials by jury for serious crimes is a cornerstone of the Scottish legal system.

Juries provide representation from all sections of society, in contrast with the judiciary in Scotland which is less diverse than the wider population. The lack of diversity in those crucial decisions affects the impact of unconscious bias in verdicts.

Juries are anonymous while judges are not. We anticipate adverse media comment in difficult cases criticising individual judges increasing the pressure that they may feel.

While we acknowledge that the jury system is not perfect, we consider that there are other ways to improve what we have. For instance, we highlight the positive impact that routes for verdicts have in understanding the jury decision making process.

We have expressed our concerns that the bill enables Scottish Ministers to provide the details of the pilots by regulations. Those details include the timescales of the pilot and the case and evaluation criteria. The Criminal Justice Committee shared those concerns in the Stage 1 report³.

³ Criminal Justice Committee of the Scottish Parliament. Victims, Witnesses and Justice Reform (Scotland) Bill Stage 1 Report. Para. 1260-1264

In section 66, page 47, line 36

leave out section 66

Effect

This deletes section 66 of the bill.

Reason

This amendment will remove the report on the single judge rape trials pilot. This is a consequential amendment.

In Schedule 1, page 50, line 3

after <Victims>
<complainers>

insert

Effect

This amends the title of the Schedule 1 of the bill.

Reason

It is a consequential amendment.