

Criminal Justice Committee

6th Meeting, 2024 (Session 6), Tuesday 6 February 2024

Victims, Witnesses, and Justice Reform (Scotland) Bill

Note by the clerk

Background

1. The Committee is taking evidence on the [Victims, Witnesses, and Justice Reform \(Scotland\) Bill](#) at [Stage 1 of the Parliament's legislative process](#).
2. The Bill proposes changes to the law to try to improve the experience of victims and witnesses in the justice system. The Bill also proposes changes to the criminal justice system to try to improve the fairness, clarity and transparency of the framework within which decisions in criminal cases are made.
3. In general, the Committee is adopting [a phased approach](#) to its consideration of the Bill, to divide the Bill into more manageable segments for the purposes of Stage 1.

Topics to be covered

4. At today's meeting, the Committee will begin taking evidence as part of the third phase of its scrutiny. This will cover certain provisions in Part 6 of the Bill, specifically the proposal for a pilot of judge-only trials for certain types of rape case—

Part 6
Sexual Offences Cases: further reform

Introduced new provisions, as well as amending existing legislation, to make further reform to sexual offence cases

- Provides automatic life-long protection for the anonymity of victims of sexual offences.
- Gives complainers in sexual offence cases a right to independent legal representation when an application is made to introduce evidence about the complainer's sexual history or character
- Gives power to the Scottish Ministers to establish, by secondary legislation, a pilot scheme for rape trials without a jury.

5. The Committee's scrutiny of the Bill will conclude on Wednesday 7 February when we will hear from the Cabinet Secretary for Justice and Home Affairs, Angela Constance MSP. Further details of the Committee's phased approach [can be found online](#).

Today's evidence on the Bill

6. At today's meeting, the Committee will take evidence from **Simon Brown**, Vice-President, Scottish Solicitors Bar Association (SSBA). The SSBA previously gave written¹ and [oral evidence](#) to the Committee on Parts 1 to 4 of the Bill on 13 December 2023.
7. The following submissions have been provided to the Committee, the relevant extracts of which (covering Part 6 of the Bill) are reproduced at the Annex—
 - [Scottish Criminal Bar Association](#)

Further reading

8. A SPICe briefing on the Bill [can be found online](#). And the responses to the Committee's call for views on the Bill [can be found online](#).
9. A [SPICe analysis](#) of the call for views, covering Parts 5 and 6, was circulated with the committee papers for the meeting on 10 January.

Previous evidence sessions

10. At previous meetings the Committee has taken evidence from a range of witnesses on the Bill. The Official Reports of these meetings [can be found online](#).

**Clerks to the Committee
February 2024**

1 Criminal Justice Committee meeting papers 13 December 2023, SSBA submissions pages 10 – 12): [7276 \(parliament.scot\)](#)

ANNEX

Extract from [Submission from Scottish Solicitors Bar Association](#)

The Scottish Solicitors Bar Association remain fundamentally opposed to the Scottish Government's proposed implementation of the pilot scheme for Juryless trials for rape cases.

It is stating the obvious to say that serving on a jury is the general public's closest involvement in the legal system, and it also provides a vitally important measure of social, cultural and ethnic diversity which is a significant advantage when compared to the judge-only pilot. Judges are picked from a very small section of society: they are all middle-aged, university graduates, predominately male, often privately-educated and almost exclusively members of the Faculty of Advocates. Juries provide a huge wealth of real world experience that is vital in properly deciding cases that involve every human emotion. It is a system that has worked, and worked well, for centuries.

We appreciate that one perceived advantage that judges would have over juries is that they would not be susceptible to rape myths. We would raise two issues regarding this point: firstly, juries are now directed specifically in relation to rape myths and not only is there is no evidence to suggest that juries are acting in contravention of their oath to try the accused on the evidence in line with their directions but the Appeal Court has repeatedly made clear that we must work on the basis that juries follow judicial directions. It appears that the Scottish Government are trying to solve a problem that does not, in fact, exist. Furthermore, no amount of judicial training or legal directions can remove unconscious biases. If we accept the premise that everyone has unconscious biases then the best way to compensate for unconscious biases are to have a group of 12 or 15 members of society, from all backgrounds, professions and

creeds coming together to judge their fellow citizens. This large, representative group should prevent any unconscious biases affecting the jury's decision making process. It is unclear what safeguards are in place to prevent judges making decisions based on unconscious biases.

Whilst the Scottish Government Ministers have made contradictory statements whether the purpose of the pilot is to increase conviction rates, the only objective criteria for assessing the success of the proposed pilot appears to be the conviction rate. It is self-evident that the conviction rate is lower, however it is submitted that there are particular evidential reasons for this anomaly. Accused persons facing a charge of murder (the only other offence that is exclusively the purview of the High Court of Justiciary and which is prosecuted on a regular basis) are often facing a number of different incriminatory pieces of evidence

ranging from eye witness testimony, CCTV evidence, forensic evidence, medical evidence, admissions and there is also nearly always a dead body that requires an explanation. By contrast in respect of rape cases, forensic and medical evidence often proves penetration which (in cases where the defence is one of consent) is routinely agreed leaving the jury to consider evidence relating to consent which often involves witnesses, who have consumed alcohol and/or other substances potentially affecting their reliability. It is, therefore, perhaps unsurprising that juries appear to have difficulty in being satisfied of the accused's guilt when weighted against the burden of proof. As an aside, it would seem strange that apparently juries can be trusted in murder cases but not rape cases.

Finally we make this point: if the Scottish Government wishes to increase the convictions when we simply ask, what is the correct conviction rate? To answer

this, we quote Tommy Ross KC who said: “the correct conviction rate is the number of cases that are proved beyond a reasonable doubt. I believe we are achieving that at present”. We agree and reiterative our opposition to a pilot scheme that would increase the risk accused persons suffering a miscarriage of justice, deliver no discernible benefits for either the justice system or wider society and undermine the public’s confidence in our criminal justice system. For the avoidance of any doubt, despite the huge financial pressures currently being faced by Scottish solicitors and the consequential decimation of our numbers, this is not and has never been a question of fees. We are not prepared to take part in this scheme.