JUSTICE Scotland

Victims, Witnesses, and Justice Reform (Scotland) Bill

30 October 2023, Edinburgh

JUSTICE Scotland hosted a roundtable to discuss aspects of the Victims, Witnesses, and Justice Reform (Scotland) Bill on 25 September 2023.

The following individuals and representatives were in attendance:

Shelagh McCall KC, (Chair)

Sandy Brindley, Chief Executive of Rape Crisis Scotland

Laura Buchan, Head of Policy at Crown Office and Procurator Fiscal Service

Angela Constance MSP, Cabinet Secretary for Justice and Home Affairs

Almira Delibegović-Broome KC, Chair of JUSTICE Scotland

Andrew Forsyth, Partner at Burness Paull LLP

Andrea Fraser, Lawyer at JUSTICE

Jeff Gibbons, Head of Violence Against Women and Girls Unit

Lauren Kane, Trainee Solicitor at Burness Paull LLP and JUSTICE Scotland rapporteur

Philip Lamont, Head of Criminal Law, Practice and Licensing Unit

Alasdair Macleod, Procurator Fiscal Depute, Policy and Engagement

Lisa McCloy, Head of Criminal Justice Reform Unit

Alan McCreadie, Head of Research at the Law Society of Scotland

Stuart Munro, Convenor of the Law Society Criminal Law Committee and Managing Partner of Livingstone Brown

Fiona Rutherford, Chief Executive of JUSTICE

Iain Smith, Founding Partner of Keegan Smith Defence Lawyers

Seonaid Stevenson-McCabe, Vice-Chair of JUSTICE Scotland

Dr Andrew Tickell, Senior Lecturer in Law at Glasgow Caledonian University

Kate Thompson, Justice Policy Worker at Rape Crisis Scotland

Heather Tulley, Team Leader at Criminal Justice Reform Unit

Kate Wallace, Chief Executive of Victim Support Scotland

I. Background

1.1 JUSTICE Scotland is a branch of JUSTICE, a cross-party law reform and human rights organisation. JUSTICE works to strengthen all aspects of the justice system: civil, criminal and administrative, with a focus on access to justice and upholding and promoting the rule of law. It is the UK section of the International Commission of Jurists. Our purpose is to create a UK justice system that is fair, accessible and respects the rights of all.

1.2 This paper concerns the draft *Victims, Witnesses, and Justice Reform (Scotland) Bill* (the **"Bill"**) and reflects the views expressed at a roundtable event hosted by JUSTICE Scotland on 25 September 2023 (the **"Roundtable"**). Chaired by Shelagh McCall KC, the Roundtable was attended by practitioners, academics, victim support organisations, researchers and policymakers, including the Scottish Government. Where relevant public statements have been made by attendees, this paper makes reference to them. This paper also refers to relevant work conducted by JUSTICE in the context of England and Wales.

1.3 It is clear from the discussion that attendees supported the underlying principle of the Bill, which is to increase the support available to victims and witnesses. There was also consensus that certain aspects of the Bill represented positive developments. This includes certain provisions relating to trauma-informed practices and the expansion of special measures. However, other aspects of the Bill remain controversial. Provisions relating to the abolition of the 'Not Proven' verdict, changes to jury sizes and the removal of juries from rape trials attracted both criticism and support from different attendees. This paper seeks to highlight areas of consensus, even within those discussions. However, it is clear that further work requires to be undertaken by policymakers to increase confidence on these aspects of the Bill and/or to respond to calls to remove these aspects of the Bill entirely.

1.4 Finally, whilst some discussion took place regarding the Bill generally, most of the discussion was directed at provisions that had received less public scrutiny or attention. For that reason, this paper should not be understood as setting out an exhaustive list of all relevant matters arising from the Bill. Nonetheless, JUSTICE Scotland hopes that this paper will be a useful contribution to the evidence in-gathered by the Criminal Justice Committee as part of its work scrutinising and developing the Bill.

II. Part 1: The Victims and Witnesses Commissioner for Scotland

7.1 Part 1 of the Bill establishes the office of the Victims and Witness Commissioner for Scotland (the "**Victims Commissioner**"). The role of the Commissioner is to promote and support the rights and interests of victims and witnesses.

7.2 The proposal to create a Victims Commissioner received a mixed reception. Attendees agreed that in principle, the creation of a Victims Commissioner could send an important message to victims and the wider public. Some argued that it is important that there be an establishment figure who represents victims, given that the Lord Advocate acts in the public interest and the Cabinet Secretary represents other interests. Attendees were advised that many victims' groups supported the creation of the Commissioner.

7.3 However, there was widespread concern that the role of the Victims Commissioner would be limited in practice and that its envisaged services would not meet victims' expectations. For example, a number of attendees suggested that victims were under the impression that the Victims Commissioner would consider individual cases with a view to intervening in them. In that sense, victims might consider that the Victims Commissioner would have similar powers to that of the Children's Commissioner. However, as far as attendees were aware, this is not going to be the case. It is unclear from the Bill what action the Victims Commissioner would be permitted to take on an individual basis and no enforcement powers are mentioned. Furthermore, it is unclear what the relationship between the Victims Commissioner and the Lord Advocate looks like and whether the former can instruct the latter. For these reasons, there was general concern that victims may be advocating for the establishment of the role under the false assumption that it will directly benefit them.

7.4 A number of attendees suggested that the wording in the Bill should be clarified to explicitly reflect the powers of the Victims Commissioner. An easy-to-understand, accessible document must also be produced to explain the role of the Victims Commissioner to lay persons.

7.5 It is unclear how the office of the Victims Commissioner is to be funded. Attendees emphasised that **resources must not be re-directed from essential support services that assist victims directly.** In the context of cuts to legal aid, and the lack of funding for frontline services, several attendees questioned whether the resources required for a Victims Commissioner would not be better spent elsewhere. In terms of priorities, it was suggested by some attendees that funding for independent legal representation should come before the creation of a Victims Commissioner. Furthermore, some attendees warned that the Victims Surcharge Fund must not be used to resource the office of the Victims Commissioner.

7.6 Overall, attendees understood the symbolic importance of creating a Victims Commissioner and noted the public appetite for one. However, they recommended that **the Government must be realistic about what a Victims Commissioner can achieve, whilst being cautious of not duplicating services provided elsewhere by other**

Commissioners. Furthermore, the office must be adequately resourced to ensure that it has the desired impact but is not so inflated that it reduces valuable resources from other frontline services.

III. Part 2: Trauma-Informed Practice

4.1 Part 2 of the Bill contains proposals to incorporate trauma-informed practice into the civil and criminal courts. As set out in the Fact-sheet accompanying the Bill, trauma-informed practice is constituted by five core principles:[1]

a) Safety;
b) Choice;
c) Collaboration;
d) Trust; and
e) Empowerment.

4.2 There was an extended discussion concerning the definition of "Trauma-Informed Practice". Attendees emphasised that the nature of trauma-informed practice, depends on the individual circumstances and characteristics of the individual. There is no 'one-size-fits-all' approach. Care must be taken to ensure that "trauma-informed" is more than a mere buzzword but at the same time, is not overly prescriptive that it excludes the range of measures that might constitute trauma-informed practice. **An effective trauma-informed approach must acknowledge that victims and witnesses do not all experience trauma in the same way**.

4.3 That being said, it is possible to determine certain key principles, which could be translated into practice via codes, rules or practice directions. Furthermore, it should be the responsibility of all individuals engaged in the justice system to apply them – not just lawyers. It was suggested by some attendees that there was a general need to improve understanding of trauma-informed practice and vulnerability across the whole justice system. In its 2019 report titled, '*Prosecuting Sexual Offence Cases*', [2] JUSTICE discussed the difficulties inherent in defining "vulnerability" and the need for it to be identified early on in legal proceedings, adopting a person-centred approach. **Some attendees at the roundtable recommended that the vulnerable accused must also be addressed in the Bill.**

4.4 There were suggestions that concepts such as vulnerability are not well understood generally and that standards of service across the justice system require improvement.[3] Existing support for individuals involved in the criminal justice system is inadequate. Lay members require support to engage in legal proceedings that impact them. Vicarious trauma may also be experienced by court staff and lawyers and should also be considered. Attendees suggested that broader system-wide change and awareness of vulnerability is required. Nonetheless**, despite concerns about meaningful implementation, the inclusion of trauma-informed practice was seen as a positive**. The Bill provides greater visibility of a trauma-informed approach and offers momentum around the direction Scotland should move towards. **Attendees encouraged the Scottish Government to engage and work with a range of experts from across the justice system to ensure that the provisions relating to trauma-informed practice have the desired impact.** In

[1] Scottish Government, 'Victims, Witnesses, and Justice Reform (Scotland) Bill: factsheet' (October 2023)

[2] JUSTICE 'Prosecuting Sexual Offences' (2019), para 4.10-4.23

[3] JUSTICE, 'Understanding Courts' (2019)

particular, the voices of those with lived experience – as victims, witnesses and accused – must be heard. A number of attendees also highlighted the need for defence solicitors and judges to identify and consider the impact that childhood trauma has had on many accused.

4.5 There was also broader discussion on whether the Scottish adversarial system could ever fully adopt a trauma-informed approach. This is because there are fundamental aspects of the criminal justice system that do not align well with these principles. For instance, cross-examination can be traumatic for victims and witnesses, and vulnerable accused, but is a key feature of our criminal justice system.

4.6 Adopting a trauma-informed approach means looking beyond the way we communicate with victims and witnesses. We must also look at whether the procedures involved in the justice system are trauma-informed. For example, floating trial diets and their impact on persons experiencing vulnerability was also discussed. Floating trials lead to uncertainty and increased anxiety for all involved – particularly victims. To mitigate this, it was suggested that floating trial diets should only be used where there is pre-recorded evidence. This would ensure that victims are not brought to court only to find that their trial is no longer happening that day. On a related point, some attendees suggested that pressures on the part of judges to address court backlogs often meant that proceedings would start very late in the day. Victims would be called upon to start providing evidence, only for the court to adjourn a short while later – leaving the victim's evidence part-heard. Inadequate attention is given to the trauma that this causes to the victim – leaving them in a heightened state of stress at the end of the court day. Practical guidance or directions should be put in place to ensure that this does not happen.

4.7 It was noted that **the Bill will only be effective in increasing trauma-informed practice if provision is made for training**. Training on trauma-informed practice must be top-down as well as bottom-up. It must be available for all actors within the justice system from judges, to lawyers, to court clerks and administrative staff. The type of training that each professional will require will be different. Work must be done within the justice system to foster an environment where person-centred practice is implemented by all those involved in the process, such as SCTS staff, witness support services, and police officers. Not only that, but the way that training is delivered needs serious consideration. As discussed at the roundtable, many small firms do not have the capacity to attend conferences.

4.8 Whilst not discussed at the meeting, in its 2019 report titled, *'Understanding Courts'*,[4] JUSTICE discusses challenges experienced by lay persons and vulnerable persons when communicating with legal professionals.[5] JUSTICE recommends that training for legal professions should be designed to increase awareness of trauma and vulnerability generally, and to ensure that communicating with law persons is a key component of legal professional training.[6] The value of trauma-informed practice could also be reflect in Law

[4] JUSTICE, 'Understanding Courts', see note 3 above

[5] JUSTICE, 'Understanding Courts', see note 3 above, para 3.1 – 3.68

[6] JUSTICE, 'Understanding Courts', see note 3 above, para 3.19

Society rules and guidance, including in the Code of Conduct for Solicitors. Ideally, all training should involve some element of role play and putting the professional in the shoes of the person experiencing vulnerability. Pre-Professional Education and Training (PEAT) Outcomes must also be updated to reflect the need for person-centred outcomes.

4.9 Finally, some attendees also discussed trauma-informed practices in the context of the physical court space. The way that courts are designed physically, does not always reflect the needs of people experiencing vulnerability or trauma. For example, the fact that victims and accused are required to share the same entrance in some court buildings. **There also needs to be measures put in place to familiarise lay persons – victims, witnesses and other parties with the layout of court building and courtrooms**. This would help to alleviate some of the intimidatory aspects of attending court. Attendees pointed out that there are some good resources available already, including those created by Victim Support.[7] However, these materials need to be more widely available and hosted in a central location, e.g., via the Scottish Courts and Tribunal Services webpage. Materials should be designed in collaboration with experts and those with lived experience. In *Understanding Courts,*[8] and also in its *"What is a Court?"*[9] report, JUSTICE recommended various changes that should be made to the court estate in England and Wales to make it more accessible to lay persons and those experiencing vulnerability. Some of these recommendations may be relevant to Scottish Courts and Tribunals in this context.

[7] See for example, Victim Support Scotland, "Virtual Tours of Scottish Courts"

[8] JUSTICE, 'Understanding Courts', see note 3 above, para 2.51-2.55. See also recommendations set out at page 107;.

[9] JUSTICE, 'What is a Court' (2016), chaired by Alexandra Marks, recommended a re-focus of the court estate in England and Wales to focus it on the needs of the user; with flexible justice spaces that can be located closer to the communities they serve and accommodate multiple jurisdictions; and enhanced services through investment in technology for remote and virtual proceedings and appropriately trained personnel.

IV. Part 3: Special Measures

4.1 Part 3 of the Bill aims to increase the availability of special measures in civil proceedings.

4.2 Despite the improvements to the provision of special measures in civil cases set out in the Bill, some attendees believed gaps would remain. They felt that this was particularly true in relation to cases concerning sexual violence and domestic abuse. They have experienced civil cases where special measures were not granted when they consider that they should have been. Where measures are granted, this is because a protective order is in place or because the accused has already been convicted of an offence relating to the victim. Attendees agreed that this is not sufficient.

4.3 One suggestion was to **align the provisions in civil cases with the measures in criminal proceedings**. This suggestion stems from the view that individuals involved in certain types of civil cases, e.g., cases concerning abuse or sexual offending, are inherently vulnerable due to the nature of the case.

4.4 As touched upon during discussions relating to trauma-informed practice, concepts such as vulnerability are not well understood across the justice system. This can act as a barrier to identifying when special measures should apply. Attempts to define vulnerability have had mixed results. In the criminal context, JUSTICE's *'Prosecuting Sexual Offences'*[10] Working Group, which made several recommendations relating to Scotland as well as the wider UK, suggested that "vulnerable" could be defined to refer to *"any child, young person or adult, including a defendant, who may not be able to participate effectively at court if reasonable steps are not taken to adapt the court process to their specific needs."*[11] This encapsulates the principles set out in the Criminal Practice Directions and Rules[12] that the court and advocates must adapt to the needs of the witness and take every reasonable step to facilitate the participation of any person, including the defendant. Special measures will only be effective if parties are able to identify when someone is experiencing vulnerability and understands what measures are available. A number of attendees explained that knowledge of special measures is still poor. Again, training will require to be developed across the whole justice space and a broader cultural shift is needed.

[10] JUSTICE, 'Prosecuting Sexual Offences' see note 2 above

[11] Ibid., para 4.23

[12] The Criminal Procedure Rules 2020

V. Part 4: Criminal Juries and Verdicts

7.1 Part 4 of the Bill includes significant reform to juries and available verdicts in Scotland. It proposes the reduction of the size of the jury and a move towards a two-thirds majority for a guilty verdict. It also seeks to abolish the 'not proven' verdict from solemn and summary proceedings.

Abolition of the 'not proven' verdict

7.2 Attendees were split on whether the "Not Proven" verdict should be abolished or retained.

7.3 Some felt strongly that the "Not Proven" verdict was a barrier to conviction in rape cases. It was stated that the verdict was used disproportionately in rape cases, compared to other offences. A number of attendees expressed their opinion that the "Not Proven" verdict is used inappropriately in circumstances where jurors, *"feel that the accused is guilty but there is not enough evidence"*. One attendee countered this statement by suggesting that the nature of our "social contract" as citizens means that jurors should be entitled to "opt out" of acquitting / convicting where they are *"just not sure"*. Others wished to emphasise that the return of a "Not Proven" verdict should not be interpreted as evidence that the jury was not 'doing its job', unless it was clear they had considered extraneous factors. Another supported this by explaining that it is not just jurors who return the "Not Proven" verdict but judges too, especially at Summary level. Others felt that this is unsatisfactory for victims, leaving them to feel like the jury has simply 'opted out' of making a decision. On the other hand, attendees heard that there was a small number of victims who supported the retention of the verdict, preferring it to a verdict of "Not Guilty".

7.4 Whilst attendees agreed that there were some negative aspects arising from the "Not Proven" verdict, some felt that these issues are capable of being resolved without abolishing it. For example, they felt that expectations concerning the verdict could be better managed. Furthermore, if there was concern that the verdict was being used erroneously e.g., in cases where extraneous factors were being relied upon, or rape myths were at play – the focus should be on challenging and educating jurors and the public about these things, rather than removing the verdict. Others expressed concern that removing the "Not Proven" verdict might lead to worse outcomes for victims, as a "Not Proven" outcome may be viewed by victims as more positive than a "Not Guilty" verdict. They felt that the preference for the "Not Proven" verdict reflected a wider unwillingness on the part of juries to convict. It was suggested at the roundtable that this is also reflected in homicide cases. By removing the verdict, they felt that there might be more acquittals, with unsure jurors being more likely to acquit than convict. In doing so, this could lead to more victims being dubbed or perceived to be "liars" and therefore actually worsen rape myths.

7.5 However, all attendees agreed on the difficulty of defining what the verdict means, with some considering that this alone should be a reason to abolish it. Others discussed the need to increase public awareness about the meaning of the verdict although the discussion became circular: if you cannot define the verdict, how do you educate the public about it. There were also suggestions that judges must provide better directions to the jury about what is meant by the "Not Proven" verdict, e.g., that it does not automatically mean that

the accused will be brought before court again in the future. Whilst jury directions already exist, some attendees felt that this required to be improved, including via the provision of information in different formats. Again**, it was felt that an evaluation of juries would be helpful.** This should include an evaluation of the manner in which information is provided to juries and whether it is accessible.

7.6 Overall, there was some consensus that **the Scottish Government should provide greater clarity as to why they propose removing this verdict. Given that the abolition of the "Not Proven" verdict is a significant change to Scotland's justice system, the decision to do so must be evidence-based**. The evidence relied upon must be made available and scrutinised. Doing so would help alleviate concerns expressed by some attendees, that research on the "Not Proven" verdict is capable of being misinterpreted. For example, some attendees expressed concern that the move to abolish the verdict could be motivated by desires to increase convictions, yet the evidence currently available does not suggest that this would be the case. Therefore, the motivation behind removing the "Not Proven" verdict should not be based on such considerations. This was countered by an explanation that this was not the reason for the proposals to remove it. Finally, attendees suggested that there is a need for further evaluation of jury deliberations generally, amidst concerns that jurors do not always understand the process.

Jury size and majority

7.7 Attendees felt that the perception of juries differed in Scotland compared to other jurisdictions like England and Wales. In England and Wales, the focus was upon the jury as a whole, acting in unanimity, whilst in Scotland the focus was on the jurors and their individual decisions. This was described as the reason why decisions could hinge upon a simple majority.

7.8 Some attendees wished to stress that changing the jury size or majority required to convict should not be understood as a necessary counterweight to removing the "Not Proven" verdict. Instead, each proposal had to be considered individually and thereafter, its collective impact assessed.

7.9 That being said, one attendee submitted that a jury size of 15 was awkward. In particular, they explained that it made it difficult for deliberations to take place and referred to practical factors like the ability of jurors to communicate with one another around a table. Others referred to additional psychological factors that influenced jury deliberations, including the impact that strong personalities have on the group. Research produced by the Home Office, titled "*Are Juries Fair",*[13] was referred to. Ultimately, the *"study found little evidence that juries are not fair"*.[14] However, it also indicated that far more women change their minds during jury deliberation. There were suggestions that the time of the day also impacted upon decision-making. Attendees also discussed whether a reduction in jury size might be beneficial due to the current difficulty in recruiting jurors. There were

[13] Ministry of Justice, 'Are Juries Fair?' (February 2010)

[14] Ibid, page. i

suggestions that more analysis and evaluation was needed in relation to juries in Scotland generally.

7.10 The Bill recognises how out of step Scotland would be if it moved to a two-verdict system and retained a simple majority. Some view it as troubling that a conviction may hang in the balance of arguably one juror's opinion. Others, however, expressed concern that increasing the majority would make it more difficult to obtain a conviction.

7.11 On a related point, several parties expressed concern that changes to the available verdicts, jury sizes and majorities amounted to *"tinkering with the system"* and could cause unintended or negative consequences. Instead, they suggested that **the Scottish Government must first evaluate the operation of the "Not Proven" verdict fully, and thereafter come to a decision regarding its status. Thereafter, they should evaluate jury sizes and majorities.** It was suggested that the issues require separate attention, individual evaluation and should not be "lumped together". Changing one does not necessarily require changes to another, especially when there might be alternative measures that could be taken. For example, more work to educate the jury on rape myths may negate the need to make other changes.

VI. Part 5: Sexual Offences Court

6.1 Part 5 establishes a new court for sexual offences to be presided over by Sheriffs and High Court judges depending on the level of the offence. The proposal is based upon recommendations arising from a cross-justice review group tasked with '*Improving the Management of Sexual Offence Cases',* chaired by the Lord Justice Clerk, Lady Dorrian (the **"Lady Dorrian Review"**).[15] The Bill specifies that judges and practitioners will receive specific training before being able to work in the specialist court.

6.2 Several attendees were supportive of the proposal to establish a separate Sexual Offences Court, whilst others were more sceptical. Nonetheless, there was widespread agreement that there is a need for greater amounts of detail to explain how the court would fit within the wider justice system. Some were concerned that it would overlap with the work of other courts. For example, some attendees were concerned that it would hollow out the work of the High Court, given that sexual crimes constituted 75% of the COPFS High Court caseload.[16] Others were sceptical about the process by which judges would be appointable to the Sexual Offences Court by the Lord Justice General. They felt that this was less transparent than the usual process for judicial appointments. Whilst understanding that judges in the Sexual Offences Court required to be trained and be trauma-informed – arguably this should be a requirement for all judges; a 2-tier system was not viewed as desirable.

6.3 Furthermore, there was concern that having the same practitioners and judges working exclusively in the Sexual Offences Court would increase the risk of vicarious trauma. All those working in the court will be relentlessly subjected to the same material. This is at odds with the trauma-informed messaging of other aspects of the Bill. **The training made available to practitioners and professionals requires to be carefully thought out**. The reality is that some firms only deal with a very small number of sexual offences cases, rarely. They might not deem it reasonable for them to undertake specialist training. Furthermore, **the cost of training must be considered. It cannot be set at a rate which means it is inaccessible or acts as a deterrent to professionals.**

6.4 There was further discussion around the uncertainty of how the court would operate in practice, with some suggesting that it should be constituted as a division of the High Court. This was countered with the argument that a division would be cosmetic and would fail to bring together cases that are prosecuted before the Sheriff and High Court . A number of attendees felt that it was likely to only sit in the central belt, despite having jurisdiction across Scotland. Further, it is unclear how the court will be physically structured. It cannot simply be a room within an existing court building. **The expectations of those who support the proposal is that it will be a bespoke, state of the art court building that is built with trauma-informed design principles at its heart.** A number of attendees were sceptical that this would be the case. Again, attendees reflected on the need to revisit the physical layout of the court estate generally. Many courts are currently not fit for purpose and do not adequately address the needs of members of the public, as set out in JUSTICE's

[15] Lord Justice Clerk's Review Group, 'Improving the Management of Sexual Offence Cases' (March 2021)

[16] Scottish Government, 'Investigation and prosecution of sexual crime: follow-up review' (August 2020)

'Understanding Courts' report.[17] Some considered that improving existing court buildings and increasing the information provided to victims and witnesses about courts and court processes – should take priority. They suggested that the use of technology such as apps should be enhanced. Tools could be built and disseminated to victims and witnesses to help demystify the process.

6.5 On a related point, there was discussion about the need to **avoid a paternalistic approach when re-envisaging court processes or buildings in the context of sexual offending**. Whilst some individuals may wish to provide pre-recorded evidence; this was not likely to be the case for all. Some individuals wanted to be present in court and felt aggrieved that they were not afforded the opportunity to do so. **What is important is that victims and witnesses are afforded the opportunity to make their own choices**. Therefore, whilst it may be helpful to have a presumption in favour of pre-recorded evidence, there must also be recognition that not all victims will want to exercise that right. Recognition of a complainer's agency is key. That being said, some attendees suggested that there is a tension between the victim's wishes and the Crown's determination of how evidence is best presented. The quality of pre-recorded evidence can be poor. It was suggested that nothing must limit the ability of the Crown to present its best case and this requires to be clarified in the Bill. This was an example which highlighted the importance of communication and managing expectations. Others disagreed that the Crown should be permitted to override the interests of the victim in not coming to court.

6.6 **There are further issues with presenting evidence, such as a lack of information given to victims, which would need to be addressed when considering the new court**. For instance, complainers have been unaware that the accused can see them when they are giving evidence behind a screen or via video. This may be alleviated by extending the provisions for independent legal representation. In its report on '*Prosecuting Sexual Offences'*, JUSTICE identified that **individuals can only make informed choices if they know what their choices are.** One of the underlying principles of a trauma-informed practice is control and JUSTICE consider that enabling victims to understand their rights and choices is fundamental to access to justice and trauma-informed approaches in legal proceedings.

[17] JUSTICE, 'Understanding Courts', see note 3 above

VII. Part 6: Further Reform for Sexual Offence Cases

7.1 Part 6 of the Bill introduces a range of further measures relating to cases concerning sexual offences. For example, it provides automatic life-long anonymity for victims of sexual offences, gives complainers in sexual offence cases an automatic right to independent legal representation when an application is made to introduce evidence about the complainer's character, and provides a power to the Scottish Ministers to carry out a pilot of rape trials conducted by a single judge.

Anonymity

7.2 According to the Bill, the aims of the proposals relating to anonymity are to provide simplicity and certainty to victims during their lifetime. The right to anonymity ends upon the death of the victim. The provisions are designed to respect the privacy and dignity of all victims. The Bills also states that it recognises the importance of choice by empowering those who wish to waive their anonymity.

7.3 Attendees discussed the growing importance of anonymity in the context of today's widespread use of social media, and referred to examples relating to their practice where information was shared across social media platforms, such as TikTok.

7.4 Whilst all attendees agreed upon the need to improve complainer anonymity, there was discussion about when the protection should end e.g., whether it should extend beyond the death of the victim. This was considered to be important in the context of protecting other parties, such as dependents. In certain contexts, e.g., in cases involving trafficking or inter-familial abuse, this was felt to be especially important as it gave rise to safeguarding issues/was required to protect vulnerable parties.

7.5 Nonetheless, it was explained that the practice in foreign jurisdictions had identified potential issues with anonymity prevailing beyond natural life. For example, the family of a victim killed in a sexually motivated murder may be restricted in the information that they can share. Families in other jurisdictions require to seek a court order to remove this anonymity and access to the court is not simple. That being said, information becoming available upon death can be hugely traumatising for a victim's family. Nevertheless, some parties felt that anonymity ending on death provided a degree of certainty, particularly as even within families there can be differing views.

7.6 For that reason, **some attendees felt that there should be the opportunity to apply to extend anonymity and/or a grace period following death.** This could, for example, involve an automatic extension of anonymity for one year post-death. This would allow time for the family to seek an order to extend the anonymity, should they wish to do so. However, it is important to recognise that the family may not speak with one voice. A decision would have to be made as to how to deal with conflicting views on part of the family members although it was noted that courts are used to balancing such interests.

7.7 With regards to the trigger point for anonymity, organisations have campaigned for the start point to be as early as possible. As currently drafted, the provisions cover potential disclosures made to the police and those not tied to the criminal process. **Attendees agreed that anonymity should begin before a victim's first appearance in court.** It was suggested that if a person is made aware of a disclosure, they should not publicise it.

7.8 Nonetheless, there are concerns about how the anonymity provisions would be enforced in practice. There is also a need to educate members of the public on anonymity – particularly in terms of what it means in the context of sharing posts on social media. This is made especially challenging when having regard to the volume of content which is available on social media. Some attendees suggested that the aim of the Bill could be to create a culture of compliance rather than attempting to prosecute all those who have breached the provisions. **More work could be done to ensure the provisions in the Bill align with and are embedded within wider reforms regarding online safety and accountability of social media companies.**

Independent Legal Representation

7.9 Attendees supported the proposals for Independent Legal Representation (**"ILR"**) **although they also emphasised the need for much greater detail as to how it will operate in practice**. The Bill lacks details as to who will provide representation, how it will be resourced, what training is required and how it will be funded. Furthermore, **the scope of ILR must extend beyond simply legal representation, and also cover advice and communication about the process generally.** This includes supporting victims and witnesses to provide their best evidence – an issue covered by JUSTICE in its *'Prosecuting Sexual Offences'* report.[18] Furthermore, the way that information about representation is currently provided to victims is inadequate. Directing them to the Law Society website is not good enough and there needs to be serious consideration about how individuals will access ILR. **ILR is only a valuable right if it is easily accessible**.

7.10 There was also some technical discussion regarding the application of ILR. For example, in respect of the new process for section 275 applications, there are concerns that there was not enough time following intimation to access representation. To mitigate this**, it was suggested that provision must be made to allow for an administrative postponement of the preliminary hearing to allow the complainer enough time to secure representation.** Furthermore, some attendees suggested that it was appropriate for there to be judicial oversight of what has been disclosed to the independent legal representative.

7.11 Concerns were raised about the practicalities of securing ILR. Solicitors are not paid well to undertake the work. It has been suggested that it would be more efficient to have an automatic grant of legal aid. **Attendees agreed that the provision of legal aid must be increased.**

[18] JUSTICE, 'Prosecuting Sexual Offences' see note 2 above

Rape Trial Pilot

7.12 The Bill proposes to pilot juryless, single-judge trials for cases concerning rape and attempted rape (the **"Pilot"**). The suggestion for the Pilot arises from the findings of the Lady Dorrian Review. Attendees discussed the motivations behind jury-less rape trials, namely:

a) The need to improve complainer's experience of the system;
b) Conviction rates pose a legitimate cause for further inquiry into whether the procedural format of rape trials is leading to low conviction rates; and
c) Concern about the impact of rape myths on jury decision-making.

7.13 The proposal is the most controversial out of all changes suggested by the Bill, and many attendees were strongly against it on the basis of fairness and human rights grounds. Some attendees raised concerns about it creating a two-tier system within the criminal justice system and felt that it would create confusion. Others felt that it was a "slippery slope" to remove juries in cases where it was felt that the Crown was not achieving enough convictions. This was countered that the purpose of the Pilot was to increase integrity, not to lead to higher conviction rates. However, in response to this point, some questioned whether alternatives had been considered. For example, it was stated that convictions in England and Wales are notably higher in sexual offence cases, but they still have a jury. What is it about their process and procedure that provides better outcomes for complainers? Some suggested that **more work should be done to address court backlogs, bring forward ILR, improve communication and the funding of support services for victims and embed the other improvements discussed at the roundtable first.** They felt that these developments were the most important and may negate the need for the Pilot.

7.14 Some attendees explained that there has been little evaluation of juries beyond the finding that conviction rates are low. On a related point, some attendees explained that it would be a fallacy to believe that removing juries would lead to less bias or even more convictions. They pointed to the fact that the judiciary in Scotland has problems with diversity and removing a jury may lead to other unintended consequences with bias. They were also concerned that a judge may be no less likely to believe rape myths than the jury. A report in England and Wales, titled *'Are Juries Fair',*[19] found little to no evidence that juries were unfair, and suggested that they had an important role to play in ensuring fairness. Nonetheless, it was emphasised that the English and Welsh criminal courts operate differently, and lessons drawn from that work should be contextualised. A number of attendees explained that defence solicitors often accurately predict the outcome of a case or hearing depending on their knowledge of an individual judge. They were concerned that this trend would continue into the Pilot. **The Government must be alive to these concerns. If the Pilot is to go ahead they must put in measures to monitor and evaluate this.**

---

[19] Ministry of Justice, 'Are Juries Fair?' see note 13 above

7.15 It was suggested that neither the Bill nor the associated documents explain whether the accused would be entitled to object to their case being heard without a jury and if consent would be required**. Clarification was needed on whether or not the accused was required to consent.** Attendees considered that the accused would never consent to a trial without a jury. Furthermore, their legal representatives would likely advise that the defendant elects to have a jury trial. This is most likely true no matter what the offence in question was.

7.16 Those who were supportive of the Pilot highlighted that Scotland was not the only jurisdiction considering this change notwithstanding that it was unique within the UK. They explained that there have been many studies on the issue of sexual offence prosecutions over the past 40 years and that there was a need to address these issues. Commentary from some Senators has highlighted that prosecutions are continuing to fail despite reliable and credible evidence. They also emphasised that the expansion of juryless trials beyond the planned Pilot was not inevitable. Instead, the Pilot is an opportunity to learn more. One reason suggested in favour of a Pilot would be to test if the outcome would lead to more timely conclusions and more focused deliberations. There was a suggestion that the process may be shorter as there will be no directions to the jury. At most, there may be discussions about how the judge will direct themselves. However, this was countered by another attendee who suggested that research from abroad had indicated that the lack of a jury did not make a substantive difference to the speed of cases. That being said, they indicated that the research did not draw strong conclusions because the sample size had been small. Nonetheless, other positive aspects of the Pilot achieved more support from attendees. For example, **it was agreed that providing written reasons would make a difference to complainers.** All too often, support organisations were aware of victims seeking court transcripts to try to understand the process because they had "no idea what happened". At the same time, there was a comment that the quality of written reasons might vary significantly – as is the case currently. Again, some attendees suggested that there may be alternative ways of addressing these issues other than removing juries.

7.17 There was a discussion about the different skill set required of legal professionals when arguing a case in front of a judge alone versus a judge and jury in that a judge understands the process unfolding in front of them. Whereas it is important that witness examination and evidence must be presented more clearly and without using legal terminology (it should also be noted that there are benefits to open justice with this approach i.e. the public can better understand what's going on too). Further, in terms of submissions, one would address the judge on the facts and the law but would only address the jury on the facts.

7.18 **Resources required to train or re-train professionals also need to be considered. Attendees also identified the need for further education around rape myths and explained that a wider cultural shift was needed.**

7.19 Whilst attendees continued to disagree on whether the Rape Pilot should go ahead, there was consensus that considerable thought must go into how the Pilot could be evaluated, if it were to go ahead. **Attendees wanted to see more detail on the evaluative criteria that would be applied and what success might look like.** From JUSTICE's perspective, the

creation of any Pilot requires evaluative criteria to be set out in advance. The Government must engage with a wide range of stakeholders to ensure that the evaluative criteria is appropriate and that there is ample opportunity to hear the views of all those involved in the Pilot, including the voice of the accused, the victim, legal representatives, judges and other professionals and, where relevant, other court officials. Attendees discussed the difficulty of assessing the Pilot against a "control". Others emphasised that the need for a robust evaluation of juries before the Pilot could start.

VIII. Conclusions

8.1 There was support for a Victims and Witnesses Commissioner but there are concerns about victims misinterpreting the function of the Commissioner. Attendees also shared concerns about the allocation of funding to support the role. They felt strongly that resources must not be diverted from existing victim's support services.

8.2 There was clear support for a trauma-informed approach to be embedded. However, it is evident that the practice must be meaningful: it must be person-centred and recognise that a one size fits all approach is not necessarily appropriate. Furthermore, whilst embedding a trauma-informed practice in one area is a welcome step forward; the approach needs to be expanded to the justice system as a whole. Finally, the Bill, as currently drafted, fails to take account of the vulnerable accused.

8.3 Discussion was supportive of extending the special measures available to victims and witnesses although this could be extended further through alignment between the processes in the criminal and civil justice systems. To be workable, provision must be made available for training and to ensure sufficient resource is available to facilitate the special measures.

8.4 Opinions on the abolition of the "not proven" verdict were mixed. On one hand, some felt that jurors do not understand the verdict. On the other hand, some felt that it reflected jurors right to be "not sure". They felt that its removal may lead to fewer convictions. In terms of jury size, attendees agreed that the current size of juries in Scotland may pose difficulties for deliberations.

8.5 There was some support for the creation of a sexual offences court, but many attendees were unclear on how the court would be structured and how it would operate in practice. There was agreement that more detail was required to assess whether the court, as currently envisaged, was capable of delivering a trauma-informed approach.

8.6 Lifelong anonymity for victims was agreed unanimously. There were conflicting opinions on the measures that should be put in place to extend anonymity beyond death.

8.7 The provision of independent legal representation was also supported unanimously. It was made clear that there must be appropriate advice and communication, not just representation. Complainers must be directed to legal assistance as soon as possible and made aware of their entitlement to it.

8.8 Finally, the rape trial pilot has proved arguably the most controversial provision in the Bill. Those in support believe it will improve complainers' experiences and mitigate the impact of rape myths. Those against the provision are concerned about fairness, transparency, and diversity of the judiciary. This issue was divisive.