

Briefing for MSPs ahead of Stage 1 Debate on the Victims, Witnesses, and Justice Reform (Scotland) Bill

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Angela Constance S6M-12922: Victims, Witnesses, and Justice Reform (Scotland) Bill

That the Parliament agrees to the general principles of the Victims, Witnesses,
and Justice Reform (Scotland) Bill

Background

Ahead of the Stage 1 Debate on the Victims, Witnesses, and Justice Reform (Scotland) Bill on 23 April 2024, the Commission acknowledges there are a wide range of views with regard to the proposals for reform.

The Commission is aware that some members of the legal profession have raised concerns that some of the proposals – or their cumulative impact – affect the balancing of rights between the complainer and accused too far in favour of the complainer and put at risk the right of the accused to a fair trial.

The Commission recommends that Parliament should seek all opportunities to ensure that the justice system is more responsive to the needs of complainers, especially women and children, while ensuring an accused's right to a fair trial in accordance with Article 6 of the European Convention on Human Rights (ECHR). This may also include consideration of non-legislative remedies.

Ahead of the Scottish Parliament's Stage 1 debate, in order to assist MSPs, this briefing sets out:

- The balance of rights of complainers versus accused
- The right to a fair trial under Article 6 ECHR
- Human rights considerations on four areas of the Bill where public debate has focused

About the Scottish Human Rights Commission

The Scottish Human Rights Commission was established by the Scottish Commission for Human Rights Act 2006, and formed in 2008. The Commission is the national human rights institution for Scotland and is independent of the Scottish Government and Parliament in the exercise of its functions. The Commission has a general duty to promote human rights and a series of specific powers to protect human rights for everyone in Scotland.

Balancing rights of complainer and accused

Human rights apply equally to both complainer and accused in the criminal justice system. However, in some instances, the rights-based interests of complainers conflict with those of the accused. In those instances, the rights of complainers need to be balanced and reconciled with the accused's right to a fair trial.

The rights of the accused to a fair trial are consistent in all trials heard through the Scottish courts system, regardless of the nature of the charge.

Relevant rights of complainers include the right not to be subjected to torture, inhuman and degrading treatment or punishment (Article 3 ECHR), the right to respect for private life (Article 8 ECHR), and the right to be free from discrimination (Article 14 ECHR). Both the United Nations and the Council of Europe have implemented treaties, ratified by the UK, which agree that gender-based violence, and sexual violence in particular, is recognised as a form of discrimination, due to its disproportionate impact on women.¹

The Right to a Fair Trial

Everyone charged with a criminal offence has the right to a fair trial under Article 6 ECHR. Article 6 sets out basic standards that require to be satisfied before a fair trial can take place.

Article 6 ECHR contains two sets of obligations:

- First, Article 6(1) ECHR provides a general guarantee, which applies to both criminal and civil proceedings, to receive a fair and public hearing within a

¹ For further information please see [Istanbul Convention Report \(scottishhumanrights.com\)](https://www.scottishhumanrights.com/ibcr-reports/istanbul-convention-report) and [ICCPR Parallel Report UK Examination \(scottishhumanrights.com\)](https://www.scottishhumanrights.com/ibcr-reports/ccpr-parallel-report-uk-examination)

reasonable time by an independent and impartial tribunal which gives judgements in public.

- Second, Articles 6(2) and (3) ECHR contain a number of specific guarantees which relate to criminal proceedings only, including for instance the right to be presumed innocent until found guilty or the right to examine, or have examined, witnesses and to obtain their attendance and examination.

In deciding whether there has been a violation of Article 6, the European Court of Human Rights (ECtHR) considers whether the proceedings as a whole were fair. The regulation of a national criminal justice system is generally within a State's margin of appreciation, meaning it is left to the State to determine the best manner of arranging a system that complies with its fundamental human rights obligations.

Part 4 - Jury size and quorum

The Criminal Justice Committee's report on the Victims, Witnesses, and Justice Reform (Scotland) Bill at Stage 1 notes support for the abolition of the not proven verdict, but does not support the proposed changes to jury size and majority, as it has not heard compelling evidence to support this reform.

Human rights law does not provide guidance on national criminal justice systems, or specific elements thereof, as long as criminal proceedings as a whole are fair and conducted in accordance with Article 6 ECHR. In this context, it is worth noting that Article 6 does not confer an individual right to trial by jury.

Part 5 - Sexual Offences Court

The Criminal Justice Committee's report at Stage 1 notes that more needs to be done to improve the experience of victims and witnesses in relation to sexual offences, however, Committee Members are divided on the proposal for a new, standalone Sexual Offences Court.

Human rights law does not provide any guidance on, nor obligation to establish, a specialist court to try sexual offences. Under Article 6, a tribunal must be established by law, be independent and impartial. The creation of a new specialist court is, in theory, compatible with Article 6 ECHR, provided the new Sexual Offences Court follows rules and procedures which ensure an accused's right to a fair trial.

The Commission is aware of concerns around the appointment and removal of the judiciary of a new Sexual Offences Court. The Bill would allow the Lord Justice General to remove the president, vice president or any ordinary judge of the Sexual Offences Court from office 'for any or no reason and without any prior procedure',

though not from the office which that judge held prior to appointment to the Sexual Offences Court.

The right to a fair trial in Article 6 requires that a case be heard by an independent and impartial tribunal established by law. Judges' security of tenure during their term of office is generally considered a corollary of their independence.² When determining whether a tribunal can be considered to be 'independent', an appearance of independence may also be of importance. To this end, a lack of security of tenure for judges appointed to the new Sexual Offences Court, though not from their previously held office, may not inspire confidence in the independence of the new Court. MSPs should consider this as part of their scrutiny of this element of the Bill.

Part 6 - Pilot of single judge rape trials

The Criminal Justice Committee's report at Stage 1 is divided on the proposal of single judge rape trials, however, all Committee members welcome the commitment to bring forward amendments in Stage 2 to provide more information on the pilot on the face of the Bill, including both the criteria for assessing the pilot and the criteria for cases to be included.

As a matter of human rights law, all accused persons in Scotland have the right to a fair trial, but that does not mean the right to a trial by jury.³ Notwithstanding this, the use of juries in solemn cases is an important component of Scotland's criminal justice system.

The Commission is aware of concerns around the establishment of a pilot via secondary legislation rather than by primary legislation. Article 6 ECHR requires a tribunal to always be 'established by law', but human rights law does not define the meaning of law. In this context it is worth bearing in mind, however, that the objective of the term 'established by law' "is to ensure that the judicial organisation in a democratic society does not depend on the discretion of the executive, but that it is regulated by law emanating from Parliament"⁴.

² *Broda and Brojara v Poland* App Nos.26691/18 and 27367/18 (ECtHR, Grand Chamber decision of 29 September 2021).

³ *Twomey, Cameron and Guthrie v The United Kingdom* App Nos. 67318/09 and 22226/12 (ECtHR, Chamber decision of 28 May 2013) paras 27-30.

⁴ *Guðmundur Andri Ástráðsson v Iceland* App No 26374/18 (ECtHR, Grand Chamber decision of 1 December 2020) para 214.

Part 1 - Creation of a Victims and Witnesses Commissioner

The Commission notes that section 1 of the Bill proposes the creation of an independent Victims and Witnesses Commissioner. This reflects the policy intent of this Bill – to reflect the experiences of victims and witnesses and improve the circumstances around their participation in the justice process with dignity. We note that the scope of the Victims and Witnesses Commissioner would be in respect of all victims and witnesses with experience of the criminal justice system, not just sexual offences and/or rape.

The Criminal Justice Committee's report at Stage 1 notes that the Committee remains to be convinced that a strong case has been made for the establishment of a Victims and Witnesses Commissioner. The Committee suggests that better outcomes may be achieved by focusing spending in areas which have a more direct and immediate benefit for victims and witnesses.

It is for Parliament to consider the merits of a proposal to establish a new public body in order to champion the rights of victims and witnesses in Scotland. MSPs will be aware of the current Finance and Public Administration Committee Inquiry into the commissioner landscape.

As outlined in the Commission's June 2023 paper:

[At a crossroads: What next for human rights protection in scotland.pdf\(scottishhumanrights.com\)](#) we encourage MSPs to consider fully the issues which a new Victims and Witnesses Commissioner would address, the functions required to do so, and how this would interact with the existing public body landscape.

For more information on any element of this briefing, please contact:

Elena Jenny – Legal Fellow
elena.jenny@scottishhumanrights.com