OFFICIAL REPORT
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Criminal Justice Committee

Wednesday 27 September 2023

Session 6

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CRIMINAL JUSTICE COMMITTEE
24th Meeting 2023, Session 6

CONVENER

*Audrey Nicoll (Aberdeen South and North Kincardine) (SNP)

DEPUTY CONVENER

*Russell Findlay (West Scotland) (Con)

COMMITTEE MEMBERS

*Katy Clark (West Scotland) (Lab)
*Sharon Dowey (South Scotland) (Con)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Rona Mackay (Strathkelvin and Bearsden) (SNP)
Pauline McNeill (Glasgow) (Lab)
*John Swinney (Perthshire North) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Angela Constance (Cabinet Secretary for Justice and Home Affairs)
Anna Donald (Scottish Government)
Lisa McCloy (Scottish Government)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Criminal Justice Committee

Wednesday 27 September 2023

[The Convener opened the meeting at 10:00]

Victims, Witnesses, and Justice Reform (Scotland) Bill: Stage 1

The Convener (Audrey Nicoll): A very good morning, and welcome to the 24th meeting in 2023 of the Criminal Justice Committee. We have apologies from Pauline McNeill.

Our first item of business is our first evidence session on the Victims, Witnesses, and Justice Reform (Scotland) Bill. We are joined by the Cabinet Secretary for Justice and Home Affairs and her Scottish Government officials, whom I welcome. Anna Donald is deputy director of the criminal justice division; Lisa McCloy is head of the criminal justice reform unit; and Nicola Guild is a solicitor in the legal directorate.

I refer members to papers 1 and 2. I intend to allow up to two hours for this session. Before we get under way, I want to say a few words about our forthcoming scrutiny of the bill.

As a committee, we are very aware that the bill is a major piece of legislation that contains a number of significant provisions. We are aware of our responsibility to take the necessary time to scrutinise it properly in a balanced manner and to hear a range of views on it. Furthermore, we want to ensure that all aspects of the bill get proper scrutiny, so we have decided to take a phased approach to our scrutiny in order to protect time for each part of the bill. Further details on that can be found on the Scottish Parliament website.

Today's session with the cabinet secretary is a chance for us to set the scene on the bill and to hear why the Scottish Government has brought forward the proposals. In future weeks, we will move on to taking detailed evidence on the bill from a range of interested parties.

I acknowledge all the individuals and organisations that took the time to respond to our call for written views. Those responses are now published and available online.

I invite the cabinet secretary to make a short opening statement. We will then move to questions.

The Cabinet Secretary for Justice and Home Affairs (Angela Constance): Thank you very much, convener. Good morning to colleagues.

I very much appreciate the opportunity to appear before the committee at the start of its deliberations on the Victims, Witnesses, and Justice Reform (Scotland) Bill, which is landmark legislation. The bill puts victims and witnesses of crime at the heart of our justice system. It contains an ambitious package of reforms to modernise processes and improve the experience of victims and witnesses, particularly in relation to sexual offences. It does so while continuing to safeguard the operation of key principles of the justice system and protecting the rights of the accused.

The bill draws on a wide body of evidence. It has been informed by the work of the victims task force and the independent cross-sector review of the management of sexual offence cases by Lady Dorrian, who is Scotland's second-highest judge. It is informed by the groundbreaking 2019 Scottish jury research study, which was led by leading academics, and it follows two public consultations that demonstrated broad support for the measures in the bill.

Crucially, the bill has been shaped by survivors and victims and their families. They have told us that they often feel unheard and cannot access information, that they do not feel safe, and that they often do not experience compassion.

The bill therefore represents a transformative approach to build a more modern, responsive, sensitive and person-centred justice system that will ensure that victims of crime are treated with compassion and that their voice is heard. Trauma-informed practice is key to that. That means ensuring that those who work in our justice system recognise the impact of trauma on those whom they deal with and, where possible, adapt processes to reduce the risk of retraumatisation.

The justice system has been widely engaged in that work, as is evidenced by the launch of the trauma-informed knowledge and skills framework earlier this year. The bill provides a legislative underpinning for the cultural and procedural change that is necessary to embed the practice, and I would like to briefly take you through the rest of the bill's measures.

There is clear and compelling evidence that the not proven verdict is not well understood, and that it can result in stigma for the acquitted and trauma for complainers. The bill will abolish the verdict to improve the fairness, clarity and transparency of decision making in criminal cases. We have carefully consulted on the other distinct features of our jury system and have concluded that in a reformed system with only two verdicts a requirement of a two-thirds majority for convictions is appropriate. To enhance the quality of deliberation, the bill also seeks to reduce the jury size.

The bill increases protections for vulnerable parties and witnesses in civil cases by extending the use of special measures and by protecting those who have suffered abuse from being cross-examined by their abuser. It will create a commissioner who will provide an independent voice for victims and witnesses, too.

The bill also aims to ensure that justice meets the needs of victims and survivors of sexual offences—the majority of whom are women and girls—by addressing, in a practical way, the long-standing concerns about how the system operates for sexual offending.

As the committee knows, the challenges that society faces to eradicate violence against women and girls are urgent and complex. Part of the solution is in ensuring that we have a justice system that commands confidence. That means a system that encourages victims to come forward, supports them to give their best evidence and holds those who commit such offences to account. The bill provides an opportunity to put in place significant and meaningful reform.

The creation of an automatic lifelong right to anonymity will protect the dignity and privacy of victims of sexual offences, and the right to publicly funded independent legal representation strengthens the rights of complainers in an especially intrusive aspect of criminal procedure. The sexual offences court will improve the experience of complainers through more use of pre-recorded evidence, improved judicial case management and mandatory trauma-informed training, and the new court will also help to reduce delays in cases coming to trial. The time-limited pilot of single judge rape trials will provide evidence and inform debate on how to deliver meaningful access to justice for complainers in cases of rape.

I want to ensure that victims and witnesses are at the heart of our justice system, and I hope that, in the debate and discussion on the bill, we bear that in mind, and that the discussion is measured and constructive. The undertaking that I give to committee members and others is that, in my contributions, I will do everything in my power to ensure that we have a debate that is of the very highest standard. As always, I remain committed to working with members, partners, stakeholders and—importantly—people with lived experience, to ensure that the legislation achieves its aims.

I look forward to the committee's scrutiny of the bill. Thank you.

The Convener: That was a helpful overview. I will now open up to questions. I ask members if, for the first part of our session, they could focus their questions on part 4 of the bill, which relates to the removal of the not proven verdict and a change to jury size.

I will open by asking a question on conviction rates. The cabinet secretary set out a pretty wide-ranging rationale for the provisions around removing the not proven verdict and changing jury sizes. Some of that relates to the fact that the public do not really understand those aspects of trials, and some of it is that they potentially retraumatise individuals. Can you give us some more detail of the thinking on how the changes might improve or change conviction rates in Scotland?

Angela Constance: It is important to stress that the jury reforms are not about increasing or decreasing conviction rates; they are about the integrity and fairness of our system, and transparency in decision making.

In my opening remarks, I intimated that there are challenges in people having confidence in a verdict that cannot be explained and which is open to interpretation. The independent Scottish jury research demonstrated that the not proven verdict was not understood by jurors and that understanding of it varied. It was sometimes seen as a compromise verdict. It was used if people believed that someone was guilty, but there was not enough evidence. The evidence also showed that people believed that the verdict came with associated stigma.

If we are moving from a three-verdict system to a two-verdict system, we have to make associated reforms to ensure that we keep a balanced system. Removing the not proven verdict is, of course, a historic reform, but we have to consider our verdict system in the round by considering the number of verdicts, moving from a simple to a qualifying majority and the size of juries. On all three counts, our system is unique—there is no other comparable system. However, the overriding message that I want to convey is that this is about the transparency of the decision-making process, so that we can have as much confidence as possible in the administration of justice and that our convictions and verdicts command confidence. The reforms are in no way a blunt tool in any shape or form to increase or decrease convictions.

The Convener: You mentioned that there is no other comparable system in which there are three verdicts. What happens elsewhere? Is a two-verdict model a common option in international models of justice? What happens in other jurisdictions, particularly in Europe? I am interested in that.

Angela Constance: Scotland is an outlier in having juries with 15 jurors and three verdicts. We are all rightly proud of our unique Scottish justice system, but it is important to stress that our

system has always evolved and learned from others over the centuries and that no part of our justice system is exempt from examination or, indeed, change.

The Convener: Thank you. I will open up the discussion to members.

Russell Findlay (West Scotland) (Con): Convener, is it okay to open with a more general question about the bill followed by a specific question about part 4?

The Convener: Yes.

Russell Findlay: Thank you.

Cabinet secretary, when was the bill first named the Victims, Witnesses, and Justice Reform (Scotland) Bill? Was there an original name for it?

Angela Constance: I think that that predates my time as Cabinet Secretary for Justice and Home Affairs. I do not know the answer to that question, and I do not know whether the officials can say whether there was another working title. In general, it is not uncommon for proposed legislation that is being worked on internally to have a holding name, which is changed. However, I do not know whether the bill had a different name.

Anna Donald (Scottish Government): I think that there was a placeholder name and that it was the criminal justice reform bill. However, obviously, that evolved to the current title when the bill was introduced to Parliament.

10:15

Russell Findlay: That makes sense. I asked the question because some victims groups have said that the name suggested that victims were almost an add-on to the bill's content, which is perhaps consistent with what has been said.

I move to my specific questions on part 4. Is removing the not proven verdict and reducing jury sizes expected to have any impact on conviction rates? What work has been done to assess that?

Angela Constance: On the more general point, I contend that victims' interests are woven throughout the bill. At its core, every part of the bill is about improving victims' experience when they are in contact with the criminal justice system, because we recognise that people often become involved as complainers at a time of trauma. The bill makes a number of bold but balanced reforms to reflect victims' experience.

Mr Findlay asked about part 4. I will not reiterate what I said in response to the convener; the jury reforms are not about increasing or decreasing the number of convictions; they are about achieving transparency and commanding the fullest confidence in the administration of justice and all aspects of our justice system.

The substantial independent Scottish jury research, which took place over two years and involved 900 mock jurors, isolated factors so that the researchers could consider our jury system's unique aspects. The research looked at issues of size and majority and at the impact of moving from three to two verdicts. Unlike many other studies, that study was able to examine the detail of the mock jurors' deliberations.

It was established that moving from three to two verdicts in isolation could increase the number of convictions so, to ensure the appropriate safeguards and balances in our system, the proposal is to move from a simple majority to a qualified majority, which consultation responses supported.

Russell Findlay: To understand the issue, I will put it in simple layman's terms. Are you saying that the Scottish Government's motivation was not to improve or change conviction rates, but that the study suggested that that was a likely consequence?

Angela Constance: The study suggested that, if one part of our verdict system was changed in isolation—if we moved from three to two verdicts—that would increase the prospect of convictions. The study demonstrated that it was imperative to reform the three aspects of our jury system in tandem, because they are all interrelated in one system.

Russell Findlay: Did the research show that, once everything was taken into consideration, there would be no material change to conviction rates?

Angela Constance: The research showed that a balanced approach is needed. The purpose of the reforms is to maintain confidence in the justice system by improving the experience for complainers and ensuring that the system is transparent and easily understood by everybody, because we all have a shared interest in it. We must also ensure the system's integrity and take a balanced approach that protects the rights of the accused.

Russell Findlay: I am still not entirely clear about whether the proposed changes are likely to change conviction rates.

Angela Constance: I have said repeatedly that the reforms to the jury system are not designed to either increase or decrease the number of convictions.

Russell Findlay: I am not saying that they are designed to do that—it is not about the intent; it is about whether the research shows that that is a likely consequence. That is not clear.

Angela Constance: I will ask officials to explain the research to Mr Findlay in layman's terms.

Lisa McCloy (Scottish Government): The Scottish jury research that the cabinet secretary has already explained clearly found that the structure and framework of the verdict and jury system—the number of verdicts, number of jurors and the majority required—influences outcomes. The research demonstrated that we cannot consider those elements in isolation—they have to be considered holistically, because a change to the structure in one area might have an impact across the board. The assessment that we made following the findings of that research, as well as two other independent studies that are referenced in the policy memorandum, was that, if we remove one of the verdicts in finely balanced trials, it would increase the likelihood of conviction. Considering that evidence, and taking the framework in the round, it is our assessment that the other elements have to be adjusted.

The Scottish mock jury research also provided very robust evidence on the quality of deliberation for juries in relation to jury size. It looked at 15-member juries and 12-member juries. Our assessment was that there was compelling evidence that a smaller jury number—as can be found in the many other jurisdictions that have juries of 12 members—would lead to more effective deliberation, with fewer members of the jury not participating and fewer dominant jurors. Looking at reducing the jury to 12 and having two available verdicts, the simple majority—as we have now—would be seven members out of 12, but we were not satisfied that that maintained the balance and integrity that the minister has referred to, so we consider that a qualified majority of eight out of 12, rather than seven out of 12, is appropriate.

That still recognises the differences in the Scottish legal system compared to the many other jurisdictions that require unanimity or close to unanimity. Given the other distinct features of the Scottish system, the assessment is that the package of proposed reforms maintains the integrity of the system.

Angela Constance: I will add to that briefly. I hope that this will get us to the nub of Mr Findlay's question. In the current system, there is no data on what individual jury members opt for as a result of their decision making and there is no other system that has moved from three verdicts to two verdicts, because no other system has three verdicts. That means that some of the hypotheses that Mr Findlay has—understandably—questioned have no data, because we do not have a crystal ball. However, it is the overall balance and integrity of the system that are crucial.

Russell Findlay: So, to recap, is it reasonable to say that there is no intent to change conviction rates by changing the legislation?

Angela Constance: Yes, that is a reasonable summary.

Russell Findlay: Thank you very much.

Sharon Dowey (South Scotland) (Con): Ms McCloy has already answered much of my question on the reasoning behind changing the jury size. We are going from 15 to 12 jurors and when we had 15 jurors, if three stood down or were sick, we could still run the trial with 12. Now, we are going to have 12 jurors, but if three people come off the jury, we can still run with nine members. I was wondering about the reasoning behind that, but Ms McCloy answered that.

The other part of my question was about the pilot of having one judge as the jury for serious sexual offences. How would that work?

The Convener: Could I ask you to pause that question? We will come on to that part of the bill.

Angela Constance: It is important to reflect a little bit on the history of jury sizes, which have varied over the years. For example, during the second world war, the jury size was much lower than 15 members. The size of the jury has changed at different points in history.

The core of the evidence is that, if we reduce the size of the jury from 15 members to 12, we have higher levels of participation, lower levels of jurors not participating and less domination by some jurors. In essence, reducing the size is about responding to the evidence that says that it improves the process of deliberation. It is no more complicated than that.

I will ask Lisa McCloy to respond to Ms Dowey's question about the qualified majority, which is sliding and exists in most circumstances when jurors have to be excused part way through the process. However, there are one or two exceptions.

Lisa McCloy: That is correct. At the moment, there are 15 members of the jury but, obviously, some circumstances arise in which a jury member, after being empanelled and after the trial starts, has to drop out, such as if they become sick. The framework allows those trials to continue as long as there is a minimum of 12 jurors who can continue to sit on and hear the case. That is important for avoiding unnecessary rerunning of trials and the unnecessary trauma that that would cause to everybody involved—the accused, victims and witnesses. It allows for the fairness of the procedure to be protected but keeps the administration of justice going.

The approach that we have taken in the bill reflects the fact that there will be similar circumstances in which trials start and the whole number of jurors is not able to continue. It also allows for up to three jurors to fall away and the trial to continue. It builds into the process a bit of judicial oversight to ensure that that is still in the interests of justice.

In our current system, when there are fewer than 15 jurors, you still need an absolute number of eight to convict. If, for example, the jury size were to fall to 12, you would need eight out of the 12 remaining jurors to convict. You proportionally increase the majority required as the jury size goes down.

The bill takes a slightly different approach and maintains the proportion required rather than the absolute number. It maintains the minimum of two thirds required when there are 11 or 10 jurors. However, if a trial got to nine jurors, that proportion would take us to a majority of six out of nine and we felt that, when a smaller number of jurors is reaching a verdict, stronger safeguards are required, so seven out of nine are required in those circumstances.

The bill broadly reflects current practice, which allows jury numbers to fall after the trial has started, but changes the approach to maintain the principle of a qualified majority rather than sticking to an absolute number as we have at the moment.

John Swinney (Perthshire North) (SNP): I remind the committee and people observing that I sat in Cabinet when the bill was constructed. That is consistent with what I said to the committee in my declaration of interests a couple of weeks ago. However, I will not return to that every week that we discuss the bill.

There will be cases in which jurors are judged not to be appropriate to sit on particular trials, or become ill and have to stand down. In reducing the jury size, has consideration been given to the potential unintended consequence of the criminal justice system more regularly getting to a point at which a trial cannot proceed because jury numbers have become too low?

Despite the bill's good intentions to strengthen the position of victims and reduce trauma, victims might inadvertently be put at risk of increased trauma, because reducing the number of jurors from 15 to 12 might increase the risk that the absence or loss of jurors will impact on the jury system's effectiveness.

10:30

Angela Constance: Mr Swinney poses a logical question, which I will ask officials to comment on, too. I am not aware that the research threw up any such unintended consequences. I am also not aware, although I stand to be corrected, that any jurisdiction with a jury size of 12—we should bear it in mind that Scotland's jury size of 15 is unusual—has significant issues of trials being abandoned because of problems with juries continuing. We will seek to double check that, but I am not aware of concerns.

Lisa McCloy: One reason why we are maintaining the margin of three—that is the number of jurors who can currently fall while a trial continues—is to ensure that nothing that is unintended occurs. We spoke to partners about the issue. Data has not been published on it, but it was thought to be rare for a trial to fall because more than three people could not continue to serve. However, that depends on facts and circumstances—I am sure that the issue was very live during the pandemic, for example.

John Swinney: I asked the question because the degree of risk increases depending on whether we are talking about three out of 15 or three out of 12; the risk becomes greater. Have you considered the extent to which the turnover of jurors might be a factor in influencing people's confidence that trials will proceed?

Angela Constance: The issue has not turned up in deliberations so far. Mr Swinney is aware that the reforms are built on substantial independent research, but further, intense cross-sector work has also been done to galvanise and build on the experiences of those who work in operational aspects of our justice system.

Katy Clark (West Scotland) (Lab): To be clear, I think that you are saying that you have not looked at the number of convictions that are currently passed by simple majority, rather than the new two-thirds majority. Have you not looked at data from real cases or at the numbers that are required for convictions in real cases or mock cases?

Angela Constance: The jury research held some factors still so that it could explore the impact of different majorities, different jury sizes and moving from three to two verdicts—for example, it looked at mock juries in the context of three verdicts or two verdicts.

Katy Clark: I have not seen any such detail and do not know about it. We have not had a lot of detail, but there might be more detail that is not apparent. If we make getting a conviction more difficult, which must be the case if the proportion of jurors who are required to secure a conviction is increased, that must lead to fewer convictions, unless there is evidence to rebut that. Without looking at the question in huge detail, that must surely be our presumption.

Angela Constance: I will flag up a point that might be useful. The policy memorandum speaks in detail about the jury research and gives a reference to it. We have published information today or yesterday about rape myths, which also talks about the research. I assure the committee that information is publicly available so that people can peruse the further detail.

The point that I was making in reference to the research is that we do not want to change one part of the jury system in isolation because that may well have unintended consequences. That is why we are looking at this as a package. We are following the evidence that was illuminated by the research. I hope that I understand Ms Clark correctly. The reforms will apply to all cases and throughout the system, so we must ensure that there is balance, fairness and integrity and that there are none of the unintended consequences that might be caused by changing one part without changing the other constituent parts.

Katy Clark: Do you accept that increasing the proportion of the jury required to secure a conviction will make it more difficult to get convictions and that we would therefore expect to see fewer convictions?

Angela Constance: I think that you have skipped over the evidence that, if we moved from three verdicts to two, mock juries were more likely to convict. Therefore, we would have to adapt and move from a simple to a qualified majority, in order to ensure that there is balance in the verdict system. That is a cornerstone of the system.

The reforms are designed around the experiential aspects of trials and to address issues of transparency and clarity; they are not designed to increase or decrease the number of convictions. The change in the majority is there to balance the change in the number of verdicts.

Katy Clark: Are you saying that you believe that changing the majority in isolation would reduce conviction rates, but that other aspects of the changes would increase conviction rates, therefore making the two things balance each other out?

Angela Constance: That is what the research tells us.

Fulton MacGregor (Coatbridge and Chryston) (SNP): I have a brief question because we have covered a lot already. It follows on from Katy Clark's line of questioning. Priority may be the wrong word, but I am interested in understanding whether the Government has a priority within the reforms and where any lines in the sand might be. If this committee, or the Parliament as a whole, decided to amend the bill—for example to retain the not proven verdict or to require only a simple majority for a guilty verdict—where would the Government stand on that? Does part 4 of the bill have to come as a whole package?

Angela Constance: The Government's position, based on the research, is that we should look at that as a whole package. The consultation responses from all sectors, including those from people working in the legal sector and those from victims or their families, showed strong support for the idea that changing from a three-verdict to a two-verdict system meant that there was also a need to change the majority from a simple to a qualified one.

I can give an example of the importance of that. The Law Society of Scotland is not in favour of abolishing the not proven verdict but said in its evidence that, if we did so, we would really need to look at changing the majority. As I hope that I intimated to Ms Clark, there is an important relationship between moving from three verdicts to two and moving from a simple to a qualified majority.

Rona Mackay (Strathkelvin and Bearsden) (SNP): The not proven verdict is used in some sheriff trials in justice of the peace cases, where there is no jury. Given that the removal of the not proven verdict will apply in those instances, is it the Government's view that the practice of JP courts will need some reform?

Angela Constance: No, we do not think so. At summary level, cases are presided over by a single judge—I am sure that we will get on to that later—so there is no jury. You are quite correct that, currently, sheriffs and justices of the peace can use the not proven verdict, which is given in about 1 per cent of those cases. The not proven verdict is given in 5 per cent of sexual offences cases and, for jury trials, 28 per cent of people who are proceeded against in rape or attempted rape trials will get a not proven verdict.

Rona Mackay: From everything that we have heard, I am getting that the approach is about fairness and justice and bringing us into line with other jurisdictions. I am perfectly content with that approach.

The Convener: I will move on to questions about parts 5 and 6 of the bill. As a reminder, part 5 relates to the establishment of a new sexual offences court and part 6 has three main provisions: first, the automatic statutory right of anonymity for victims of certain offences; secondly, a right to independent legal representation for complainers in sexual offences trials; and, thirdly, to enable a time-limited pilot of single judge trials with no jury for rape and attempted rape cases.

I will pick up on the final provision on single judge trials and the time-limited pilot that is being

proposed. In response to Lady Dorrian's recommendation, were alternative options to that of a single judge trial pilot considered?

Angela Constance: There was some consideration of other alternatives. Ultimately, although the Lady Dorrian review encompassed a range of opinions, it settled on a pilot for single judge trials in relation to rape and attempted rape cases on the basis that those trials are not novel in Scotland. The majority of criminal cases—I think 84 per cent—are presided over by a single judge, although admittedly those are less serious cases, which are heard in lower courts. The working group that followed Lady Dorrian's extensive review gave some consideration to whether we could have a shadow verdict system, which would involve having a shadow judge alongside a judge and jury. However, there were considerable ethical issues in and around that, so the approach was not pursued.

Some consideration was given to having more than one judge and having perhaps a panel of judges. However, a practical consideration is that we do not have an endless supply of judges and in a situation where a case was appealed, for example, we would need an even larger number of judges to supply the panel.

There are other models in other jurisdictions. Other jurisdictions have moved away from jury trials for particular cases. Parts of Australia and New Zealand and parts of America, France and Germany have a judge and a panel of lay people, and, if I am correct in my recall, the Netherlands does not use juries. There are different models, but ultimately the recommendation was to consider a single judge pilot on the basis that that model would not be novel in Scotland.

10:45

The Convener: That was helpful. I have a follow-up question on the aspirations around the experience for individuals who are going through a trial that relates to rape or sexual offences. Would it be possible to achieve what we are aiming to do and improve that experience using a non-legislative option, rather than a legislative one? That might be done by improving trauma-informed training of staff or by expanding the use of evidence by commission so that we can improve and refine what already exists.

Angela Constance: I assume that your question is broadly focused on the bill as opposed to the pilot. Over the years, the committee will have heard that legislation on its own can never be the single bullet. It was not long ago that the Parliament debated the work that is being done around the trauma-informed skills framework for everybody who works in justice services.

However, at the core of Lady Dorrian's deliberations and recommendations is the need to make seismic, structural, statutory changes, and those can be seen in the statutory changes in the bill, whether that is the sexual offences court, the automatic right to independent legal representation or the automatic right to anonymity.

We can graft on changes, but the process becomes quite iterative and slow, and there is a degree of frustration in the legal sector and in organisations that represent victims that we have been in the same territory for about 40 years on some of the issues that we are discussing in relation to the experience of complainers and the prevalence and power of rape myths. There have been numerous reports pointing to the substantive problems; now we need to move forward and make substantive changes.

Russell Findlay: My first question is on part 5 of the bill. The policy memorandum talks about staff training, improving case management, improving efficiency and reducing delays—all of which are noble aims—but victims might ask why doing any of that needs legislation. There is a risk that the bill might come across as a very expensive exercise in rebranding the courts. Could you explain that?

Angela Constance: Although, by and large, we do not need legislation to train a workforce, we do need it to helpfully define what we mean by trauma-informed practice and we need legislation that puts duties on courts, the Crown and the police to ensure that trauma-informed practice is woven into their standards of service.

We also need legislation in order to establish a sexual offences court and to establish the rights of complainers when there are applications under section 275 of the Criminal Procedure (Scotland) Act 1995, to ensure that complainers can access their right to be heard and to legal representation.

I suppose that what I am trying to indicate, Mr Findlay, is that there are broad platforms of reform in the bill that need legislation to drive them forward. I would expect the policy memorandum to speak about the more cultural aspects that underpin legislative change and that, of course, involves training staff.

Russell Findlay: Some of what you refer to is in part 6—for example, independent legal representation for victims when section 275 applications are made.

You talk about the need to define "trauma-informed practice", but the legislation does not do that; it simply says that the Lord President will decide at a later date what those arrangements will be. Why can that not just be done by the Lord President or by the courts already, without

legislation, since the legislation does not specify what it is?

Angela Constance: I contend that the legislation does have a degree of specificity around trauma-informed practice. We need to recognise the context in which it will be applied. We often discuss in committee debates how much detail the Parliament wants to put in the bill and how much scope we want to leave for those who have to implement the bill in practice.

Russell Findlay: Thank you. The next question is on part 6. There is a view that a jury comprising 15 random members of the public—or 12, if the bill goes through—is better at reaching a decision than a Scottish judge alone. Judges are predominantly late-middle-aged white males, who went the same handful of universities, were often privately educated and often live in the same affluent parts of Scotland, usually Edinburgh. It is not me saying that; that is the view of the judges. Do you agree that they are correct in their interpretation—that they would rather have jurors than rely on one of themselves?

Angela Constance: The question about diversity is a fair one. In the interests of balance and fairness, the evidence that the senators of the College of Justice submitted to the committee unsurprisingly includes more than one view. We have known for some time that there is not one view on some of the reforms that have been proposed, particularly in terms of the pilot. For the record, it is important to acknowledge that the submission from the senators narrates that there is support among some senators for that change.

However, the point about diversity is important. The jury research that I referred to earlier demonstrated that the diversity of juries did not overcome the prevalence and power of rape myths. Although Mr Findlay is, of course, right to raise issues about the diversity of the judiciary, nonetheless, the judiciary is a group of professional decision makers who have experience and training, and if they are part of the sexual offences court they will, like everybody else, have to be trained in trauma-informed practice. It is a more easily identifiable group to support with other measures including education and training, which is probably unachievable if you are randomly selecting 12 or 15 people.

Russell Findlay: I have a final quick question. Some lawyers have already said that they will boycott any juryless trial. What can you do to persuade them, or will you hope for the best once the bill is enacted?

Angela Constance: It is of no surprise to me that there is a range of views. I have spent the summer engaging with different bar associations and, in particular, criminal defence lawyers. I hope that the committee recognises that I am not a politician who wants only to meet or engage with people who agree with me. From my perspective, that engagement was very helpful in understanding better the nature of their concerns about the pilot and the other stresses and strains that they are currently experiencing in their day-to-day work.

I emphasise that no part of our system is exempt from change, but I recognise that change can be difficult and challenging. Members of the legal profession are entitled to their view—they will be part of that debate—but we have at least a year between the start of stage 1 and stage 3, when we will all vote on the final bill. We need to give one another a bit of time and space, have the debate and try to work together in the interests of our shared common goal. We all want guilty people to be convicted and people who are not guilty to walk free, and we all want complainers' experience of our court system to be better.

I would describe the journey that we are on as more of a marathon than a sprint.

Russell Findlay: Great; thank you.

The Convener: That is a good point to end on. I will bring in Sharon Dowey and then Rona Mackay

Sharon Dowey: I will follow on from that line on questioning. We have a High Court and a sheriff court, so why do we need a new sexual offences court? The convener put it quite well when she asked whether we could improve and refine what already exists. How much will it cost to set up the new sexual offences court? Would that money not be better used for training and for victim support groups so that we can use the system that we already have?

Angela Constance: That is another fair question, which was, to some extent, discussed and debated as we introduced the bill.

It comes back to the recommendation from Lady Dorrian's review. Over the decades, we have made incremental changes and improvements. However, if we want to embed specialism and revamp policies, processes and practices that both are fair to the accused and, in the interests of fairness, support complainers to give their very best evidence, we need to do something different.

The concern was that, if we just grafted on to existing structures, we would not see the fundamental change that is needed in how we deal with sexual offences cases, which are growing in number. Over the past decade or so, they have increased by 275 per cent. At the start of 2010-11, there would be around 80 cases; we are now looking at 300 cases.

We have specialism in other parts of the system, including in the police, who investigate

those complex and highly sensitive cases. We have prosecutors who specialise in leading the prosecution of those cases. My question is why we would not want our court system to have a court that specialised in those highly emotive, difficult and complex cases, which have severe and enduring consequences for victims. For me, that very much fits with the whole-systems approach to improving the end-to-end journey for victims who are pursuing justice.

Sharon Dowey: I still think that the money could be better used to upskill the existing staff. However, if the bill were to be passed, what would the timescale be to get the new court up and running, and do you actually have the resource to do that?

11:00

Angela Constance: It will be no surprise to anybody on the committee that we are living in fiscally challenging times. I will not go into the causes of that or, indeed, the solutions, because that will be part of a bigger parliamentary budget debate.

The one-off cost of establishing the sexual offences court will be a minimum of £1.4 million and we will be looking at a minimum cost of £500,000 per annum going forward. It is fair to say that those costs might change, depending on the operational decisions that are made about how we go forward with the implementation.

On the timescale, the bill will be passed a year from now—assuming that it is passed—and the measures that will be implemented first, in 2025, are likely to be those that do not require secondary legislation or court rules. Establishing a sexual offences court will require new court rules and procedures. Therefore, we are still a little bit away from achieving the ambitions in and around having a sexual offences court. As with any bill, particularly a large bill, the provisions need to be phased in in order not to overwhelm the system.

I will end on this point, convener—I am surprised that you are not telling me to cut to the chase. The other crucial argument for, and potential benefit of, a sexual offences court is that it could improve efficiency in dealing with the growing number of complex cases. Again, that is something that the Lady Dorrian review looked at. A large part of her work was about what additional measures could assist with the efficiency of cases. Yes, there is still a court recovery programme, but this measure is also an opportunity to deal with those cases more efficiently.

Sharon Dowey: You said earlier that we all share the aim of the guilty being convicted and those who are not guilty being set free, which I am sure that we all agree on. However, we are saying that we want victims' voices to be heard, and one of the things that victims have said is that, in the end, they feel let down by the sentences. Therefore, is the bill looking at anything to do with sentencing for those who are convicted of an offence?

Angela Constance: The bill does not deal with sentencing policy. It is a response to the experience of victims in the criminal justice system. I understand perfectly the point that Ms Dowey makes, but we also know from victims, particularly from the personal testimony of victims who have been through the system, that their experience is sometimes as important as the outcome. A system that retraumatises victims is not in the interests of justice or access to justice, and it will not encourage or support victims to come forward. However, as it stands, the bill makes no reference to sentencing policy.

Rona Mackay: Following on from that line of questioning on the need for sexual offences courts, I have to say that I distinctly remember the Lord Advocate, Dorothy Bain, saying at the start of session 6 that to improve justice for women and girls who are victims of sexual violence, radical reform was needed. I really think that that is what we are doing here.

My question relates to part 6 of the bill and the current approach to anonymity. Why should that approach be replaced by a statutory protection for victims?

Angela Constance: The current approach is more about practice and protocol and is non-statutory. Right now, the mainstream press abide by and adhere to what is a non-statutory approach, and they need to be commended for doing so, but we are now in the world of social media, with its massive reach and a phenomenal number of contributors who, at the click of a button, can share all sorts of information. Fundamentally, we want more clarity and certainty for complainers, so that they have the confidence to report and the automatic assurance that their privacy and dignity will be protected.

Rona Mackay: That leads me to my next question, which is about legal representation. In view of the fact that the current provisions on restricting the use of sexual history and character evidence do not provide adequate protection, can you expand on the plans to provide independent legal representation to try to address those problems?

Angela Constance: Again, the evidence in this respect comes from the victims task force, the consultations that the Government has undertaken and, of course, Lady Dorrian's review. Currently, under common law, complainers in a rape trial have rights with regard to their involvement, but

the exercising of those rights falls to the Crown Office. That is not a satisfactory approach; after all, it is the job of prosecutors to prosecute in the public interest, and that is different from the complainer's interest.

I am thinking here of section 275 applications, which seek the court's permission to lead evidence on what are often very sensitive and intrusive matters. The section is often referred to as enabling people to go into someone's character or, indeed, their history, including their sexual history—and that, of course, is deeply intrusive. Once the application process starts, there is no opportunity for the victim to be represented or for their views on it to be heard. As a result, the provision in respect of independent legal representation seeks to ensure parity, opportunity and fairness for victims in expressing their views on those applications as well as the right of appeal.

Rona Mackay: Thank you, convener.

The Convener: I call John Swinney, to be followed by Katy Clark.

John Swinney: I am interested in the linkage between the bill's provisions on trauma-informed practice and the provisions in parts 5 and 6. Forgive me for being specific here, convener, but I note that section 43(4) says:

> "In carrying out the responsibility imposed by subsection (1), the President must have regard to the desirability of doing so in a way that accords with trauma-informed practice."

I am keen to understand how satisfied the Government is that the bill's provisions will result in a genuinely more trauma-informed experience for victims. Sharon Dowey asked whether we could not achieve that simply by adapting our existing court system, but I tend to come to the view that the existing court system is so cumbersome and so heavily laden with procedure that it is difficult to adapt. I am interested to find out about the thinking that has been done to ensure that we can be satisfied that the sexual offences court would operate in a more trauma-informed way than could be achieved by adapting the existing court arrangements in Scotland.

Angela Constance: Mr Swinney and other members are correct to encapsulate what Lady Dorrian expressed, which is that the adoption of trauma-informed practices is absolutely central to how we can improve the experience of complainers. The bill seeks to do that in a number of ways. Mr Swinney quoted section 43. The bill creates a statutory definition of trauma-informed practice; it requires justice agencies to have regard to trauma-informed practices in their work with victims and witnesses; and it empowers the courts to set rules and procedures for trauma-informed practice in relation to criminal and civil business. The practical application of that means that trauma-informed practice must be taken into account when court business is scheduled.

With the sexual offences court, there is a move to a presumption that prerecorded evidence will be used. Obviously, there is some legislation on virtual trials at the moment. To get to the heart of the matter and improve people's experience and the efficiency of the system, rather than tweaking it around the edges, the sexual offences court offers us an unrivalled opportunity to embed expertise and to take what Lady Dorrian described as a "clean sheet" approach, instead of guddling about in the existing system, which is not satisfactory for many complainers and which retraumatises complainers. We are starting with a clean sheet, looking at what we need to do differently and building a new system from the ground up.

John Swinney: I appreciate that answer. I will follow up by asking about an issue that, I suspect, contributes significantly to trauma—that of timescales and the amount of time that a victim has to wait for the process to reach some form of conclusion. I completely accept the cabinet secretary's explanation of the fact that ensuring that trauma-informed practice is applied in all circumstances is the thinking that underpins the Government's approach. Does the Government believe that the bill as drafted imposes a sufficient obligation on courts to improve timescales for the handling of such cases as part of the process of ensuring that trauma-informed practice is applied in all circumstances?

Angela Constance: Right now, I do, but, of course, the purpose of scrutiny is to shine a light on areas that can be improved or to unravel any knots that exist in legislation. I am very undefensive about such things. The main priority between now and the passing of the bill is to ensure that we have the best legislation possible. I am sure that, as we embark on this journey, we all want to work together to improve the bill.

The rationale for having a specialist sexual offences court is also to improve the efficiency of the process, because we know that delays can have a traumatic impact. A range of operational matters will need to be addressed—regarding independent legal representation, for example—in order to ensure that people can access their rights timeously without additional delays.

11:15

There is a lot of detail underpinning the bill that is still to be worked through, but one of the purposes of a sexual offences court is to improve efficiency, and that was, in many ways, the starting point—or one of the starting points—for

Lady Dorrian's work. Given the increasing volume of cases, how are we going to deal with them more efficiently? That is not just in the interests of the court system; it is fundamentally in the interests of victims.

I do not know whether I have missed out or not addressed anything—perhaps my officials can tell me.

Lisa McCloy: No, I do not think so. The only other thing to mention is that Lady Dorrian's report, in its recommendations, focuses on the idea that a specialist court and a specialist environment could encourage stronger active judicial management of processes. That would include pre-trial processes as well as the trial itself, which may lead to improvements in unnecessary churn or adjournment of cases.

The cabinet secretary made the point about prerecording evidence and bringing in witnesses in advance of trial to shorten that particular part of the journey, although I appreciate that they still would have an interest in the outcome of the journey. The whole approach of the court, as a more compassionate and specialist environment, can help to keep witnesses more engaged and perhaps reduce some of the other causes of churn in the system.

John Swinney: On that point, there is a lot of hope and aspiration in the comments that Ms McCloy has just put on the record. I am interested to ensure that that is turned into practical reality, and that we do not simply create a sexual offences court that looks awfy similar to existing courts. I am interested in how we are able to oblige that to happen.

Angela Constance: That is why we have to ensure that the bill will deliver on, and will be implemented in accordance with, its aspirations. The devil is always in the detail—it is always about what happens on the ground.

John Swinney: I come to my last question. An element of the court process that we have not talked about so far is the conduct of the defence. I unreservedly accept the points in the policy memorandum about the importance of balance and the protection of the right to justice in the process. However, I cannot be the only person who has been horrified by the conduct of some defence solicitors in the way in which these matters are pursued in court.

The Government can introduce a bill that does all that it possibly can to apply trauma-informed practice to the conduct of cases considering alleged sexual crime, but what obligations will the defence be under? What approaches can be taken to ensure that the behaviour in the courts of our land that horrifies many of us is not replicated in the sexual offences court?

Angela Constance: We have all heard powerful personal testimony from complainers about their experiences in court, particularly in sexual offences cases. We also have Lady Dorrian's observations from her work, in which she reflected on the commentary by the appeal courts in such cases, with regard to intrusive and unnecessary questioning.

I say, for the record, that criminal defence lawyers are an invaluable part of our system, but we need to make a transformational change to improve the experience of complainers who go through that process. Our aim is always to ensure that doing that does not result in the unintended consequence of cutting across the rights of the accused.

The sexual offences court has the opportunity to be transformational, because everyone who participates in that court will have to undergo training to become trauma informed. There is an opportunity to create a very different court environment.

As a former prison social worker, I am very open about the fact that, although I have worked with both, I have worked with more offenders than victims and have advocated for fairness and justice for those who are accused or convicted. The real prize here is that a sexual offences court would have benefits for both the complainer and the accused. It would move us away from an adversarial system to one that was more deliberative and better managed. The court would be inquisitorial in its robust and fair testing of evidence, without disregarding the welfare of those participating in the process. That is the real prize, and there is the opportunity for everyone to work together on the journey to make Scotland's justice system bold and brave as well as fair and balanced.

Katy Clark: The figure of a minimum of £1.4 million was mentioned in relation to the pilot. How many cases is that based—

Angela Constance: It relates to the sexual offences court, not the pilot.

Katy Clark: My understanding is that the sexual offences court will not deal with all sexual offences in Scotland in the first instance. Is that correct? Is £1.4 million the additional cost of the court or the total cost of it? How many cases or places is that figure based on? I would like to have more understanding of what is being proposed. I have another question, but the cabinet secretary might want to answer those questions first.

Angela Constance: There is a cost to addressing and responding to the increasing demand caused by sexual offences cases. The figure for the sexual offences court relates to the additional costs that are specific to the proposed

changes. That figure might change, depending on operational decisions about, for example, court rules.

The sexual offences court will have unlimited sentencing powers and will deal with a wide variety of cases. It is important to put on the record that it will have the maximum sentencing powers and will deal with a broad range of cases.

Regarding numbers, we know that the number of solemn cases is increasing. Lisa McCloy, do we have any further information about the numbers and categories of cases that will go to the sexual offences court?

Lisa McCloy: In preparing the financial memorandum, we obviously worked with partners to try to identify the number of cases that might be caught under the jurisdiction of the new court, which will seek to capture all solemn-level sexual offending. Therefore, it is about bringing together cases from the sheriff courts as well as the High Court. However, the bill is not prescriptive. As Ms Clark said, it does not require sexual offences to be prosecuted in that court, but that option is open to prosecutors.

It is difficult to model exactly what the case load for the court might be, but the bill in itself and the creation of the court will not create new cases. It is about redistributing the existing case load in the system into a more focused trauma-informed forum. The figures that we quoted in the financial memorandum—we will continue to develop the predictions with partners—were based on the past three years of good data that we had. We might see up to 700 cases in the sexual offences court.

Katy Clark: That is very helpful.

Russell Findlay spoke about the demographics of the judges who sit in judgment. In relation to the selection criteria for the new sexual offences court, what thought has been given to how people will be selected to be judges and what the demographics are likely to be?

Angela Constance: That will be for the head of the judiciary—the Lord Justice General. It is important that we are clear about that. The Lord Justice General will be able to appoint across the field and to appoint sheriffs as well as judges to the court on the basis of people's experience, expertise and training.

Katy Clark: Would it be acceptable if I asked a question about part 6 of the bill, convener?

The Convener: Yes, of course. I am conscious of the time, but that would be fine. I will then bring in Fulton MacGregor, and I have a couple of follow-up questions. We might therefore run on an extra five minutes or so.

Katy Clark: I am grateful for that.

I have spoken with the cabinet secretary previously about the independent legal representation of victims in other jurisdictions. Obviously, there is very specific and narrow provision in the bill in relation to the independent legal representation of rape victims. Is the Scottish Government willing to further explore a pilot or pilots in relation to the independent legal representation of victims—particularly rape victims—before the court process and during the court process? Might that be considered in the context of the bill or, indeed, as a separate discussion?

Angela Constance: From my previous discussions with Ms Clark, I have no doubt that we will debate that matter further. Ms Clark has shared with me some very interesting research and different models from elsewhere, and I have no doubt that she will continue to press me on those matters at every stage of the bill.

On the approach that we have taken thus far and our position right now, the change is a substantive one. The model relating to automatic legal representation and how complainers access it timeously is still being developed. We are working with a range of justice partners, and there is the work of the Emma Ritch law clinic, too. As I said, it is a substantive change, and it will be a demand-led change, so estimating its cost is somewhat challenging. The budget will be demand led.

I have some caution at the moment, because we are living in the reality of resource implications. A point was raised earlier about how we will ensure that we deliver. The focus should be on delivering the proposition in an accessible way that supports women to have their voice heard, and in a way that could provide a platform for further change and reform. Given the importance of implementing legislation and of bearing costs in mind, I have a significant degree of caution right now, but I look forward to hearing more and to the sharing of experiences and evidence from further afield, because that is important.

11:30

Fulton MacGregor: My questions are on part 6 of the bill and anonymity for victims. Cabinet secretary, can you outline the advantages of replacing the current approach to anonymity for victims of sexual offences with a statutory protection, as outlined in the bill?

Angela Constance: That provision is intended to seek clarity and certainty for complainers at the earliest opportunity and to increase people's confidence to come forward and report offences and make complaints in the first place. We all know that the evidence is that sexual offences in

particular are underreported, and providing for security of anonymity is part of increasing people's confidence to come forward.

It is important to have clarity that anonymity is automatic from the start, so that people know that they do not have to go through a process to get it; anonymity would be automatic from the time of the offence. Significant research and thought has gone into that provision. I point to the work of Andrew Tickell and his colleagues and students at Glasgow Caledonian University. They have led much of the campaign for automatic lifelong anonymity. For particular sexual offences, as well as for offences relating to female genital mutilation, human trafficking and other very sensitive offences that have a particular bearing on people's physical integrity and privacy, the provision would support confidence in the system but also support people to come forward to report offences in the first place.

Fulton MacGregor: I very much welcome that provision. Was any consideration given to the possibility of extending anonymity to accused persons? That is a much more difficult area, but during the debate on behalf of the Criminal Justice Committee in the chamber last Thursday, I was struck by the discussion of the impact on the family members of the accused, which was a point that was put quite powerfully by members. The person is an accused person, but more often than not, their family members are innocent parties, yet they are also impacted by such serious accusations. Has the Government given any consideration to extending the right to anonymity?

Angela Constance: We have not considered it or consulted on it. It was not part of the Lady Dorrian review or of any of the recommendations that flowed from that, and we have not explored in any way the unintended consequences of such an extension to anonymity.

One of the advantages of removing the not proven verdict is that, in a two-verdict system, people are either guilty or not guilty, and if someone is found to be not guilty, that is clear and unambiguous.

The Convener: I will finish this set of questions with another question about the position of an accused person, but in relation to the pilot proposal and whether participation in the pilot scheme would be mandatory for an accused person who fell within the scope of the scheme. Might there be a problematic response to that?

Angela Constance: Lady Dorrian's review was silent on that. The cross-sectoral working group that picked up the work following her review opted for the position, which is also the Government's current position, that it would be mandatory for the accused in the relevant cases to participate in the pilot. In the same way, when looking at how the justice system operates more broadly, complainers or the accused do not decide which court, at which level or which procedure would be used for their case—that is mandatory. The other practical aspect is that, where we seek the Parliament's consent to introduce regulation to have a time-limited pilot, any pilot will require a certain number of cases if it is to be effective, particularly if it is to be time-limited.

The Convener: That is a helpful clarification. You will be glad to hear that we will now move on to the final part of the committee's evidence session; we will look at parts 1 to 3 of the bill, which I expect will take around 25 minutes. As a reminder, part 1 relates to the establishment of a victims and witnesses commissioner; part 2 relates to a new requirement for criminal justice agencies to have regard to trauma-informed practice; and part 3 relates to special measures in non-evidential hearings to cover civil cases, as well as allowing courts to prohibit parties from personally conducting their own cases or carrying out personal cross-examination in certain cases.

I will open with a question on the proposals for a victims and witnesses commissioner. There has been general support for that proposal; however, I have picked up that there will be potential cost implications and that there have been questions about the role of the commissioner, given that the proposal is that the officeholder would not have a role in the investigation or review of individual cases. Could the cabinet secretary expand on the thinking on that proposal?

Angela Constance: The Government has been engaging with stakeholders on that issue since around 2019. In the consultation responses, there was broad support for a victims and witnesses commissioner. Clearly, there is a demand for it from victims and victims organisations, although I hasten to add that we would not expect a unanimity of views. The purpose of that provision is to establish an independent statutory commissioner who would be accountable to the Parliament and whose role would complement, rather than duplicate, that of victims organisations, for example.

You mentioned the issue of funding. Currently, we invest heavily in victims organisations. We have allocated £48 million to the victim-centred approach fund and £19 million to the equally safe fund. The cost of establishing a victims and witnesses commissioner is laid out in the bill's financial memorandum. No financial cost is insignificant, but the costs associated with that proposal are far less substantial than the amount that we are currently investing and will continue to invest in victims organisations.

The Convener: I will just pick up on the point about potential duplication of work that is perhaps already the focus of victim support organisations. Would work be undertaken to make sure that there is no duplication and that there are clear and distinct roles and responsibilities for the commissioner, for example, and the organisations that represent victims, so that there is a holistic provision of support for victims and witnesses?

Angela Constance: That touches on the point that the commissioner will not have the power to intervene on individual cases. They can, of course, signpost and engage with victims and witnesses, either individually or collectively. The purpose of a commissioner is to hold the justice system collectively to account. We would expect them to work very closely and carefully with other commissioners where we do not want duplication—around children would be the obvious example. The commissioner's role is to identify and influence system-wide change. It is more about holding the system to account, therefore avoiding duplication with the roles that other organisations fulfil.

The Convener: I am aware that we have covered some of the provisions in parts 1 to 3 in some of our earlier questioning—for example, around trauma-informed practice. Do members have other questions on those issues?

Rona Mackay: I want to ask about the issue of better alignment of the treatment that vulnerable witnesses get in civil and criminal courts. Scottish Women's Aid has highlighted that as a concern in its submission. Is that something that could be looked at and worked on as the bill is going through? How much concern do you have about that?

Angela Constance: Ms Mackay is right to say that the purpose of part 3 of the bill is to increase the safeguards for vulnerable parties and witnesses in civil cases, extending the use of special measures and, in essence, protecting people who have suffered abuse from being cross-examined by the accused abuser. That speaks to all the evidence that we have heard, over a number of years, that people often feel less protected in the civil system—in particular, in family cases and other civil procedures when domestic violence can be a feature. The extension of the special measures in the bill is an important and significant step forward. It moves on from other comparatively recent legislation, in which special measures were enabled for a specific selection of family cases, and applies best practice across the civil system.

Rona Mackay: So this complements the measures in the Children (Scotland) Act 2020 and will strengthen protection for vulnerable witnesses.

Angela Constance: It actually takes them further. It is much more comprehensive.

Rona Mackay: Okay.

John Swinney: What consideration has been given to placing in statute—in the bill—a greater obligation on organisations to take account of the perspective of victims rather than establishing a victims commissioner? The provisions on the victims commissioner say, for completely understandable reasons, that the victims commissioner cannot look at individual cases but only at general conclusions arising out of particular cases or groups of cases. Would an alternative approach not be to put greater legal obligation on the various agencies that are involved to act in a manner that reflects the perspective and interests of victims?

11:45

Angela Constance: If Mr Swinney has specific propositions to make to strengthen the obligations on various actors and agencies that have a responsibility towards victims, we look forward to receiving those.

At the moment, we are taking a belt-and-braces approach. I am very conscious of the fact that I have a manifesto commitment to deliver on the establishment of a victims and witnesses commissioner. Of course, as an independent committee, you will come to your own views and make your own recommendations. I can assure Mr Swinney, the convener and, indeed, all members of the committee that all recommendations will be given a very fair hearing.

Russell Findlay: I have two questions, the first of which relates to part 1 and the second of which relates to part 3.

The committee received evidence from Joe Duffy, who is the father of Amanda Duffy, who was murdered many years ago. He has campaigned tirelessly for use of the not proven verdict to be ended. In his submission, he made comments on the creation of a victims commissioner, to which he is opposed. He said:

> "The creation of this post will create yet another level of unnecessary bureaucracy within the Criminal Justice Process.
>
> There are limited funding and resources currently within criminal justice Scotland and we believe this appointment would adversely impact resources".

He went on to say more along those lines. What would you say in response to him and others who share those concerns?

Angela Constance: I referred to the fact that, although the proposed introduction of a victims and witnesses commissioner has been broadly supported, there has been a lot of active

campaigning on the matter, and there is never unanimity among any group. I met Mr Duffy not that long ago.

I refer back to my earlier comments. As a Government, we continue to invest heavily in victims organisations, whether through the equally safe fund or the victim-centred approach fund, which sits at £48 million. Of course, it is the job of the Parliament to hold the Government to account on what we are investing in victims organisations, and it is the job of the Government and ministers such as me to explain where we are investing the resource.

I hope to convey to the committee that, when we are providing £48 million for a victim-centred approach fund and £19 million for equally safe, the costs of establishing a victims commissioner, and the on-going costs, although not insignificant, are small in comparison.

Russell Findlay: Part 3 is on special measures in civil cases. The committee has heard evidence of cases in which male abusers have used the civil courts in tandem with criminal proceedings to inflict further harm and abuse on their victims. It was suggested to us by various victims groups that a single-sheriff model could be brought into force whereby, if criminal and civil cases were running in tandem, they could be heard by one sheriff, who would be across everything and would be aware of such harm and abuse going on. Was any consideration given to that form of reform? Might there be scope to introduce such reform in future, even in the bill?

Angela Constance: You must forgive me, Mr Findlay; I am trying to operationalise in my head how that would work in practice.

Russell Findlay: Evidence that we heard suggested that, in situations where an individual was facing criminal proceedings of a domestic or sexual nature and, in tandem—as is often the case—was involved in civil cases relating to the custody of or access to children, you could overcome those competing factors and what is often a further traumatising process by having one sheriff deal with both sets of proceedings, civil and criminal.

Angela Constance: I am not going to comment on the merits or otherwise of such a suggestion. I can see a logic to it in terms of efficiency or fairness, but I have certainly not been sighted on or involved in any deliberations around it. Nevertheless, it appears to be an issue of interest, so we will take an interest in it.

I do not know whether officials have anything practical to add.

Anna Donald: I think that the issue has been raised with policy colleagues in the Government's civil justice division by the same stakeholders, and colleagues have had some discussion with the Scottish Courts and Tribunals Service about it. As the cabinet secretary has alluded to, there are certain operational issues that might make things quite difficult, but the issue has been the subject of discussion. I do not think, though, that those discussions have reached a level at which we would be looking to bring forward legislative proposals at this time, but the matter is being considered alongside the broader point about the potential for civil and criminal cases running concurrently to add to the trauma of families.

Russell Findlay: Given that this is the bill that will deal with court processes and victims in this parliamentary session, it provides an opportunity, and I would be happy to see whether there is a way to work on a possible amendment to bring that proposal in. Given the radical reforms that are being proposed, this might be a quite simple fix, with the court recognising those situations in which criminal cases come with associated civil cases. It does not sound particularly difficult to bring it into being.

Angela Constance: We are always willing, convener, and we want to engage with members collectively and individually on causes that are dear to their hearts. My one word of caution is that I have found that, when people say that something will be simple, it usually never is. However, we are always more than happy to have discussions, and I am sure that members will test the scope of the bill that is in front of us, too.

Russell Findlay: Thank you.

The Convener: Finally, I call Katy Clark.

Katy Clark: Very briefly, can you say for the record what you envisage that the cost of the victims commissioner will be?

Angela Constance: It will be around £600,000 in start-up costs and £600,000 in recurring costs. It might be a little over that, say, between £600,000 and £650,000. Perhaps you can bear with me while I look at my papers.

Yes—one-off costs will be up to £638,719 while recurring costs will be up to £615,149.

Katy Clark: Will those be annual costs?

Angela Constance: Yes, that is the recurring cost.

Katy Clark: Thank you.

The Convener: I apologise to Sharon Dowey for jumping ahead. Please come in with your question now.

Sharon Dowey: No problem, convener.

Following on from Katy Clark's question and the issue of the set-up and recurring costs, will the commissioner provide value for money and how will they improve the situation for victims and witnesses?

Angela Constance: It is, of course, absolutely fair and legitimate to scrutinise the costs of establishing a new commissioner role; indeed, I am conscious that today in the Parliament we will debate and vote on the establishment of a patient safety commissioner. From discussions that I have had and from representations that victims have made to me, I know that people feel that there is a range of commissioners already, but there is still no commissioner for victims and witnesses.

As I have indicated, the purpose of such a commissioner is to scrutinise the justice system and hold it to account in and around the implementation of not just the justice agencies' service standards but the victims code. They will be required to publish and lay before the Parliament a report of their findings and to make recommendations for improvements.

Sharon Dowey: As you have said, there is a range of commissioners who hold the system to account. However, have you assessed whether the other commissioners are effective in their roles? Might this be a case of, "They've got a commissioner, so we want one"? Are the commissioners effective? They might be accountable to the Parliament, but we already have a cabinet secretary and a minister who are accountable to the Parliament. Why do we need to bring in another layer of bureaucracy?

Angela Constance: That is a broader debate. I have not been intimately involved in evaluating the role and function of the wide range of existing commissioners and the effectiveness of their contributions. From my experience as a minister and as an MSP, I am very clear about the commissioners whom I have observed more or with whom I have had more dealings; the Children and Young People's Commissioner Scotland, for example, has held us all to account very effectively at different points and junctures.

I accept entirely the member's point about the primacy of parliamentary scrutiny, particularly of ministers. The role and function of commissioners do not in any way undermine or, indeed, replace any of that—that is for sure—but the question is what expertise and insight into the whole system they can bring. Again, it is my experience that the findings of commissioners quite often aid MSPs in holding the Government to account. I suppose that what I am driving at is the plurality of the system.

Sharon Dowey: A lot of groups out there, such as Victim Support Scotland, already deal with victims. Are we not listening to their voices? Are they not able to raise the issues with the system with us? Should we not be able to hear them, too? I am just thinking about the costs. Would it not be better if that money went to more of those groups?

That brings me on to my other question. Where is the money coming from? Is something else being cut to provide the money for another commissioner?

Angela Constance: Notwithstanding the fact that some victims organisations take a different view on the value of a victims and witnesses commissioner, it appears to me from the responses to the consultation and the representations that we have received over a number of years that the biggest advocates for such a commissioner are victims themselves.

As for the costs, I have put them on the record, and people will scrutinise them and come to a view as to whether that money should be used to establish a victims and witnesses commissioner. Individual MSPs, parties or committees can do the same and, if they come to the view that the money would be better spent elsewhere, they will of course be free to say so. I have also outlined the investment that we continue to make in victims organisations.

Sharon Dowey: It is not an insignificant amount of money.

Finally, on implementation, you have said that the bill is being brought in to make the system more efficient. Part 3 of the bill refers to the Children (Scotland) Act 2020; although sections 4 to 8 of that act aim to address some of the weaknesses in the Vulnerable Witnesses (Scotland) Act 2004, I note that they are not yet in force. Why have the 2020 act provisions not yet come into force?

Angela Constance: The implementation of that legislation was interrupted by the pandemic and, in the meantime, we have introduced a bill that will put more extensive protections in place in the civil system. The legislation that you are referring to was pretty bespoke and was introduced to deal with certain family cases. The bill will deliver more; indeed, my focus is on delivering more with maximum impact.

Sharon Dowey: Thank you.

The Convener: That brings us neatly to a close. I thank the cabinet secretary and her officials for attending what has been an extremely helpful session.

That completes the public part of our meeting. Next week, we will start our first phase of evidence taking on the bill by covering parts 1 and 3 and

hearing from organisations representing victims of crime as well as the third sector.

12:00

Meeting continued in private until 12:18.

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