

Citizen Participation and Public Petitions Committee

11th Meeting, 2023 (Session 6), Wednesday
28 June 2023

PE1994: Review the trial process for sexual offence cases

Lodged on	15 December 2022
Petitioner	Margaret Fagan
Petition summary	Calling on the Scottish Parliament to urge the Scottish Government to undertake a review of the trial process and handling of witness evidence in sexual offences cases.
Webpage	https://petitions.parliament.scot/petitions/PE1994

Introduction

1. The Committee last considered this petition at its meeting on [8 March 2023](#). At that meeting, the Committee agreed to write to the Crown Office & Procurator Fiscal Service, the Faculty of Advocates, the Law Society of Scotland, Rape Crisis Scotland, and Victim Support Scotland.
2. The petition summary is included in **Annexe A** and the Official Report of the Committee's last consideration of this petition is at **Annexe B**.
3. The Committee has received new responses from the Crown Office & Procurator Fiscal Service, the Faculty of Advocates, and Victim Support Scotland which are set out in **Annexe C**.
4. Written submissions received prior to the Committee's last consideration can be found on the [petition's webpage](#).
5. Further background information about this petition can be found in the [SPICe briefing](#) for this petition.

6. The Scottish Government's initial position on this petition can be found on the [petition's webpage](#).

Action

The Committee is invited to consider what action it wishes to take.

Clerk to the Committee

Annexe A

PE1994: Review the trial process for sexual offence cases

Petitioner

Margaret Fagan

Date lodged

15 December 2022

Petition summary

Calling on the Scottish Parliament to urge the Scottish Government to undertake a review of the trial process and handling of witness evidence in sexual offences cases.

Previous action

I contacted David Torrance MSP.

Background information

The laws this government have brought in to protect the victim are long overdue but it has swung way over the other way, which is leading to more convictions. This has ruined a lot of innocent people's lives as the accused lawyers have been told their evidence is irrelevant and cannot be used.

There are lots of stories of medical reports being classed as not admissible to witness statements being taken but not used. People are told again that it's not relevant and it is only the accused evidence this is happening to.

The law should be seen to be fair for all but it is not. The Scottish Government's new laws are being blamed for it by the legal aid court lawyers.

Annexe B

Extract from Official Report of last consideration of PE1994 on 8th March 2023

The Convener: Our final petition is PE1994, which is lodged by Margaret Fagan and calls on the Scottish Parliament to urge the Scottish Government to undertake a review of the trial process and the handling of witness evidence in sexual offence cases. Ms Fagan tells us that, while reforms aimed at protecting victims of sexual offences are welcome, changes to the law are, in her view, unduly disadvantaging those accused of committing such offences. She is particularly concerned that evidence gathered by the defence, such as medical reports and witness statements, is being rejected on the grounds that it is irrelevant or inadmissible.

In responding to the petition, the Scottish Government notes that reforms introduced through the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 amended the restrictions on evidence relating to sexual offences. The reforms were intended to prevent the leading of evidence that is of limited relevance to the particulars of the case or that unduly undermines the credibility of the complainer. The provisions were not intended to increase conviction rates, nor should they infringe on the accused's right to a fair trial.

The Scottish Government response also notes that careful consideration has been given to the recommendations of the Lady Dorrian review, "Improving the Management of Sexual Offence Cases", with a view to bringing forward proposals for legislative reform as part of the criminal justice reform bill. As noted in the SPICE briefing, it is anticipated that that bill will be introduced in the spring or summer of the current year.

Do members have any comments or suggestions for action?

David Torrance: Could we keep the petition open to gather more information? There are several stakeholders that I would like the committee to write to, including the Crown Office and Procurator Fiscal Service, the Faculty of Advocates, the Law Society of Scotland, Rape Crisis Scotland and Victim Support Scotland, seeking their views on what is raised in the petition.

The Convener: Are we content to proceed on the basis of Mr Torrance's recommendation? I believe that we are.

Fergus Ewing: Yes, that should be done. I wonder whether, in addition, we could seek information—I do not know whether it would come from the Scottish Courts and Tribunals Service or the Crown Office. Annex C of paper 12 is the Scottish Government's response to the petition and goes into the background of the reason behind the law reforms, which, essentially, as I understand it, was to prevent the

raising of evidence about the complainer's past sexual behaviour as being relevant to the charges. The point that I wanted to make, however, is that there is a provision under section 275 of the Criminal Procedure (Scotland) Act 1995 whereby an accused person can at their trial apply to the court to lead evidence that is prohibited by the law that, generally speaking, prevents the raising of prior sexual behaviour and history. In other words, there is a provision whereby an accused can seek to bring in that evidence, if it can be established that it is pertinent to the specifics of the case.

My query, convener, is this: how frequently have such applications been made, how frequently have they been granted and how is it working out in practice? I am curious to see whether such applications are routine and whether they tend to be dismissed because the law tends to suggest that they should be dismissed. If that specific area of questioning could be included in our letters, please, it might help to shed some light on what is happening. The petitioner indicated that she approached Mr Torrance as her MSP, but the petition does not go into much detail, at least not in the papers that I have read, about her concerns. Be that as it may, could that query be added to the enquiries that we are making?

The Convener: Yes. That is helpful, Mr Ewing. Let us face it: on numerous occasions during consideration of petitions in the past, the committee has received submissions in which it was suggested that there was already a route through which the aims of a petition could be realised, only for us to find, on investigation, that there were obstacles in place or that, in fact, the route was rarely exercised or understood. Given that that has been suggested to us as a remedy, it would be helpful to understand the extent to which it is one. I am happy to agree to that. Are we agreed?

Members indicated agreement.

Annexe C

Faculty of Advocates submission of 19 April 2023

PE1994/C Review the trial process for sexual offence cases

Since petitions usually concern matters of policy, we do not generally take a position on them. On this occasion, however, we consider that there is reason for us to respond, as we will explain.

The petitioner is "Calling on the Scottish Parliament to urge the Scottish Government to undertake a review of the trial process and handling of witness evidence in sexual offences cases". I have read the Scottish Government response to the petition and the SPICE briefing. I note the various initiatives referred to in those documents. For our part, we made reference to this specific issue in our response to the consultation in 2022 by the Scottish Law Commission. The Commission was consulting on what should be in its eleventh programme of law reform. In the Faculty response, prepared in August 2022, we highlighted the practical operation of sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995 as a potential project for the Commission¹. We enclose a copy of that response.

We hope this is of assistance to the committee in its consideration of the petition.

¹ Note by the Clerk: The suggestion made by the Faculty of Advocates was not taken up by the Scottish Law Commission and is not part of its [11th Programme](#).

FACULTY OF ADVOCATES RESPONSE TO PREPARATION OF THE ELEVENTH PROGRAMME OF LAW REFORM (ABRIDGED)

1. Do you have any suitable law reform projects to suggest?

Criminal Procedure (Scotland) Act 1995 (ss 274-275)

2. If suggesting a new project:-

- (a) Please provide us with information about the issues with the law that you have identified:

Section 274 of the 1995 Act imposes a general prohibition on the leading of character evidence and evidence relating to prior sexual activity in relation to sexual offences. Section 275 provides a limited exception to this prohibition. The experience of practitioners in sexual offence cases is that the interpretation of s. 275 has narrowed in recent years. The SLC is invited to consider whether the current approach to ss. 274 and 275 strikes an adequate balance between the rights of complainers and the rights of the accused to lead evidence which may be of relevance to the issues at trial.

- (b) Please provide us with information about the impact this is having in practice:

A number of issues arise in relation to the present approach to the law. Firstly, there is a sense that the scope of the exception in s. 275 is unpredictable and subject to repeated judicial consideration. Appeals in relation to s. 275 applications form a substantial part of the Appeal Court's business. This leads to practitioners having difficulty in advising clients and formulating trial strategies when it is difficult to predict what evidence will and will not be admitted. Further, the present approach arguably excludes too much evidence from a jury's consideration. Relevant context may be excluded from the jury.

- (c) Please provide us with information about the potential benefits of law reform:

The law in relation to these provisions has developed incrementally in the context of specific factual circumstances in specific cases. The Faculty considers that it would be beneficial for the SLC to analyse the issues from first principles and consider whether any reformulation of the statutory tests is necessary in order to: (i) promote certainty, and (ii) strike the correct balance between the rights of complainers and the rights of the accused.

3. Do you consider that your suggested law reform project would be suitable for the law reform process in the Scottish Parliament; or, in relation to reserved matters, for the House of Lords procedure for Commission Bills?

Potentially, depending on the outcome of any review of the existing law.

Victim Support Scotland submission of 3 May 2023

PE1994/C: Review the trial process for sexual offence cases

Victim Support Scotland have been asked to share our views on the action called for in petition PE1994: Review the trial process for sexual offence cases.

The petition calls for the following action: *Calling on the Scottish Parliament to urge the Scottish Government to undertake a review of the trial process and handling of witness evidence in sexual offences cases.*

The following background information has also been provided: *The laws this government have brought in to protect the victim are long overdue but it has swung way over the other way, which is leading to more convictions. This has ruined a lot of innocent people's lives as the accused lawyers have been told their evidence is irrelevant and cannot be used.*

There are lots of stories of medical reports being classed as not admissible to witness statements being taken but not used. People are told again that it's not relevant and it is only the accused evidence this is happening to.

The law should be seen to be fair for all but it is not. The Scottish Government's new laws are being blamed for it by the legal aid court lawyers.

In response to this petition, Victim Support Scotland would strongly contest the view that laws which have been introduced to protect victims have resulted in innocent people being wrongfully convicted.

This view does not align with the experiences of people affected by crime, nor does it reflect the conviction rates for sexual offences.

Victim Support Scotland would also seek clarification on the specific laws which are believed to have resulted in an increase of wrongful convictions.

1. Conviction Rates for Sexual Offences

Criminal proceeding figures published by the Scottish Government in June 2022 revealed the number of convictions for sexual crimes decreased by 33% in the previous year.²

The number of convictions for sexual crimes was 817 in 2020-21, down 400 convictions from 1,217 in 2019-20.³

The number of convictions for rape and attempted rape decreased by 40% (from 130 in 2019-20 to 78 in 2020-21). The figure in 2019-20, was the second lowest in the past decade after 2011-12 (49) prior to the further decline in conviction rapes in 2020-21.⁴

Only 51% of rape and attempted rape trials result in a conviction, compared to a 91% overall conviction rate. In 2020-21 there were 2,176

² National Statistics, Scottish Government, [Criminal Proceedings in Scotland, 2020-21](#), June 2022 – (www.gov.scot)

³ National Statistics, Scottish Government, [Criminal Proceedings in Scotland, 2020-21](#), June 2022 – (www.gov.scot)

⁴ National Statistics, Scottish Government, [Criminal Proceedings in Scotland, 2020-21](#), June 2022 – (www.gov.scot)

rapes and attempted rapes reported to the police, but only 152 prosecutions and just 78 convictions.⁵

Scottish Government figures also demonstrate a recent decline in convictions for sexual assault. There were 147 sexual assault convictions in 2020-21, down 52% since 2019-20 (306 convictions). Prior to this year the number of convictions for sexual assault had been increasing, from 151 in 2011-12 to 306 in 2019-20.⁶

The above figures highlight a decline in convictions for sexual offences, with convictions rates for rape and attempted rape reaching almost record low levels. This does not support the petitions claim that laws implemented by the Scottish Government have resulted in an increase in wrongful convictions for sexual offences.

Rather, the contrast in the conviction rate for rape and attempted rape trials, when compared to the overall conviction rate, suggests that more needs to be done address this disparity.

This is of particular concern as the decline in conviction rates takes place against the backdrop of the highest number of sexual offences being recorded in the last five years in December 2022.⁷

2. Use of Evidence in Sexual Offence Cases

Victim Support Scotland are unaware of frequent reports of the accused in sexual offence cases being consistently told their evidence is non-admissible.

However, we do understand the challenges survivors face securing evidence in sexual offence trials.

⁵ National Statistics, Scottish Government, [Criminal Proceedings in Scotland, 2020-21.](#), June 2022 – (www.gov.scot)

⁶ National Statistics, Scottish Government, [Criminal Proceedings in Scotland, 2020-21.](#), June 2022 – (www.gov.scot)

⁷ Scottish Government, [Justice Analytical Services \(JAS\) Safer Communities and Justice Statistics Monthly Data Report: April 2023 edition](#), April 2021 – (www.gov.scot)

Evidence compiled by Rape Crisis Scotland from its Survivors Reference Group highlights that securing evidence for a prosecution in cases of rape and sexual violence is incredibly challenging.⁸

The initial report from the Survivors Reference Group notes of these challenges:

‘Even in prosecutions where there was significant supporting evidence – including an audio recording of the attack taking place – a not proven verdict was delivered.

Commenting on this, a local Rape Crisis Centre Manager said: “It is well worth all of us reflecting on what message it sends to survivors thinking about reporting rape – knowing full well that securing sufficient evidence is a challenge – that a literal audio recording did not carry the weight necessary to secure a conviction.”⁹

This is only one example of the challenges survivors of rape and attempted rape face in obtaining a conviction and the extremely high threshold of evidence required.

The Scottish Government’s 2017 investigation and prosecution of sexual crimes: review noted that the requirement for corroboration of evidence in criminal cases under Scots Law presents challenges in sexual offence cases.¹⁰

The review notes: *“Corroboration is particularly problematic where the crime occurs in a private setting, as is very often the case with sexual crimes, as it is unlikely there will be any other direct eyewitness evidence to support the victim’s account of what happened.”¹¹*

Victim Support Scotland advocates for fair trials, considering the court experiences of people affected by crime.

⁸ Rape Crisis Scotland, [Survivor Reference Group Initial Report](http://www.rapecrisisscotland.org.uk), 2019 – (www.rapecrisisscotland.org.uk)

⁹ Rape Crisis Scotland, [Survivor Reference Group Initial Report](http://www.rapecrisisscotland.org.uk), 2019 – (www.rapecrisisscotland.org.uk)

¹⁰ The Scottish Government, [Investigation and Prosecution of Sexual Crimes: Review](http://www.gov.scot), 2017 – (www.gov.scot)

¹¹ The Scottish Government, [Investigation and Prosecution of Sexual Crimes: Review](http://www.gov.scot), 2017 – (www.gov.scot)

Evidence from victims and survivors suggests that much work is still required to improve the experiences of people affected by crime in court. This has been highlighted by the recommendations of the Lady Dorrian review of the management of sexual offence cases.

Considering the above, Victim Support Scotland contest the action called for in petition PE1994: Review the trial process for sexual offence cases.

Crown Office and Procurator Fiscal Service submission of 12 May 2023

PE1994/D: Review the trial process for sexual offence cases

I refer to your letter dated 14 April 2023 seeking information on the use of section 275 of the Criminal Procedure (Scotland) Act 1995, under which an accused person can apply to the court to lead evidence at trial that would otherwise be prohibited by Section 274 of that Act. You have also requested information on how many applications have been made under this provision, and what proportion of them have been granted.

The Petition raises a concern that the application of the provisions of section 275 of the Act prevents accused persons from leading evidence at trial.

For evidence to be admissible in a criminal trial in Scotland, it must be relevant to the facts in issue. The common law provides that evidence which is irrelevant, or which is collateral to the facts in issue, is inadmissible. Section 274 of the Criminal Procedure (Scotland) Act 1995 further restricts the admissibility of evidence in relation to sexual offence cases.

The common law rules on admissibility of evidence, and the provisions of sections 274 and 275, apply equally to the Crown and the defence. Should the Crown seek to introduce evidence, which is prohibited by the terms of section 274, the Crown requires to lodge a s275 application, in the same way as the defence would, if the accused sought to lead evidence which was prohibited in terms of section 274 of the Act.

In relation to the request of the Committee regarding the numbers of applications made and granted, I can advise that HM Inspectorate of Prosecution in Scotland (HMIPS) carried out a review of “Criminal Procedure (Scotland) Act 1995 – sections 274 and 275: inspection of COPFS practice” in 2022. A copy of the Inspectorate report is available at: [Criminal Procedure \(Scotland\) Act 1995 - sections 274 and 275: inspection of COPFS practice - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/criminal-procedure-act-1995-sections-274-and-275-inspection-of-copfs-practice/pages/1-introduction.aspx). COPFS has accepted HMIPS recommendations and is in the process of implementing them.

The Committee’s attention is drawn to the HMIPS report, which sets out that of the 123 High Court cases randomly selected by the Inspectorate for review 238 applications in terms of section 275 were identified (38% of which were Crown applications). Of the 238 applications, 85% of Crown applications were granted in full or in part and 74% of defence applications were granted in full or in part.

To assist the Committee regarding the number of applications made, I can confirm that in relation to High Court cases, COPFS recorded that between 24th May 2022 and 31st March 2023 312 applications were lodged by the Crown seeking the Court’s permission to lead evidence in terms of section 275. The process for recording defence applications became operational in March 2023 and accordingly no meaningful data is yet available.

The responsibility for the recording of data in relation to court proceedings is primarily that of the Scottish Courts and Tribunals Service (SCTS). The Committee may therefore wish to direct its request for statistical data in relation to the numbers of applications made and granted to SCTS.