

# **Victims, Witnesses and Justice Reform (Scotland) Bill**

## **Criminal Justice Committee**

### **Meeting with the families of victims whose lives were taken during a criminal act**

**Tuesday 16 January 2024**

#### **Introduction**

On Tuesday 16 January, Audrey Nicoll MSP, Russell Findlay MSP, Sharon Dowey MSP, Fulton MacGregor MSP, and Rona Mackay MSP of the Criminal Justice Committee met informally and privately with three individuals<sup>1</sup>. All three of whom have had a close family member (like a spouse, child, parent, or sibling) lose their life because of a serious crime of a non-sexual nature.

All three of those we met have first-hand experience of prosecution actions being taken against individuals for the deaths of their loved ones.

This informal meeting was facilitated by Victim Support Scotland to allow Members of the Criminal Justice Committee to hear first-hand the lived experiences of those we met, as part of the Committee's Stage 1 scrutiny of the Victims, Witnesses and Justice Reform (Scotland) Bill (the Bill).

The following note has been prepared by the Committee clerks and summarises the issues raised in the discussion, and the views expressed by those we met.

This note has been seen and approved by those we met prior to its publication. The Committee wishes to thank the individuals for taking the time to meet with Members and share their lived experiences of the criminal justice system. This is a most valuable contribution to the Committee's scrutiny of the Bill.

#### **Key issues emerging**

##### **1. The criminal justice system, its culture and public knowledge**

- Those attending felt that hearing their lived experience is one of the most important things the Committee can undertake as part of its scrutiny of the Bill. None of the people we met were in the position they found themselves in through their own choice. They said they had been thrust into the criminal justice process at one of the worst moments of their life.
- One of the people we met noted that most ordinary lay people in Scotland have little or no knowledge of the Scottish criminal justice process, or how it works, until they had first-hand experience of it. In their view, there is a huge

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<sup>1</sup> Apologies were received from Katy Clark MSP, Pauline McNeill MSP and John Swinney MSP, who wished to attend the meeting but were unable to.

lack of reliable easy-to-access public resources with information on how a violent or unexplained death is investigated in Scotland. They also said that people do not understand how decisions are made on the charging of suspects, how individuals are prosecuted in Scotland, how the Scottish trial courts work and what engagement or support from the system the family member of victims should expect.

- Some of those we met noted that their exposure to the criminal justice system coincided with a time when they are trying to deal with the trauma of the sudden death of a close loved one, in their case, in violent and unexplained circumstances.
- One person we met who had lost a child in a violent incident described the whole experience of the criminal justice system for them as horrendous from start to finish. They said that people do not realise how much additional trauma someone can experience because of the disjointed, piecemeal and unempathetic structure and culture in the criminal justice system, and the way it treats victims and their families.
- Another person with experience of the social care system drew a comparison with their experience of going through the trial of a person accused of the involvement in the death of their loved one. The court process, they felt, provided an institutional model of care and not a social model of care, and this leads to an experience which is not person-centred/victim centred.

## **2. A victim's commissioner**

- Those present were complementary and supportive of third-sector organisations such as Victim Support Scotland (VSS). However, some felt there was still a need for a victims and witnesses commissioner in Scotland to act as a common source of support and advice on the legal aspects of what to people should expect when a loved one dies, and a criminal investigation and prosecution followed.
- It was felt the definition of a commissioner in the Bill was quite well crafted as people with lived experience of the criminal justice system had inputted to that process.
- In their view, engaging with victims, their families and third sector support agencies (like VSS) should be a key role for any commissioner. At present, the police, and staff in other agencies like the NHS or courts can be supportive, within the role they each play. However, often a victim or their family could just be handed a leaflet about other support and left to try to figure it out for themselves.
- Working with third sector organisations and others to raise the general awareness of the public on how the criminal justice system works, and what to expect if you find yourself having to engage with it, should be another gap in the present system which a victim's commissioner could fill.

- Those attending felt it was right that a commissioner would not get involved in individual cases. However, some of those we met felt that if there was an issue which kept being raised repeatedly by victims and witnesses - as part of their experience of the criminal justice system, then this is something a commissioner could advocate for reform on. They thought, this could help to improve victims experience and outcomes in the criminal justice system.
- While it was felt that many third sector support organisations are particularly good, some of those present believed that there are other third sector organisations in Scotland who may not be so good at supporting victims/witnesses. It was stated that a commissioner could also play an 'audit' role in ensuring third sector groups are providing a good service.
- When asked if they were concerned by the view expressed by some that the role of a commissioner may be a bit toothless as set out in the Bill and may not deliver what victims and witnesses expect, one of our guests said they were slightly worried. However, they went on to say that victims and witnesses at the moment have nothing in terms of the type of support a commissioner could bring. It was also felt the role of a commissioner could evolve over time.
- There was concern expressed around the workload a commissioner may face and the level of resource provided to support the role of a commissioner as victims and witnesses might expect it to deliver a certain level of service.

### **3. Trauma informed practice**

- Those present also felt the criminal justice system needed to be more trauma informed across all its agencies. In their view, a victim commissioner could work to assist the process of cultural change in the system so that professionals across the criminal justice system become more trauma informed.
- They believed that there is sometimes a lack of common sense and empathy shown by various individuals in various agencies towards those who may just have experienced the sudden or violent death of a loved one and where a criminal investigation may get underway or is underway.
- One of our guests pointed out that there is nothing anyone can do to prevent or control the primary trauma people face when a loved one is murdered or dies because of a crime. However, the Scottish Parliament and Government, and criminal justice system, can and should prevent the secondary trauma people experience because of the way the criminal justice system operates at present.
- One guest cited an example of a police officer being present in the hospital room there their child was dying following a criminal act. When asked why

they were present, the officer referred to the need to ensure the chain of evidence was preserved in case criminal proceedings may follow. While the person understood the need for this, they felt the way they were handled in that terrible moment for them was unfeeling and thoughtless.

- Other guests referred to the language and tactics used by some defence counsel in trials as being extremely traumatic for them. Some examples given by guests included attempts by defence council to gaslight their deceased loved ones, suggesting that the behaviour of the victim contributed to their death.
- Others highlighted the use of irrelevant anecdotes by defence counsel, for example comparing the behaviour of a defendant who is charged with a serious crime like murder, with lapses in judgement like speeding. These were felt to be deflection tactics designed to persuade jury members that the actions of a defendant were not as serious as may appear.
- Such behaviour, if was felt, greatly added to the secondary trauma for our guest and their family as a result of seeing and hearing these tactics in court.
- Some of those present expressed concern that the Bill would not require defence practitioners to undertake trauma informed training, but rather the Bill leaves it up to judges to set the rules for such issues in court.

#### **4. Not proven verdict**

- Those present felt that most people in Scotland do not know about the not proven verdict, or what it means. In their view, often a victim or their family may only learn about it when it is handed down by a jury in a trial and this can leave them confused and shocked.
- One of those present was of the view that some of those involved in crimes feel that they were able to get away with crimes they did commit because of the existence of this verdict. They said they had spoken to people who indicated this.
- There was a feeling amongst those we met that the accused persons in serious criminal cases in Scotland have an unfair advantage of an acquittal as there are two verdicts to acquit, (not guilty and not proven), and only one to convict (guilty). There was also a feeling amongst those we spoke to that juries often do not understand the implications of a not proven verdict.
- We also heard concerns about how jury members were briefed on the rules which apply to them and whether sufficient briefing is given to them on the three current verdicts available, and what the outcome of each of those verdicts actual mean in terms of a conviction or acquittal.

- Our guests also highlighted a lack of communication by the Crown Office and Procurator Fiscal Service (COPFS) with victims and families on decisions around which provisions of the criminal law an individual was being prosecuted under. They felt this was important to know as this has a bearing on what the penalties could be applied for those individuals, if convicted.
- Some guests felt that a conviction may be more likely to result depending on the exact law under which someone is charged and prosecuted. They felt a jury may deliver a guilty verdict for someone charged under say misuse of drugs legislation, as opposed to being charged with murder or wrongful death, where a jury might be more inclined to go for a not proven verdict.

## **5. Jury sizes and majority**

- There was no consensus from those we met on the provision in the Bill to change the size of juries, or the majorities for conviction. Some felt it was more important that jurors receive proper induction before they started to hear evidence. They thought this should include issues such as what the practical outcomes of the various verdicts are, and how jurors should behave in court etc.
- Another guest highlighted what they saw as an anomaly of when the current size of a 15-member jury drops during a trial because a juror gets ill and cannot continue etc. They wanted the majority for guilty to be adjusted accordingly.
- One of those present recognised that the not proven verdict can also be unfair on an acquitted person, as it may leave them with the stigma of guilt hanging over them in their eyes and the eyes of others, as opposed to a clear not guilty verdict.

## **6. Communications and interaction**

- Those present agreed that a lack of uniform quality information and clear and timely communications from the various parts of the agencies in the criminal justice system is a problem.
- There was agreement that there was not enough interaction or communications between the COPFS in a trial and the family of a victim/deceased victim.
- One person felt that the perception by some prosecutors is that many aspects of the trial, or the prosecution process, would be too complex or difficult for family members to understand or comprehend. It would therefore be a waste of time for the prosecution to try to explain these, or answer families' questions.

- The pressures and workloads of prosecutors was recognised, nevertheless, in the view of those we met, this attitude by some prosecutors can give rise to a lot of secondary trauma, as victims and families are left in the dark about key issues of the trial process which is meant to seek justice for them and their loved one.
- We heard that the lack of physical space in the court building and the opportunities for victims/family members to liaise with prosecutors during a trial can sometimes be damaging to the chances of securing a conviction. For example, the opportunity to challenge inconsistencies or errors in the defence arguments can be missed out in court, because the prosecution chooses not to challenge these, or may not be aware of them because they are not as familiar with the relevant facts as the families and victims are.
- It was recognised that most victims and family members will never get enough of a level of communications or interaction to satisfy them or answer all their questions. However, at present, the view of some was the system is failing many people, and it is causing additional harm which will never leave families and victims.

## **7. Independent Legal Representation (ILR)**

- Those we met believed that the provisions to introduce Independent Legal Representation (ILR) in the Bill are welcome, but that ILR also needs to be available to the families of deceased victims, whether any of them are formally called as witnesses in a trial or not.
- One person spoke of a defence counsel calling into question the mental health of the deceased victim, while similar issues about an accused person are not raised in court. They thought ILR could help support families in such situations.
- They thought ILR could also play a role in supporting families with legal advice when they find themselves classed as witnesses in a trial. For example, when a family members of a deceased loved one is denied access to things like viewing a pre-trial diet in a courtroom because they are to be a witness in the trial. Lack of knowledge about these issues can cause families great distress in the moment and trauma for a long time afterwards.

## **8. A trauma-responsive environment**

- One of those we met raised the issue of the physical court space and environment and its suitability in the 21<sup>st</sup> century for deeply emotive cases (like murder, rape etc.), where the families/supporters of a victim/deceased victim must share public court spaces like entrances/exits, public galleries, toilets etc. with the family/supporters of the accused, and the physical and psychological intimidation which can take place during a trial.

- It was recognised this may not be an issue for primary legislation such as the Bill. They thought this was a policy issue for government and a question of resources for courts and for court procedures.
- However, in their view, unsuitable court environments can, in turn, open the door to further secondary trauma for people, or, to longer lasting issues of aggravation/tension even after a trial process is finished. They thought there was a chance, on occasion, for violence between individuals in or around the court building to occur when emotions were running high and comments or even body language can be provocative.
- It was agreed that alongside a policy of trauma-informed practice, what was also needed was a policy of developing a trauma-responsive court environment in which trials and other criminal justice proceedings take place, even if this takes a long time to deliver, and dedicated resources over time.

**Criminal Justice Committee clerks  
January 2024**