

Supplementary Written Evidence from Scottish Women's Aid ahead of Stage 2 of the Victims, Witnesses and Justice Reform (Scotland) Bill.

Ms Audrey Nicoll MSP
Convener
Criminal Justice Committee
The Scottish Parliament
Edinburgh
EH99 1SP

25th February 2025

Dear Convenor,

Scottish Women's Aid ("SWA") appreciate the opportunity to provide written comments in lieu of oral evidence on the Committee's consideration of the Scottish Government's proposed amendments ahead of Stage 2.

Victims and Witnesses Commissioner

We maintain our opposition to the creation of this Commissioner: this will add a layer of bureaucracy, impact on victim support service budgets and the funds could be better utilised improving services and advice to victims.

Ability for complainers to give evidence by commission

SWA support a presumption of prerecorded evidence in the specialist court to improve complainers' experience of giving evidence, removing the requirement for a judge to decide whether or not it is in a complainer's interest to give evidence by commission, or not, if the complainer so wishes. This must be a rebuttable presumption giving complainers choice.

Not Proven verdict-

SWA support abolition of this verdict and note the Scottish Government's intention to retain this enabling provision in the Bill.

Jury size

We support retention of jury of 15 and the Scottish Government bringing forward amendments to remove the Bill provisions reducing the number of jurors on a jury to 12.

Jury Majority

While SWA supported the abolition of the not proven verdict, we did not support the introduction a two-thirds majority requirement for conviction as a "balancing measure." We have concerns around unintended consequences and that this will erode the benefit of removing the not proven verdict, echoing the comments made by Sandy Brindley of Rape Crisis Scotland in her evidence to the Committee,¹ also noting the Committee's comments in the Stage 1 Report, that the Scottish Government must evidence the link between removing the not proven verdict and

¹ <https://www.parliament.scot/api/sitecore/CustomMedia/OfficialReport?meetingId=16146>

needing to change the jury majority, as this would make it harder to get a conviction, particularly in rape cases, given the already low conviction rates.

Single judge trial pilot

We are disappointed that the proposal will be removed from the Bill but are pragmatic about the situation given the lack of consensus. We welcome the commitment from the Cabinet Secretary to seek changes to the Contempt of Court Act 1981 to enable direct research to be carried out with juries, thus establishing a solid evidence base to inform this work.

Vulnerable Witnesses

We reiterate our position that the current amendments in the Bill are piecemeal and continue to apply eligibility thresholds that do not give women automatic eligibility for standard special measures of their choice in any civil proceeding where domestic abuse is an issue.

While it is positive that the Bill will extend the availability of special measures to **all** civil proceedings (both evidential and non-evidential, and both child and non-child related), continued limits to eligibility thresholds restrict women's access to these protections.

- Under the Bill, to be able to access these special measures, and be automatically a “deemed vulnerable party”, whether giving evidence or not, the woman must be in possession of a protective order, or there must be a previous conviction or ongoing prosecution for domestic abuse or stalking against the other party to the case. Without this, women will be denied automatic eligibility to access special measures and will have to depend on the discretion of the court.
- As the court can still order, or decline, special measures other than those requested, women could be denied the special measure they feel would benefit them most. This means that women face uncertainty as to whether they will not only have to face the abuser in court but also be cross-examined personally by him if he is conducting his own case.

One positive aspect is that, at any point in the proceedings, the court can, without the witness having asked for them, order the use of special measures for a witness who appears vulnerable, but the success of this depends on the awareness of the court, their being vigilant to the actions of the abuser and any impact on the witness' ability to participate.

The Scottish Government has indicated that it intends to further amend the test for deemed vulnerability at Stage 2 ² “ • *The first area is to extend who is deemed vulnerable when involved in a civil court case. The amendments would extend who is deemed vulnerable to include: persons who provide evidence from a reputable source (e.g. health practitioner) of domestic abuse or sexual assault committed by a party to the case persons applying for a civil protection order against domestic abuse or for damages following a sexual assault.*”

This proposal, borrowed in part from legislation in place in England and Wales, is wholly unacceptable as a test allowing women experiencing domestic abuse access

² Letter from the Cabinet Secretary for Justice and Home Affairs on the VWJR Bill 31 October 2024 <https://www.parliament.scot/-/media/files/committees/criminal-justice-committee/correspondence/2024/vwjr-bill-letter-from-cab-sec-jha-31-october-2024.pdf>

to special measures. We have real concerns about the implications and potential negative consequences for women in having to obtain such intrusive “medical” evidence from a health practitioner or another specified third party, such as a support organisation, simply to be able to use a screen, supporter or CCTV to engage their legal and human right to participate in civil legal proceedings and give their best evidence, a witness’s right and ability to give their best evidence being a position previously publicly espoused by the former Lord President, Lord Carloway.

Women in civil proceedings experiencing domestic abuse are just as vulnerable, open to overt and explicit coercive and threatening tactics and behaviour, as women facing perpetrators in criminal cases. Therefore, women experiencing domestic abuse who are involved in any civil proceedings where this is the issue, need the basic automatic right to be deemed vulnerable witnesses and the automatic right to use standard special measures, including the prohibition of personal questioning by the abuser.

The reluctance to grant, for our purposes, women experiencing domestic abuse the right to use special measures is perplexing as this in no way restricts the other party’s right to engage or to take the vulnerable person’s evidence. It is, in fact, trauma-based practice, a reform advanced by the Bill, which benefits the parties and court by allowing it to hear all the information and/or best evidence from both parties that may otherwise be restricted by one party’s fear of the consequences of participation.

In relation to the above, the pathologization and medicalisation of domestic abuse is not acceptable and is a retrogressive step in the understanding of the spectrum of abusive behaviours. There are extensive unforeseen consequences:-this “evidence” being subject to disclosure or recovery and being misused by abusers in civil and criminal proceedings; thresholds being imposed by the court around the degree and nature of the abuse they will accept as evidence of the need for special measures, and physical abuse being once more prioritised over coercive control and other forms of abuse.

This is confidential information, which may involve other people and children, a potential breach of their data protection rights, disclosure of which could damage the woman’s relationship with both medical practitioners and support services and her relationship with support services. This could constitute a breach of women’s privacy.

SWA considers it unacceptable that women experience such barriers to access to justice and safe participation in civil proceedings, of any nature, where domestic abuse is an issue. This is ostensibly failing to uphold their Article 6 rights, the right to participation and arguably their Article 3 rights, if the process of being cross-examined by the perpetrator, being intimidated by the fact of his presence and having to sit in close proximity during a Child Welfare Hearing or face him in evidential proceedings, is degrading to them and causes fear. The outcome of not being able to participate fully and give their best evidence will impact on their own and their children’s safety, security and homelife, also does not accord with their Article 8 rights, and is not victim-centred, trauma-based practice in line with the direction of travel in relation to victims, their rights and treatment within the justice system as set out in the Bill.

Additionally, the Cabinet Secretary's letter indicates that deemed vulnerability would also be extended to persons applying for a civil protection order against domestic abuse or for damages following a sexual assault. Again, following our comments above, this would simply be another piecemeal attempt to widen the scope of vulnerability. More importantly, it is not acceptable by its very definition, since the amendment would exclude both persons applying for a civil protection order following a sexual assault and persons experiencing domestic abuse who were seeking damages.

SWA is seeking parity with the protection offered women in criminal proceedings as follows:

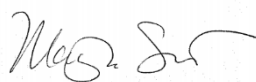
- Where a party is involved in pursuing or defending **any** civil action which involves domestic abuse perpetrated, or alleged to have been perpetrated, against them or directed, against a child by a party to those proceedings (i.e. the abuser), then the party alleging the abuse is automatically deemed to be a vulnerable witness.
- There would be no need for any "qualification" via a protective order or "criminal proceedings."
- This means that they will also be automatically entitled to use standard special measures of their choice, including the prohibition of personal questioning by the abuser.
- These special measures would be available in both evidential and non-evidential hearings.
- This would apply in any civil proceedings, for instance divorce, small claims, actions for protective orders (either a standalone application or as an ancillary crave in other proceedings), child welfare or child contact/residence hearings.

Witnesses' views and needs are important and should inform the use of special measures and which of these are used. However, we are aware that women's preferred choice of special measure in criminal cases is not always made available so, for both civil and criminal proceedings, these must be properly resourced and available across all the courts in Scotland.

Victim Notification Scheme Reform.

We note from the Minister's evidence that the Scottish Government intends to introduce technical amendments laying the groundwork for the creation of a Victim Contact Team. It is important that there is clarity around the role of this new mechanism and that the Scheme overall is amended to provide clear and consistent information for victims around release, and parity of access to information for victims that is not restricted by the length of the offender's sentence.

We would be pleased to discuss this paper further with the Committee.



Dr Marsha Scott
CEO, Scottish Women's Aid