

Engender Parliamentary Briefing: Criminal Trials During the Covid-19 Outbreak

April 2020

BACKGROUND

Engender is Scotland's feminist policy organisation. We work to secure a Scotland where women and men have equal access to resources, safety, rights and power.

The Covid-19 pandemic represents a crisis for gender equality around the world and in Scotland. We have already set out in our paper **Women and COVID-19**¹ the ways in which Covid-19 places women at increase risks of violence, poverty and inequality and called for gender to be systematically and consistently mainstreamed into our responses to this crisis at every level.

Engender previously called on MSPs and Government to “[e]xplore innovative options to protect women’s access to justice, including juryless trials in the instance of rape and serious sexual assault.” We continue to believe that judge-only trials respect the dignity and rights of women who have experienced gender-based violence, minimises additional trauma of delayed and protracted attempts to seek justice and balance the rights of women and the accused in a proportionate way while our society experiences the present disruption. However, we also recognise that further options have been put forward for the duration of the outbreak and **welcome the opportunity here to raise points specific to the possible continuation of jury trials**. We are concerned that many of these options will exclude women from participation in jury trials and undermine women’s access to justice by rendering juries less representative of the experiences of Scotland’s population.

¹ Engender (2020) *Women and COVID-19* Available at:
<https://www.engender.org.uk/content/publications/Engender-Briefing---Women-and-COVID-19.pdf>

CRIMINAL JUSTICE IN SCOTLAND DURING COVID-19

1. How does Covid-19 affect women's access to justice?

Engender and other women's organisations have drawn attention to the ways in which Covid-19 and the present lockdown create the perfect enabling conditions for men's violence against women to be perpetuated with opportunities for safeguarding, intervention and support curtailed. Increased calls to support agencies and organisations around the world demonstrate this reality.² However, it must be remembered that gender-based violence is not itself caused by the pandemic, but already permeates Scottish society at epidemic levels and is intrinsically connected to women's inequality with men, patriarchal structures and outdated gender norms.³

Victim-survivors of such crimes - including harassment, victimisation, physical and emotional abuse, those associated with commercial sexual exploitation, and sexual offences - must already endure serious barriers to justice and safety, for example the low conviction rates associated with such trials and having their own behaviour, histories and dignity effectively put on trial.⁴

Yet before they even reach this point, victim-survivors in Scotland must withstand long and arduous procedural delays which stretch the trauma of seeking justice for up to two years. This uncertainty and protraction not only exacerbate the psychological stress for complainers but additionally impacts on their ability to give evidence.⁵ Additional delays caused by Covid-19 may range from weeks to many months and add to the distress of these women.

2. How do we apply a gender lens to the role of jury in Scotland?

As a feature of Scottish criminal justice, the jury is given "enormous significance" despite being a feature of a relatively low number of total criminal cases⁶ – around

² BBC Scotland (19 April 2020) '*Coronavirus: Lockdown 'increasing' domestic abuse risks*' Available at: <https://www.bbc.co.uk/news/uk-scotland-52338706>

³ Scottish Government (2016) *Equally Safe: national strategy* Available at: <https://www.gov.scot/publications/equally-safe/>

⁴ M. Burman (2009) '*Evidencing sexual assault: Women in the witness box*' Journal of Community and Criminal Justice. Available at: <https://www.rapecrisisscotland.org.uk/publications/Evidencing-Sexual-Assault-Burman.pdf>

⁵ Rape Crisis Scotland (2020) *Briefing on Coronavirus (Scotland) Bill Provisions* Available at: <https://www.rapecrisisscotland.org.uk/publications/?cat=4>

⁶ P. Duff (2001) '*The Limitations of Trial by Jury*' *Revue internationale de droit pénal* 2001/1-2 (Vol. 72). Available at: <https://www.cairn.info/revue-internationale-de-droit-p%C3%A9nal-2001-1-page-603.htm>

six per cent.⁷ While a small number of serious offences (including rape and murder) must always be tried by juries, other crimes may be heard under solemn or summary procedures.⁸ While many speak of a ‘right’ to trial by jury, this does not entirely accurately describe the role of juries in Scotland – it is ultimately the right of the state, whether by statute or the prosecution as the master of the instance, to determine the mode of trial.

A majority of states within Europe do not use jury or rely on a mixed system, and even in England and Wales trials without juries have taken place.⁹ There is no right under Article 6, Paragraph 1 of the European Convention on Human Rights (ECHR) to a jury trial and the European Court of Human Rights has stated that choice of criminal procedure is a matter for the state, provided that the system chosen does not contravene the principles of fairness within Article 6 of ECHR.¹⁰

This “political and symbolic” importance¹¹ has the potential to obfuscate and restrict discussion around the limitations of jury trials. Juries are imperfect, for example, it has been widely shown that juries are less likely to convict in rape and sexual assault cases than for other crimes, a weakness that is significantly gendered.¹²

3. How can we ensure that jurors are kept safe?

Almost all proposals to convene juries during a time of ‘lockdown’ and/or social distancing rely on prospective jurors and court officials to leave their homes in order to facilitate selection and trial. Maintaining social distancing standards in existing court facilities will, as the Scottish Government notes, be near to impossible.¹³ We

⁷ Scottish Government (2020) *Criminal Proceedings in Scotland, 2018-19, Table 3*. Available at: <https://www.gov.scot/binaries/content/documents/govscot/publications/statistics/2020/03/criminal-proceedings-scotland-2018-19/documents/crime-justice-criminal-proceedings-scotland-2018-19/crime-justice-criminal-proceedings-scotland-2018-19/govscot%3Adocument/crime-justice-criminal-proceedings-scotland-2018-19.pdf>

⁸ Solemn cases involve a jury, *c.f.* summary cases where no jury is involved.

⁹ *R v. Twomey and Others* [2009] EWCA Crim 1035

¹⁰ *Twomey, Cameron and Guthrie v. The United Kingdom* ECHR No. 67318/09 and No. 22226/12, citing *Taxquet v. Belgium* ECHR No. 926/05

¹¹ P. Duff (2001) ‘*The Limitations of Trial by Jury*’ *Revue internationale de droit pénal* 2001/1-2 (Vol. 72). Available at: <https://www.cairn.info/revue-internationale-de-droit-p%C3%A9nal-2001-1-page-603.htm>

¹² Rape Crisis Scotland (2019) ‘*New figures show almost 1 in 5 trials for rape/attempted result in Not Proven*’. Available at: <https://www.rapecrisisscotland.org.uk/news/news/new-figures-show-almost-1-in-5-trials-for-rapeattempted-result-in-not-proven/>

¹³ Scottish Government (2020) *Covid-19 and Solemn Criminal Trials Scottish Government Discussion Document*. Available at: <https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2020/04/coronavirus-covid-19-options-for-progressing-the-most-serious-criminal->

should also note that the Scottish and the UK Government have invested considerable effort to instil the need to stay at home among the public.

Asking, or indeed requiring, jurors to now leave their home risks their health, puts stress on their own evaluation of the risk, and exacerbates the legitimate fear many will have about catching the virus or spreading it for themselves and their families. Women's provision of paid and unpaid care to elderly and high-risk persons must be a key consideration in the evaluation of risk.

4. How can we ensure that juries remain as representative as possible?

Juries represent a segment of the population selected at random and are not guaranteed to be representative of the general population in Scotland. It may be the case that the 15 jurors involved the trial of a perpetrator of gender-based violence all come with direct experience of perpetuating such abuse or holding misogynistic ideas and values.

Any change to selection or juries poses risk to the balance of prospective jurors.

Engender has set out the many ways in which Covid-19 is likely to place women under additional pressure in providing unpaid care and childcare, isolating them from support networks and increasing their responsibilities at paid work as frontline workers. **We believe that any proposal to hold jury-trials during either the lockdown period or phased recovery must seriously consider the representativeness of jurors if women's experiences and rights are to be at all respected and reflected.**

For example:

- Women are more likely to rely on public transport, and not have access to their own car, **making travel to participate in juries impossible or at least not without extra-risk.**¹⁴

cases/documents/coronavirus-covid-19-options-for-progressing-the-most-serious-criminal-cases/coronavirus-covid-19-options-for-progressing-the-most-serious-criminal-cases/govscot%3Adocument/COVID19%2B-%2BOptions%2Bfor%2BCriminal%2BJustice%2BSystem%2B-%2BDiscussion%2BPaper%2B-%2BFINAL-%2B14.04.20.pdf

¹⁴ International Transport Forum (2018) *Understanding Urban Travel Behaviour by Gender for Efficient and Equitable Transport Policies* Available at: <https://www.itf-oecd.org/sites/default/files/docs/urban-travel-behaviour-gender.pdf>

- Women are more likely to experience poverty and even before the outbreak represented the majority of part time and precarious workers.¹⁵ **Lack of access to resources will inevitably hamper any attempt to travel to courts** or other temporary facilities.
- Women are more likely to have childcare responsibilities and no alternatives in the form of school, family support or paid for childcare. As we have seen with campaigns to ensure women with children at home have access to furlough, **balancing childcare and schooling with other work, including serious matters like jury participation, is next to impossible.**¹⁶
- Data shows that **nearly 20% of women have seen their care responsibilities affected** by the outbreak.¹⁷ With women already providing up to 70% of unpaid care,¹⁸ unpaid care will remain a significant barrier to other forms of participation such as juries.

Other issues of class, race and ethnicity, age and disability all have the potential to be exacerbated by proposals. Disabled women, working-class women and Black and minority ethnic women (BME) women are all more likely to be engaged in frontline work, while disabled women, young women and women living in poverty are less likely to have the resources to safely travel to courts or temporary facilities.

Juries must not be allowed to become dominated by men, particularly white, middle-class and non-disabled men who are more likely to have access to resources that make attending trials possible. To do so would further undermine women's confidence and experiences of a justice system that already fails to deliver them justice. This concern equally applies to women accused of an offence.

Justice in Scotland will be significantly undermined if juries are allowed to go ahead without proper consideration of how to ensure the most representative field of prospective jurors possible.

¹⁵ Alakeson, Vidhya (2012) *'The price of motherhood: women and part-time work'* Resolution Foundation. Available at: <https://www.resolutionfoundation.org/publications/price-motherhood-women-part-time-work/>; The TUC (2019) *'1 in 10 women don't earn enough to qualify for sick pay, TUC analysis reveals'*. Available at <https://www.tuc.org.uk/news/1-10-women-dont-earn-enough-qualify-sick-pay-tuc-analysis-reveals>

¹⁶ Institute for Fiscal Studies (2020) *'Trying times: how might the lockdown change time use in families?'* Available at: <https://www.ifs.org.uk/publications/14814>

¹⁷ ONS (2020) *Coronavirus and the social impacts on Great Britain data 16 April 2020, Table 2: Impact on people's life overall*. Datasets available at: <https://www.ons.gov.uk/peoplepopulationandcommunity/healthandsocialcare/healthandwellbeing/datasets/coronavirusandthesocialimpactsongreatbritaindata>

¹⁸ Carers UK (2015) *Valuing carers 2015* Available at: <https://www.carersuk.org/professionals/policy/policylibrary/valuing-carers-2015>

CONCLUSION

We do not believe that women's rights have been adequately balanced in the consideration of the options to date. **Asking women to wait for justice adds serious injury to women whose lives have already been seriously affected by men's violence, but so too does instituting changes, however temporary or otherwise, which further undermine and exploit their own right to a fair trial and to justice itself.** Many of the proposals on the table fail to adequately consider impacts of an unrepresentative jury for women's rights and safety.

We call upon stakeholders from all parties to **reflect on women's experiences of criminal justice**, and seriously question whether steps to positively ensure women's participation in the justice system and the rights of victim-survivors have been given sufficient weight.

FOR FURTHER INFORMATION

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ABOUT US

Engender is a membership organisation working on feminist agendas in Scotland and Europe, to increase women's power and influence and to make visible the impact of sexism on women, men and society. We provide support to individuals, organisations and institutions who seek to achieve gender equality and justice.