



The Lord Justice Clerk

Parliament House
Edinburgh, EH1 1RQ

8 March 2019

Margaret Mitchell, MSP
Convenor, Justice Committee
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The Scottish Parliament
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Dear Convenor,

VULNERABLE WITNESSES (CRIMINAL EVIDENCE) (SCOTLAND) BILL

As you might imagine, I have been following the progress of the Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill with keen interest. The Committee was good enough to include in its Stage 1 Report a number of references to the oral evidence I gave to you in December. I hope that my contributions so far have proved helpful to the Committee's consideration of this important piece of legislation.

The Lord President and I are very keen that the passage of this Bill genuinely provides for a better environment for the taking and testing of a vulnerable witness' evidence. We believe that the Bill's core provisions of a presumption in favour of Commissioner hearings, the requirement for a ground rules hearing, and the possibility of conducting a commission earlier in the process than is currently possible, are all measures that will significantly contribute to achieving that objective. The Bill is shaping up to be a ground-breaking piece of legislation that will advance the administration of justice.

The Committee has, in its deliberations, identified a number of further issues that it feels should be addressed in order to ensure that the new system of evidence by Commissioner hearing runs effectively. These include the ability to recall the witness to a further Commissioner hearing, the need for post-commission and post-trial arrangements to support the witness further, and the importance of training for those taking part in Evidence by Commissioner hearings.

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All of these issues arise from very legitimate and compelling concerns. I would, however, suggest that the first of these – the ability to hold follow-up hearings – could be achieved within the current legislative framework, and there are significant risks associated with introducing explicit provisions. The second and third issues are properly outwith the Court's competence to regulate, and the intended purpose is best achieved by means other than envisaged in the relevant proposed amendments. I hope that you will forgive the presumption, but I attach a brief note covering these three issues for your consideration.

I hope that my comments are helpful, and are seen as they are intended, designed to support the passage of a Bill that has the potential to make a real and positive difference both to vulnerable witnesses and to the overall quality of the justice system.

Yours sincerely

A handwritten signature in blue ink that reads "Leona D. Donnan". The signature is written in a cursive style with a horizontal line underlining the name.

NOTE

Further Commission Hearings

There are arguments both for and against such a provision. Although there may be some advantage in setting out a new process to allow the holding of a further commission hearing, there are significant risks. Experience would suggest that, if there were an explicit procedure on the face of the Bill to allow for a further hearing, applications for these would rapidly become a routine occurrence. This would undermine two of the central objectives of the Bill, which are to minimise the uncertainty over when a vulnerable witness might have to appear, and to avoid repeat appearances. As stated in the evidence to the Committee at Stage 1, there has not yet been an instance where new circumstances had arisen to give cause for a second Commission hearing. It would not be desirable to facilitate or encourage a change to that position. It is the judiciary's view that there is already sufficient flexibility within current court procedures to allow for such a follow-up hearing if it is required.

Post Commission and Post-trial support arrangements for the witness

The position remains that contained in the Lord President's letter to the Convenor, and given at the evidence session in December. It is recognised that a witness should not suffer from the fact that she or he has given evidence. The Court, however, would not have the locus, expertise nor any legal mechanism to require the provision of support services after they have given evidence, or to monitor whether those services have been provided.

A ground rules hearing is a procedural hearing which can only regulate the conduct of a process that is within the court's control – i.e. the commission itself. There are no order-making powers which could be deployed to require service providers to act in a certain way, and no mechanism to ensure compliance. It is respectfully suggested that this important issue would best be explored with all the potential agencies and interests involved, in the forum of the Victims Task Force, which is looking at the entirety of support that is given to the victims of crime, from one end to the other of their involvement in the criminal justice system.

Training for those questioning vulnerable witnesses

It is absolutely right that training in questioning vulnerable witnesses is an extremely important part of the package of measures required to make the new approach work. In relation to practitioners, however, the Court cannot and should not regulate training through Court rules in an Act of Adjournal, as this would cut across the responsibilities of the relevant professional bodies. If the intention is to prevent any practitioner who has not undergone the relevant training from taking part in a

Commissioner hearing, this would interfere with the statutory regime¹ governing the rights of audience of qualified practitioners and would be a major innovation in Scots legal practice. The implications for this regime would be significant, might require amendment to the primary legislation, and would require consultation with the professions. It was a feature of the Evidence and Procedure Review work that we sought to develop proposals for change by a collaborative process in which the professions were fully invested, and were willing participants; and this has continued in the implementation of the Practice Note. It would therefore be premature to impose a requirement on them. We will of course continue to explore the nature of training which is provided with the relevant professional bodies, and work with them to secure the highest possible standards of advocacy.

¹Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, section 24