

JUSTICE COMMITTEE**VULNERABLE WITNESSES (CRIMINAL EVIDENCE) (SCOTLAND) BILL****SUBMISSION FROM MISCARRIAGES OF JUSTICE ORGANISATION**

1.1 This submission is supplementary to our submission of August 2018, (Reference No. J/S5/18/VW/9) made in response to the call for views on the draft Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill (“the Bill”). This submission is made at the request of the Chair of the Scottish Parliament Justice Committee, and relates to safeguards that we regard as necessary and appropriate should the Bill proceed to enactment in, or resembling, its draft form.

1.2 For the purposes of this exercise we have assumed that the Bill will be enacted in such form as incorporates the principal proposals of the draft, including those proposals to which we have voiced objection in our earlier written and oral submissions.

2.1 Notwithstanding the terms of paragraph 1.2 above, we are concerned to note the absence of provision in the Bill for the availability to vulnerable accused persons of protective measures, similar to those afforded and to be afforded to complainers and other witnesses. We consider that this amounts to fundamental unfairness. It is, we note, recognised that such measures may be appropriate, and that the identification and enactment of such is anticipated at some indeterminate time in the future. At Paragraph 60 of the Policy memorandum, it is recognised that further work requires to be undertaken on the provision of suitable support for vulnerable accused. In our view - and as narrated at paragraph 3.4.2 of our earlier written submission - the interests of fairness and of justice require that this provision be identified, and incorporated in the proposed legislation, before the legislation is enacted. The phased introduction of the Bill’s provisions in this regard, as currently proposed, will, in any interim period, result in unjustifiable disadvantage to vulnerable accused, and to increased risk of miscarriage of justice.

2.2 That general observation aside, we seek safeguards in the areas of:

Crown disclosure
Section 275 procedure
Deeming of witnesses as vulnerable
Judicial direction

3 Crown Disclosure

3.1 We share, and echo, the concerns expressed by the Faculty of Advocates at pages 8 and 9 of their written submission to the Justice Committee (Reference No. J/S5/18/VW/28). Failure by the Crown to disclose, and/or to disclose timeously, relevant evidence has been a feature in the wrongful conviction of a number of our clients whose trials were conducted under “normal” circumstances - ie where oral evidence was given in the ordinary

course, at the trial diet. It is self-evident that the risk of miscarriage of justice, arising from the non-availability of relevant, disclosable evidence, is significantly higher where witness evidence is taken at an earlier (and indeed much earlier) stage. For the current proposals to operate safely and properly there must be certainty that the Crown's disclosure obligations in terms of Part 6 of the Criminal Justice and Licensing (Scotland) Act 2010 will be met in the circumstances envisaged by the Bill. We would propose that, prior to enactment of the legislation, the Crown be required to provide clear and robust evidence of the processes by which it will meet this requirement, not simply in respect of its current obligations but, additionally and specifically, in the circumstances envisaged by the Bill.

3.2 Section 275 procedure

3.2.1 Our view, as expressed both in our written and our oral submissions, is that the credibility and weight given to the evidence of complainers and witnesses who have been designated "vulnerable" will each be enhanced, as a direct consequence of that designation. In this context, we draw your attention, in particular, to paragraphs 3.1.1 and 3.1.2 of our written submission. Such advantage to the Crown is at corresponding disadvantage to the accused and is potentially such, in our submission, as to prejudice the right of an accused person to a fair trial. As a counter to this, albeit a limited one, we would propose that in all cases where the status of "vulnerable" has been afforded to a complainer or witness, the legislation should provide for a strong presumption in favour of the allowing of any application made by the defence, in respect of that complainer or witness, under s275 of the Criminal Procedure (Scotland) Act 1995.

3.2.2 For the avoidance of doubt, what we seek in this proposal is a presumption bearing on the application of s275 as drafted. We neither seek nor propose any amendment to the substantive terms of the section.

3.3 Deeming of witnesses as vulnerable

3.3.1 We have no objection to, and would welcome, the deeming of all child witnesses as "vulnerable". Our following comments are to be read, therefore, in the context of adult witnesses.

3.3.2 As discussed at paragraph 3.3 of our August 2018 submission, we consider the proposed definition of the term "vulnerable witness", as offered at paragraph 62 of the Policy Memorandum, to be remarkably and indeed excessively broad. We note that it requires no specific or objective measure of actual vulnerability. The proposed test of vulnerability appears simply to be the nature of the offence alleged. Given the undoubted reality that a proportion of complainers and witnesses will not be truthful, and in the context of our comments at paragraph 3.2.1 above, the danger of miscarriage of justice arising from the processes now proposed is very real, and equally obvious. We would propose that this risk be mitigated by the introduction to the legislation of provision for objective and evidence-based testing for actual vulnerability.

3.3.3 We have been concerned to note, under current procedures, the presence in court and within sight of the jury of persons whose function is to offer support to complainers and witnesses who have been designated “vulnerable”. Our concerns in this regard mirror those expressed at paragraph 3.2.1 above. We believe that these concerns can be mitigated, in the currently proposed procedures, by provision that such supporters be kept out of sight of the jury in any evidence either transmitted by video link or recorded on video storage medium.

3.4 **Judicial Direction**

3.4.1 We have voiced both general and specific concerns in relation to this proposed legislation. In light of these, we believe that there is a need for an overarching safeguard in addition to the specific instances examined in this document.

3.4.2 We would propose that this should take the form of direction, by the trial judge to the jury, in all cases where the measures specified in the Bill have been employed.

3.4.3 Direction should be given both in advance of the introduction of vulnerable witness evidence and in the charge to the jury, to the effect that:

- a) no inference should be drawn from the measures employed to the effect that a complainer is in fact a victim; and
- b) no extra weight, credibility or reliability should be imputed to the evidence of a vulnerable witness by reason of that witness’s designation as vulnerable.

Supreme Courts



Euan McIlvride
Casework Team
Miscarriages of Justice Organisation
121- 127 Saltmarket
Glasgow
G1 5LF

Depute in Charge of Justiciary Office
Parliament House
11 Parliament Square
Edinburgh
EH1 1RQ

DX 549306 Edinburgh 36

Our Ref: RM081118/FOI/MCIIVRIDE

08 November 2018

Dear Mr McIlvride

FREEDOM OF INFORMATION (SCOTLAND) ACT 2002

Thank you for your request for information received on 22 October 2018. You seek the following information:

- 1) In respect of each of the last five years for which statistics are available, the total number of appeals against conviction heard by the High Court of Justiciary Appeal Court
- 2) In respect of the same periods, the total number of such appeals allowed by the High Court of Justiciary Appeal Court.

The information requested is set out in the table below.

	2013	2014	2015	2016	2017	2018	Total
Conviction Appeals Heard	84	87	55	72	59	42	399
Conviction Appeals Refused	61	65	24	54	43	31	278
Conviction Appeals Sustained	23	22	31	18	16	11	121