

## **JUSTICE COMMITTEE**

### **VULNERABLE WITNESSES (CRIMINAL EVIDENCE) (SCOTLAND) BILL**

#### **SUBMISSION FROM THE CROWN OFFICE AND PROCURATOR FISCAL SERVICE (COPFS)**

##### **The rule in favour of pre-recording evidence**

###### General

1. COPFS strongly supports the use of pre-recorded evidence for child and vulnerable witnesses in the most serious cases. This is a reform which will reduce the traumatic effect of the current criminal justice system on some witnesses, while protecting the accused person's right to a fair trial.
2. COPFS is particularly pleased to support the commitment to extending, in due course, the use of pre-recorded evidence to deemed vulnerable adult witnesses, particularly in cases of serious sexual offending.

###### The process

3. At present, a party citing a witness may apply to the Court to allow the evidence to be pre-recorded in advance of trial when making a child or vulnerable witness application. The consequence of introducing the rule is that pre-recording evidence in advance of trial will no longer be optional but will be compulsory in respect of the specified witnesses unless there is a good reason to the contrary. The establishment of the rule is welcomed by COPFS.
4. At present the measures which facilitate pre-recording are 'non-standard special measures' and thus the Court must be satisfied that it is appropriate to make an order authorising use of those measures. The Bill proposes that these special measures become 'standard special measures' in relation to the categories of witness to whom the rule will apply. The result will be that, in relation to those categories of witnesses, the court does not have the option to refuse such an application save in the limited circumstances specified in section 271BZA(7) or (8). It is proposed that this amendment is logical and compliments the introduction of the rule.
5. Where a good quality visually recorded police statement has been taken from a prosecution witness to whom the rule applies, COPFS intends to comply with the rule by applying to the court under section 271M to enable the witness' visually recorded police statement to be used as the witness' evidence in chief and to conjoin that with an application under section 271I for cross-examination and re-examination to proceed by 'taking evidence by Commissioner'. This mirrors the process employed in England and Wales in terms of sections 27 and 28 of the

Youth Justice and Criminal Evidence Act 1999. Should the prosecutor require to elicit evidence not dealt with in the police statement(s) the prosecutor will seek to ask supplementary questions of the witness at the 'evidence by Commissioner' hearing prior to cross-examination.

6. In cases in which the witness' police statement has not been visually recorded or the recording cannot be used for the purposes of section 271M, due to the quality of the recording, the quality of the interview, or the nature of the evidence elicited, COPFS will make an application in terms of section 271I to take all of a witness' 'evidence by Commissioner'.
7. Whilst it is possible to lodge a written statement as the witness' evidence in chief, in terms of section 271M, COPFS does not generally favour this. If the jury is to assess the credibility and reliability of a witness' evidence, it is of value for the jurors to see and hear the witness as they give their evidence.
8. The Bill removes the statutory barrier to lodging child and vulnerable witness notices and applications and seeking evidence by Commissioner, prior to the service of an indictment. However, COPFS anticipates that the vast majority of 'evidence by Commissioner' hearings will continue to take place after an indictment has been served. It is only when all relevant evidence is available and the indictment is served that the charges upon which the accused will go to trial are certain. If evidence were to be taken before the indictment has been served, the examination would not be focused by reference to the charges on which the accused will face trial. If the accused is not, in fact, indicted, evidence would have been taken unnecessarily. If the accused is indicted, but on charges which differ from those which had been anticipated at an earlier stage, it might be necessary to hold a further commission hearing; multiple hearings would be liable to increase, rather than to reduce, trauma.
9. Early capture of witnesses' evidence can be facilitated by other means. Visually recording witnesses' police statements at the outset of investigations is the principal method. The Police Service of Scotland and Social Work Scotland are revising the training that they provide to staff who conduct 'Joint Investigative Interviews', normally conducted in respect of children aged under 16. That project will be of great importance in facilitating efficient compliance with the rule. The need for Police Scotland to extend routine visual recording, but not necessarily 'Joint Investigative Interviews', to the other categories of witness to whom the rule will apply in future, i.e. child witnesses aged 16 and 17 and deemed vulnerable adult witnesses, will play an important role in minimising the demands on those witnesses.
10. In August 2018 the Scottish Government committed to providing COPFS with additional in-year funding. Part of that funding will enable COPFS to progress a

programme of work which, over time, should reduce the time between first appearance on petition and the service of the indictment. This should, in turn, result in 'evidence by Commissioner' hearings, albeit that they occur after the indictment has been served, taking place at an earlier date after first appearance than is currently possible.

### Impact

11. Pre-recording evidence has not previously been undertaken in Scotland on the scale that is proposed in the Bill. Several organisations in the criminal justice system, including COPFS, will require significant additional resources in order to comply with the new rule. It will be necessary to establish high quality facilities for pre-recording evidence and for playing it back at trial, as well as suitable technical solutions for editing, transcribing, storing and transporting recordings. At the same time, the pre-recording of evidence, and the 'Ground Rules Hearing' which will precede it, will impose additional demands on COPFS, SCTS and the defence.
12. COPFS supports the creation of a procedural hearing, in advance of the pre-recording of evidence, to be known as a 'Ground Rules Hearing'. In the majority of cases this hearing will not be a stand-alone hearing but will be conjoined with the Preliminary Hearing in High Court cases or the First Diet in Sheriff and Jury cases. However, the nature of the preparation required for a ground rules hearing, to achieve the aim of the Bill (and reflected in High Court of Judiciary Practice Note 1 of 2017) is significant and additional to that which would otherwise be required for a Preliminary Hearing. In effect, the prosecutor requires to prepare fully for the examination of the witness, with a view to discussing, potentially in some detail, at the ground rules hearing the nature and scope of the questioning of the witness. The same is required of defence counsel. In addition to the extra preparation time, the hearing itself is likely to take longer. These features of the ground rules hearing are a key feature of the reform. Judicial supervision, in advance, of the nature and scope of the questioning of the witnesses to whom the Bill applies should give those witnesses confidence that any questions which they may be asked are necessary for the proper administration of justice.
13. The 'evidence by Commissioner' hearing is additional to those hearings which traditionally occur in the course of proceedings on indictment and will require additional judicial and prosecutorial resources to be put in place.

### Implementation

14. This reform will have a very marked impact on the organisation of the business of the criminal courts. It is inevitable that the rule will require to be implemented in a phased manner. Deliberate decisions should be taken sequentially over time to

extend the presumption to additional categories of witnesses. Those decisions can only safely be made once the necessary resources are in place – not merely the facilities to record evidence on the scale envisaged, but also the resources to provide the capacity in the system on the part of the Crown, the Court and the defence (via the Scottish Legal Aid Board). Phasing will allow the system to absorb change while minimising risk both to the system and to individual cases. It will also enable any difficulties which arise in the operation of the rule to be identified and addressed before the rule is extended.

15. A flexible, phased approach also offers protection against significant and unanticipated obstacles which may arise during implementation. The experience in England and Wales is instructive. Hearings in terms of section 28 of the Youth Justice and Criminal Evidence Act 1999 have been trialled in three Crown Courts in England since December 2013. Despite the apparent success of the trial and the stated intention of the Ministry of Justice to begin national roll-out, section 28 hearings are still employed only in the three trial courts. COPFS understands that a technological obstacle has been encountered which has frustrated the intended national roll-out. A fixed implementation timetable would be incompatible with managing unforeseen challenges.
16. COPFS proposes that each implementation phase should be defined both by the category of witness to whom the rule will apply and also the forum in which proceedings will take place. For example, it is suggested that the rule be first introduced in respect of child witnesses in High Court cases that involve a charge on the designated list of offences, given that it is there that the most serious offences are prosecuted. When successful implementation in that regard has been achieved, and when the required capacity in the system has been developed, it is proposed that application of the rule be extended to either: a defined category of deemed vulnerable adult witnesses in High Court cases; or a defined category of child witnesses in Sheriff and Jury cases.

#### Accused persons aged under 18

17. Whilst it is important that due account is taken of the age and vulnerability of accused persons, the creation of a rule that required the evidence of accused persons to be recorded in advance of trial could not readily be reconciled with the accused's right to silence. Two of the key benefits of pre-recording evidence are that it removes the need for the witness to attend at the trial and removes the need to give evidence in the presence of the accused person. Clearly neither of these outcomes can apply to accused persons.
18. COPFS raises these matters for the Committee to consider but notes that there are likely to be other organisations better placed to provide greater detail and insight in respect of these matters.

The new process for intimating vulnerability and requisite special measures

19. Child witnesses and deemed vulnerable adult witnesses are automatically entitled to 'standard special measures' when giving evidence and, therefore, the requirement to lodge formal, written notices that require judicial approval is an inefficient use of resources. In November 2017 the Inspectorate of Prosecution in Scotland in her report titled "Thematic Review of Investigation and Prosecution of Sexual Crimes" recommended that the need to lodge such notices and applications should be abolished so that witnesses have certainty about the special measures which will be available to them when they give evidence.
20. The new process for intimation of vulnerability in respect of child witnesses (those aged under 18) and deemed vulnerable adult witnesses (those alleged to be the victims of sexual, domestic, human trafficking or stalking offences) seeking only 'standard special measures' (a live television link, a supporter, a screen) is welcomed – though since it still requires notice to be lodged with the Court, it does not go as far as the Inspectorate of Prosecution recommendations. COPFS does not anticipate that this new process will result in releasable savings. Rather it will enable a better standard of service to be offered to witnesses by Victim Information and Advice (VIA) staff. The new process will 'free-up' VIA staff, allowing them to spend a greater portion of their time engaging with vulnerable witnesses, establishing their support needs and providing pertinent information.
21. COPFS intends to create a new and almost entirely automated process which will convey the requisite information – namely: the requisite standard special measure(s); the witness' age if the witness is a child; and such other information as may be prescribed by the Act of Adjournal, to SCTS and to the solicitor representing the accused person via Criminal Justice Secure Mail (CJSM) or the COPFS Secure Disclosure Website. The COPFS view is that the requirement to intimate whether the witness is a child or vulnerable witness is unnecessary given that the age of the witness will only be specified if the witness is a child. This process will similarly enable solicitors representing accused persons to intimate the necessary information to SCTS via CJSM or by letter.