

JUSTICE COMMITTEE**VULNERABLE WITNESSES (CRIMINAL EVIDENCE) (SCOTLAND) BILL****SUBMISSION FROM PROFESSOR JAMES CHALMERS AND PROFESSOR
FIONA LEVERICK (UNIVERSITY OF GLASGOW) AND PROFESSOR VANESSA
MUNRO (UNIVERSITY OF WARWICK)**

1. We strongly support the introduction of the “new rule” that the court must enable child witnesses in the most serious cases to give all their evidence in advance of a criminal trial. The short submission that we make below draws heavily on a more extensive evidence review undertaken (as part of a larger, ongoing project on jury decision-making) for the Scottish Government by Professor Munro – The Impact of the Use of Pre-recorded Evidence on Juror Decision-Making: An Evidence Review (2018)¹ (subsequently referred to as the “Evidence Review”) – which the Justice Committee might well find to be of interest.

The case for the new rule

2. As noted in the Policy Memorandum accompanying the Bill, the case for the new rule is two-fold. First, child witnesses may be re-traumatised by their participation in the criminal justice system, a proposition supported by a significant body of prior research indicating that giving evidence in criminal trials can have adverse physical, mental and psychological effects on child witnesses (see Evidence Review, p.11). Second, while the new rule does not eliminate entirely the possibility that there will be a long delay between the alleged events and the giving of evidence (unavoidable, of course, in cases of historical abuse), it does at least ensure that evidence is taken closer to the point at which an allegation is made than if it were given live at the trial. The importance of this is demonstrated by research that shows that while all witnesses forget information over time, young children are particularly susceptible to this (see Evidence Review, p.11).
3. The new rule would mean that, unless one of the exceptions applies, jurors would not be able to observe child witnesses giving live evidence in court but would instead be played a video of their evidence. Concerns have been expressed that watching a video rather than observing live testimony might influence jurors’ assessments of the credibility of child witnesses and ultimately impact on verdict decisions. On the one hand, it has been suggested that this might place the accused at a disadvantage by presenting the child as especially vulnerable or affected by events. Conversely, it has also been suggested that video evidence might lack the emotional impact of live testimony, thereby reducing the likelihood of a child witness being believed and empathised with by a jury who are not able to observe them ‘in the flesh’.

¹ <https://www.gov.scot/Resource/0053/00532556.pdf>

4. The Evidence Review (see chapter 3) suggests that such concerns are broadly unfounded. Research with mock juries has demonstrated that – contrary to many people’s misplaced confidence in their ability to do so – jurors are not in fact significantly better able to discern deception when children testify in open court as compared to via live-link or pre-recorded testimony. Likewise, there is no compelling evidence that the use of pre-recorded evidence by child witnesses has a significant effect on verdicts in criminal trials. Individual jurors may harbour a preference for evidence delivered live and in person, but the research suggests that this does not translate in any consistent or reliable way into collective verdict outcomes.

Implementation of the new rule

5. In the Evidence Review (see chapter 5) a number of issues are identified that will need to be addressed in order for the implementation of the pre-recorded evidence reforms to be fair and effective.
6. The first of these are technical issues. There is a need to ensure that videos are of good visual and audio quality and that the screen upon which the witness’ image appears is large enough and positioned appropriately. As noted in the Evidence Review (p.27), studies have shown that jurors can be distracted by poor audio and visual quality of pre-recorded evidence videos, which may make it difficult to concentrate on the content of the testimony. Good quality videos will minimise the likelihood of any of the possible adverse effects of video-recorded testimony on jurors’ credibility assessments occurring in practice. Attention also needs to be given to the equipment in the courtroom, to ensure that statements can easily be played at the appropriate point in the trial without delay due to technical difficulty or equipment malfunction. Further, careful consideration will need to be given to how prior statements are edited for, and presented at, trial as evidence-in-chief: statements given during a police investigation are often lengthy and repetitive, they may lack the sequential narrative of accounts led by counsel at trial, and may include details that prove to be irrelevant to trial proceedings. Editing can redress this but may result in a disjointed account.
7. In implementing the new rule, those responsible should be aware of the issue of camera perspective (see Evidence Review, pp. 27-28). In the context of criminal confessions, studies have demonstrated that confessions are more likely to be perceived as voluntary and reliable when the camera is focused on the suspect alone, than when the camera is focussed on the interviewer and the suspect. There is evidence that camera perspective can similarly impact on assessments of credibility in relation to child witnesses giving video testimony, with one study finding that when the camera was focussed on the child alone, their testimony was regarded as being more truthful than when the camera focus was on both the child and the interviewer. A follow up study by the same researchers did not

replicate these findings, but the authors suggest that this may be because the effect only occurs in certain circumstances (such as where the child is relatively unemotional).

Extension to other vulnerable witnesses

8. We support the principle of extending the new rule to other vulnerable witnesses, including adult “deemed vulnerable witnesses”. We see no reason in principle why they should not be extended to any of the categories of vulnerable witness presently listed in the Criminal Procedure (Scotland) Act 1995 s.271(1)(b)-(d).
9. There is ample evidence of the traumatising effects of trial participation for vulnerable adult witnesses, and of the positive response to the availability of pre-recorded evidence amongst this constituency, and of the improved potential for ‘best evidence’ to emerge as a result. The same concerns that have been expressed in relation to child witnesses (namely that the use of pre-recorded evidence could affect juror assessments of credibility and – ultimately – trial outcomes) have been made in relation to adult vulnerable witnesses. However, although the evidence base in relation to adult vulnerable witnesses is more limited, existing research suggests that these concerns are also broadly unfounded (see Evidence Review, chapter 4).
10. Far fewer studies have been conducted on the use by adult witnesses of pre-recorded evidence compared to its use by child witnesses. Two significant studies involving rape trial simulations have indicated, however, that the level of any impact on mock juror decision-making is low, and its direction in terms of ultimate jury verdict is unpredictable. Use of special measures by an adult rape complainant may increase one person’s empathy for the witness while raising another’s suspicion about his or her credibility in equal measure. This was found both in relation to pre-recorded prior police statements used as evidence-in-chief and pre-recorded examination and cross-examination by counsel (see Evidence Review, chapter 4).
11. We would, however, caution against a wider rollout of the provisions until the implementation issues noted in paragraphs 5-7 above have been effectively addressed. We would also note that the evidence base in respect of the impact on jurors of pre-recorded cross-examination is particularly thin: the recent review of the pilot of section 28 of the Youth Justice and Criminal Evidence Act 1999 in England and Wales (in relation to child witnesses) did not address this matter directly, and the more recent of the two research studies referred to above (Ellison & Munro, 2014), also pertaining to England and Wales, combined a pre-recorded evidence-in-chief statement with cross-examination via live-link. An earlier Australian study (Taylor & Joudo, 2005) did extend to pre-recorded cross-examination, but here it was secured under questioning by defence counsel,

rather than being taken by a third-party commissioner as envisaged in the Scottish Bill.

Full references for the sources cited above are available in the [Evidence Review](#).