

**JUSTICE COMMITTEE****VULNERABLE WITNESSES (CRIMINAL EVIDENCE) (SCOTLAND) BILL****SUBMISSION FROM CHILDREN 1<sup>ST</sup>****1. Do you agree with introduction of the “new rule” that child witnesses in the most serious cases must give all their evidence in advance of a criminal trial? Do you have any views on how this new rule should be implemented?**

Yes. As Scotland’s national children’s charity, Children 1st has a long history of supporting child victims and witnesses before, during and after both criminal and civil court procedures. Over and over again child victims and witnesses have told us that Scotland’s justice system – designed for adults and rooted in the Victorian era – often causes them greater trauma and harm. At the same time, as scientific understanding of child development – and recently our understanding and awareness of the impact of Adverse Childhood Experiences – has grown, it has become overwhelmingly evident that Scotland’s traditional approach to justice is the least effective for eliciting consistent, reliable accounts from child victims and witnesses. Our current system’s ability to re-traumatise children and to fail to gather their best evidence is therefore detrimental not only to child victims and witnesses, but also to accused children and adults. Giving better support to children and young people will enable them to give better evidence to the benefit of all parties including the accused. As Baroness Hale observed in *W (Children)* [2010] UKSC 12 the two aims of improving the quality of the child’s evidence and decreasing the risk of harm to the child are not in opposition to one another.<sup>1</sup>

Children and young people tell us that repeatedly telling their story to a number of different professionals, complex and confusing procedures and long delays compounds their trauma and distress and prevents them from starting to recover from their experiences. As recognised by the European Barnahus Quality Standards Guidance for Multidisciplinary and Interagency Response to Child Victims and Witnesses of Violence: “*avoiding undue delay is a fundamental principle of child protection and child-friendly criminal investigations and proceedings.*”<sup>2</sup>

Developmentally children’s ability to recall memories varies with both age and their experiences of trauma. When a child’s ability to recall their experiences is compounded by long waits within the criminal justice system this can impact their ability to tell their story consistently, affecting the quality of the evidence they give. As the case of *MacLennan v HM Advocate* showed in 2015, a delay of a year

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<sup>1</sup> <http://www.familylawweek.co.uk/site.aspx?i=ed54115>

<sup>2</sup> Haldorsson O. L. (2017) *European Barnahus Quality Standards – Guidance for the Multidisciplinary and Interagency Response to Child Victims and Witnesses of Violence*, Council of the Baltic States Secretariat and Child Circle.

between the Joint Investigative Interview and cross-examination taken on commission meant that the memories of the young children giving evidence had deteriorated to such an extent that the cross-examination was found to be ineffective and the trial was deemed unfair.<sup>3</sup>

There is clear recognition in international and European law that there should be specific procedural safeguards during criminal investigations and court proceedings to take account of the rights of the child and their particular circumstances.<sup>4</sup> In 2016 the United Nations Committee on the Rights of the Child Concluding Observations Review of the UK, including Scotland, recommended the introduction: “*as standard, video recording of the interview with a child victim or witness during investigation and... {to}... allow the video recorded interview as evidence in court.*”<sup>5</sup> By ensuring that the pre-recorded evidence of child victims and witnesses is used as standard in trial proceedings, Scottish Ministers would be fulfilling their duty: “*to keep under consideration whether there are any steps which they could take which would or might secure better or further effect in Scotland of the UNCRC requirements and if they consider it appropriate to do so, take any of the steps identified by that consideration*” as set out in Part 1 of the Children and Young People (Scotland) Act 2014.

In terms of implementation of these changes, Children 1st believe the change required is as much about culture and practice as it is about systems and processes. Simply taking a child or young person physically out of court, will not be sufficient to reduce the risk that they will experience further trauma or equip them to give their best evidence – as the experience of introducing standard special measures, such as off-site vulnerable witnesses suites shows.

Despite the introduction and strengthening of special measures in the Scottish courts, it is only a few years ago since Children 1st heard that the Victim Information and Advice Unit (VIA) had advised a young person that they were more likely to get a conviction against the person who had sexually abused them if they stood up in court without special measures. Our cultural notions of justice can result in some child witnesses expressing a strong preference to give evidence within a Court room setting without a fully informed understanding of what this could be like. Children 1st family support workers have seen children and young people who wanted to give evidence in court become increasingly traumatised after encountering judicial processes they don't understand and lines of questioning that are both confusing and combative.

Children 1st welcomed the High Court Guideline on Taking Evidence of a Vulnerable Witness by Commissioner (Practice Note Number 1 of 2017), as described by Lady Dorrian QC as a tool for parties to think: “*in some depth, in advance, about how best*

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<sup>3</sup> MacLennan vs HM Advocate [2015] HCJAC 128

<sup>4</sup> O'Donnell, R. (2017) PROMISE *Compendium of Law and Guidance*, Council of the Baltic States Secretariat and Child Circle.

<sup>5</sup> CRC/C/GBR/CO/5:Para:81

*to ensure the process is as appropriate and effective as possible.*<sup>6</sup> Ensuring that the environment in which the commission is taken is as child-friendly as possible should be a crucial element of the preparation for a commission. There is opportunity at every level – from the moment a child arrives in the building onwards – to ensure child-friendly processes are in place and children feel comfortable, safe and supported. The system must be flexible enough to take into account the individual needs of children and to ensure their rights have been respected and their voices have been heard as an integral part of the process.

It is important to make sure that support is readily available, is trauma- informed and takes into account each individual child’s specific needs—including with respect to speech and language and development.

A child’s right to participate fully in the justice process includes not just their right to be heard, but their right to receive clear and comprehensive information about processes, procedures and choices, appropriate to their age and stage. Children 1st regularly hear from children and young people that they do not understand what is happening during their journey through the justice system. This confusion can increase child witnesses’ distress and prevent them from being able to give their best evidence. It also makes it harder for a child or young person to make an informed choice about special measures. The implementation of this Bill must be accompanied by measures to ensure children are fully informed of their options and the processes that they will be involved in.

Children 1st are deeply concerned by the stories we hear from children and young people we support who have had to a wait for up to, or even more than a year from giving an initial investigative interview to hearing that an indictment has been served on the accused. The evaluation of section 28 pilots in England found that while section 28 cases took on average around half the time for cross-examination than other cases, *“for witnesses though, the cross-examination still took place months after they had given their evidence in chief and so they did not have the same sense of this process being earlier and witnesses considered their memory recall to be “patchy.”*<sup>7</sup> We would encourage the Scottish Government and its criminal justice partners to give in-depth consideration to how best to reduce the length of time between pre-recording of evidence in chief and taking cross- examination by commissioner while continuing to comply with the requirements of a fair trial. As changes are introduced to the current system, it will be important to collect data to monitor times between reporting, Joint Investigative Interview (JII)/initial investigation, indictment, evidence taken by commissioner and trial in order to

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<sup>6</sup> Speech by Lady Dorrian QC (2017) [www.scotland-judiciary.org.uk/Upload/Documents/PNNo1of2017speechLJC28March2017.pdf](http://www.scotland-judiciary.org.uk/Upload/Documents/PNNo1of2017speechLJC28March2017.pdf)

<sup>7</sup> Baverstock J (2016) Process evaluation of pre-recorded cross-examination pilot (Section 28) [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/553335/process-evaluation-doc.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/553335/process-evaluation-doc.pdf)

evaluate whether the aims of reducing waits and avoiding undue delay for child witnesses are being achieved.

The implementation of these changes needs to be accompanied by a review of the support that is provided to children and vulnerable witnesses at all stages of their involvement in the justice system—and beyond. There must be clear acknowledgement of the need for trauma-informed recovery support and the links between recovery and prevention to ensure that children and families are able to move on from their experiences. As we have referred to in our answer to question 2 below Children 1st believe that the ultimate aim for Scotland should be the type of family-minded, child-centered support provided by a Barnahus approach within the Scottish context.

Finally, we wish to highlight our concern about how the exception set out in section (1)(8) of the Bill may be interpreted and applied. We do not believe that any child should ever enter a Court room, in line with the previous Cabinet Secretary's own ambition. Our justice system also has a duty to protect them from harm. The policy intent to stop children giving evidence in court because it is harmful must be matched by legislative reform to remove the choice for a child to give their evidence in court.

Since it is not in the best interests of a child to be physically present at Court, the Court should never consider it appropriate to make an order for them to do so. As is clear from other judicial systems (both adversarial and inquisitorial), pre-recording of evidence makes it possible for a child's voice to be fully heard within judicial proceedings, without the need to be physically present in court. Given that the involvement of a child in court proceedings would be in violation of their Article 3 rights detailed in the UNCRC we are not clear where or when this exemption would ever apply and encourage the Committee to seek clarification from the Government in this regard.

**2. The Bill would allow in the future for this new rule to be extended to other vulnerable witnesses, including adult “deemed vulnerable witnesses”. Do you agree with this approach and, if so, to whom would you extend the provisions?**

Children 1st warmly welcomed the previous Cabinet Secretary's commitment to introduce a presumption that *all children's* evidence should be taken in advance of a criminal trial, while believing that Scotland can and should be even more ambitious for children. The provisions set out in the Vulnerable Witnesses Bill are a key step on the journey towards establishing a truly child-centred and rights-based model of Scottish justice; but cannot be the end point. More can and must be done to ensure that no child suffers further trauma, is able to recover from their experiences and move on with their lives.

We also refer to our comments above about the overall ambition for the justice system in Scotland, to which we believe these measures are an important contributory factor – but most certainly not the end point.

The drive to create a model of Scottish justice which draws on the strengths in our current system, learns from international examples of child-friendly approaches, such as the Barnahus<sup>8</sup> and listens to the voices of children and young people about what needs to change must continue beyond the passing of the Vulnerable Witnesses Bill. We encourage our response to this consultation to be read in conjunction with our paper on learning from the Barnahus approach, ‘Trauma- free Justice, Care and Protection for Scotland’s Children’, available here:

<https://www.children1st.org.uk/media/6701/trauma-free-justice-care-and-protection-for-scotlands-children.pdf>.

If we timeously evolve our judicial systems, practice and culture to become truly child-centred while continuing to comply with due process and the rights of the defendant, we in Scotland will not only get this right for children, we will get it right for all vulnerable witnesses and indeed the justice system as a whole.

As the Committee may be aware, Children 1st and the Scottish Government have a joint action contained within Equally Safe (the Violence Against Women and Girls Strategy) to consider how the lessons from Barnahus may be applied in Scotland. We are aware of a significant amount of positive ongoing work, which includes this Bill, to improve the experiences of child and vulnerable witnesses – including the Chief Medical Officer (CMO) Taskforce on Forensics, improving JIIs and discussing improved facilities for giving evidence. We encourage the Committee to ensure that this work all links together and contributes to the eventual aims and ambitions of a Barnahus-type approach in Scotland.

Children and young people we speak to about experiences in court, often describe the negative impact that un-child-friendly environments and/or professionals can have on their levels of anxiety and their ability to give their evidence confidently. The need for more careful consideration of the appropriateness of rooms is an issue that has been highlighted in the evaluation of the English section 28 pilots. The European Barnahus Quality Standards for a Multidisciplinary and Interagency Response to Child Victims and Witnesses of Violence have identified a child-friendly environment as one of ten best practice standards for realising a child-sensitive and rights based approach to care and justice for children. We would therefore encourage the Scottish Government, Scottish Courts and Tribunals Service and other partners to work together to ensure that any future pilots of a Barnahus type multi-disciplinary service in Scotland include a facility for evidence to be taken by a commissioner.

In terms of the extension of the measures set out within this Bill, Children 1st were clear in our initial consultation response that the initial focus of any presumption to

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<sup>8</sup> Haldorsson O. L. (2017) *European Barnahus Quality Standards – Guidance for the Multidisciplinary and Interagency Response to Child Victims and Witnesses of Violence*, Council of the Baltic States Secretariat and Child Circle.

use pre-recorded evidence of child witnesses should be as wide as possible. We recognise the considerable operational and training implications that would be required if the presumption to use pre-recorded evidence initially focused on all child witnesses, we consider it an investment worth making.

We would, of course, prefer for these measures to be extended to all children and adults who need them as quickly as possible but are pleased that there is room for a phased approach that goes further than the initial proposals. Children 1st understands the need for a carefully phased introduction of the changes. We appreciate that the Scottish Government is mindful of what the system can cope with and is keen to ensure changes are not rushed so that lessons can be learned, implementation can be monitored and children are provided with high- quality and consistent support. However, it must be made very clear that the initial implementation of the measures included within the Bill are the first steps towards further, more far reaching changes for children and vulnerable witnesses – including children accused of crimes.

Children 1st support vulnerable children and families in local communities across Scotland to prevent, protect and support them to recover from trauma. While we support child victims and witnesses for long periods before, during and after their experiences of both criminal and civil justice proceedings, we do not have a particular expertise in supporting children accused of crime. Increasing the use of pre-recorded evidence of children within the Scottish justice system is not about tilting the system in favour of child witnesses. Rather it is about ensuring that justice is done well – for every victim, witness and defendant. Children accused of crime are innocent until proven guilty. Accused children have the same rights to be heard and to be protected from harm within the criminal justice system as children who are victims or witnesses. What we know about eliciting consistent, reliable accounts from children’s testimony applies equally to children accused of crime as it does to child victims and witnesses.

We also know that accused children are also extremely vulnerable. It is almost 60 years since Scottish law first recognised the principle that: “rarely does a child harm without having been harmed themselves,” with the establishment of the Children’s Hearings system. More recently the 2013 Edinburgh Study of Youth Transitions and Crime showed that children and young people who became involved in violent offending were also the most vulnerable and victimised. The study found that children and young people involved in violent crime were significantly more likely than their non-violent counterparts to be: victims of crime and adult harassment; engaged in self-harming, feeling suicidal, suffering depression and experiencing a high level of conflict within families or with caregivers.<sup>9</sup> The principles applied to improving the justice system to better protect children from further harm and to enable them to give their best evidence, need to apply to victims, witnesses and

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<sup>9</sup> [http://www.research.ed.ac.uk/portal/files/17725465/Justice\\_for\\_young\\_people\\_web.pdf](http://www.research.ed.ac.uk/portal/files/17725465/Justice_for_young_people_web.pdf)

defendants alike.

We are also clear that, in line with the UNCRC definition of a child, and in recognition of the risks to children of giving evidence in court, the right for all children under the age of 18 to choose to give evidence in court should be amended.

We cannot see a Child Rights and Wellbeing Impact Assessment that accompanies the Bill documents at present and consider that this should be a priority in to consider how the Bill can help to realise the rights of all children who become involved in the criminal justice system.

### **3. Do you have any views on the changes proposed to the procedure for taking evidence by commissioner, such as the introduction of a ground rules hearing?**

In mapping a child's typical journey through Scotland's care and justice system, Children 1st estimate that a child could speak to over 14 different professionals from the point at which they speak out about abuse.<sup>10</sup> Children and young people have repeatedly told us that they wish some of the people they had to speak to were 'nicer' or 'more understanding.' The tone of voice of the person who is asking questions, the look that questions if a child is telling the truth, the delays in the process and lack of anyone offering emotional support or practical support to help navigate what is often a confusing system can so compound a child's trauma that they say that what happened after they disclosed abuse was as bad as or worse than the trauma of the abuse they had already suffered.

Reducing the number of professionals a child has to speak to and ensuring that those professionals a child does speak to are highly skilled, with a consistent level of knowledge about trauma and child-development and take a relational approach to their practice, is crucial to improving the experience and outcomes for child victims and witnesses of crime.

The Scottish justice system will only become more child-friendly and rights-centred by reducing the number of professionals a child needs to retell their story to and ensuring these professionals are highly skilled and knowledgeable. Commissioners need to be considerably upskilled to be able to make the final decisions, not just about the questions to be asked at a ground rules hearing but about the broader issues of when, where and how a Commission should be conducted in order to enable a child to give their best evidence without risk of further harm.

There is an accumulating body of research that shows that conventional cross-examination misleads and confuses witnesses – particularly children and young people.<sup>11</sup> Through Children 1st's participation over the last two years in the

<sup>10</sup> Children 1st (2016) What can happen what a child or young person speaks out about abuse available at <https://www.children1st.org.uk/blog/delivering-justice-for-children>

<sup>11</sup> Baverstock J (2016) Process evaluation of pre-recorded cross-examination pilot (Section 28) [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/553335/process-](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/553335/process-)

European-wide Promise Exchange, to promote child friendly approaches to care and justice, we have learnt much about more child-centred processes in a variety of jurisdictions. One of the things that is particularly striking is that in Iceland and Norway – there is a clear understanding across professions of what evidence a child can give, based on their cognitive ability. In Children’s Houses in both countries charts are up on the wall during forensic interviews to ensure everybody, particularly legal representatives, understand exactly what type of questions a child can or cannot answer at their age and stage. The introduction of ground rules hearings in England, accompanied by specific training for judges and advocates about child development and best practice around handling vulnerable witnesses and defendants appear to be facilitating a shift in culture and practice. The evaluation of the section 28 pilots: “suggests that greater scrutiny of cross-examination questions at ground rules hearings may lead to a more positive experience of cross-examination.”<sup>12</sup>

Timing of the ground rules hearing should be based on the principle that it is in the best interests of a child to give their complete testimony as soon as possible. Avoiding undue delay helps ensure children’s memories are as fresh as possible, reduces the distress children feel because they are having to wait to give evidence and would allow children to start their journey of recovery more quickly. By doing so it will also improve the quality of the child’s evidence, which is in the interest of all parties in the proceedings.

**4. Do you agree with the introduction of a simplified notification procedure for standard special measures?**

Yes. Clearer processes that children and young people, and their families understand and are supported throughout are important in order to prevent re-traumatisation and support early recovery. Existing over-complex processes can often be perceived as a barrier to children and young people easily accessing special measures.

**5. The Scottish Government considers that the proposals in the Bill will have significant implications for the criminal justice system. Do you have any views on the practical, financial or other impacts of the Bill, including the proposed phased roll-out of the provisions in this Bill?**

A significant level of investment in resources and training is required in order to implement these changes successfully. Legislative change needs to go hand in hand

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[evaluation-doc.pdf](#)

<sup>12</sup> Baverstock J (2016) Process evaluation of pre-recorded cross-examination pilot (Section 28) [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/553335/process-evaluation-doc.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/553335/process-evaluation-doc.pdf)



with training and guidance to ensure that all professionals involved in forensic interviewing of children have the skills and knowledge to sensitively elicit best evidence from a child or young person, without the risk of re-traumatisation.

Legislative change that makes it the norm for all child victims, witnesses and defendants to give all of their evidence through pre-recording must be accompanied by considerable upskilling of all those involved in the justice process and the development of more comprehensive trauma support and recovery services for children and families both during and after their journey through the justice system. One young person recently told Children 1st that when she discovered that specific charges against her abuser had been dismissed as a result of a plea bargain, she began to self-harm and have suicidal feelings. While the outcome of that case is not open to change, ongoing support to help that young person make sense of the court's decision and their increased confusion, distress and trauma would have made a considerable difference to her mental health and wellbeing.

Data collection and monitoring will be crucial to evaluating whether Scotland is making the rapid progress that is urgently required to develop a child-centred, rights-based model of justice and support for child victims, witnesses and defendants. The dearth of information to-date about the use of special measures in cases involving children has made it extremely difficult to track progress and must be urgently addressed. Through the European Promise Exchange, a tracking tool has been produced based on ten quality standards that have been developed to help countries achieve a rights-based child sensitive approach to supporting child victims and witnesses of violence. Children 1st would recommend the Scottish Government use these standards as a starting point for developing a framework for measuring progress in Scotland.