

JUSTICE COMMITTEE

VULNERABLE WITNESSES (CRIMINAL EVIDENCE) (SCOTLAND) BILL

SUBMISSION FROM THE EQUALITY AND HUMAN RIGHTS COMMISSION

The Equality and Human Rights Commission is the National Equality Body (NEB) for Scotland, England and Wales. We work to eliminate discrimination and promote equality across the nine protected grounds set out in the Equality Act 2010: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

We are an “A Status” National Human Rights Institution (NHRI) and share our mandate to promote and protect human rights in Scotland with the Scottish Human Rights Commission (SHRC).

Our interest in this matter originates in the opportunity for this legislation to protect some of the most vulnerable members of our society, in the first instance those whose vulnerability lies in the protected characteristic of age. However we also see space for these provisions to benefit those with other protected characteristics.

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?

The Equality and Human Rights Commission welcomes these proposed new provisions that seek to address weaknesses in the current system where witnesses report giving evidence is stressful, humiliating and even traumatic.¹ We note that some victims have claimed that the process of attending trial is worse than the original crime and in high profile cases have committed suicide as a consequence of their experiences in court.²

The existing system brings in risks of unreliable evidence due to the passage of time between the original offence and the trial. Similarly we consider the potentially intimidating environment of a court and current stressful procedures could introduce barriers for vulnerable witnesses testifying, a view that has also been taken by some legal practitioners using pre-recorded evidence in England and Wales.³ The Commission believe that it is in the interests of both the witness and of due process, that quicker and more sensitive evidence collection is used, particularly in cases involving vulnerable witnesses.

¹ Scottish Courts Service (2015), ‘Evidence and procedure review report.’

² BBC News (16.11.17), ‘Rape victims criticise ‘degrading’ justice system.’

³ Baverstock John J.B. (2016) ‘Process evaluation of pre-recorded cross-examination pilot (Section 28).’ Ministry of Justice

The adoption of these new provisions to prevent re-traumatisation is a valuable step in complying with Article 3 of the Convention on the Rights of the Child that specifies that when a court of law acts with regard to children “the best interests of the child shall be a primary consideration.”⁴ We are pleased to note that the exceptions to this new rule have a test regarding the interests of the child embedded within them.

Questioning children, especially young children, is often more a complex process than for other witnesses. For example many child witnesses need toys or regular breaks to help testify⁵ and their communication skills are rarely compatible with conventional trial proceedings. Evidence by the commissioner could allow these difficulties to be managed with minimal disruption to the proceedings in court itself. In principle this rule is therefore very welcome.

However, in its review of video links Transform Justice identified a few weaknesses in pre-recorded evidence. Specifically they are concerned that juries put a premium upon evidence presented before them in person and, perhaps more seriously, defendants who are pre-recording are less likely to understand proceedings.⁶

The same research also raises concerns that witnesses could find themselves isolated from family and supporters.⁷ It is therefore important to ensure that this new rule does not have negative impact upon those who have difficulty understanding proceedings by ensuring that they have full access to legal and emotional support.

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?

We welcome the extension of these proposals to other vulnerable witnesses. Given the recent policy and press attention given to these matters we believe that cases involving accusations of rape, sexual assault, modern slavery and human trafficking are the most obvious candidates for being considered to be included. Given the sensitivities involved in these crimes we welcome efforts to make testifying in such cases easier. Other sensitive crimes, including indictable hate crimes, may also justify the use of special measures, although our view is that this can be handled by the simplified vulnerable witness notification procedure on a case by case basis

⁴ United Nations (1989) ‘United Nations Convention on the Rights of the Child.’

⁵ Williams Rachel R.W. (17.02.18) ‘Helping child witnesses: ‘One girl gave evidence with a hamster on her lap.’ The Guardian

⁶ Gibbs Penelope P.G. (October 2017) ‘Defendants on video – conveyor belt justice or a revolution in access?’ Transform Justice

⁷ Equality and Human Rights Commission (29th March) ‘Response of the Equality and Human Rights Commission to the consultation: Fit for the future: transforming the court and tribunal estate’

rather than a blanket assumption of special measures, as may be justified in the case of the aforementioned offences.

This same concern with blanket measures leads us to caution that within groups of deemed vulnerable persons there will be individuals who will be able to testify. As such we consider it appropriate that the proposed 'special measures section (8)' (Section 271BZA(8) Criminal Procedure (Scotland) Act 1995) makes clear that all vulnerable witnesses over the age of 12 may attend court in person if they wish, if doing so is in their best interests.

Other vulnerabilities that have potential to affect the quality of testimony include individuals with learning difficulties and mental health problems so there may be benefits for extending these provisions to these groups. However, within these groups there is vast variation, so there may be the case for retaining the existing system for such witnesses, with the court determining whether special measures are justified in these instances.

The Commission considers that when it is appropriate for a vulnerable individual with mental health or learning difficulties to testify they should be able to do so. For this purpose, we welcome the proposed regulations that allows vulnerable witnesses over the age of 12 to choose to testify in court when it is in their best interest; or exceptionally requires them to testify in court when the giving of testimony in advance would harm the interests of justice and this risk substantially outweighs the risk to their own interests.

Given these provisions already exist we see no problem in extending this new rule to people with mental health or learning difficulties.

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 1ZD (c) the commissioner is empowered to permit a supporter to attend as they feel appropriate.

We note that witnesses attending remotely have shown less understanding of the law, a matter particularly pronounced with regards young defendants.⁸ As such the commission considers it would be beneficial in the ground rules hearing if the commissioner has an obligation to ensure that the witness has adequate legal advice.

⁸ Gibbs Penelope P.G. (October 2017) 'Defendants on video – conveyor belt justice or a revolution in access?' Transform Justice

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

As noted before trials and the court environment are often stressful and traumatic for vulnerable individuals. Any measures which minimise the exposure of vulnerable individuals to court proceedings without interfering with the rights to a fair trial and access to justice, are welcome. Expediting the process of notification for vulnerable witnesses is welcome in this respect. We also note the estimated savings in judicial time and welcome these.

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?

The Commission notes that concerns have been raised that this could interfere with the ability of the defence to properly test the evidence presented against them,⁹ as they are entitled to do under Article 6 of the ECHR.¹⁰ We understand that witnesses shall continue to be cross-examined and have noted our views on the quality of evidence obtained in this way.

The committee may wish to consider these views in more detail.

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⁹ Adams Lucy L.A. (13.07.18) 'Children and rape victims' courtroom evidence shake-up.'

¹⁰ Council of Europe (1st November 1998) 'European Convention on Human Rights.': As amended by Protocols Nos. 11 and 14 supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16.'

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