

## **JUSTICE COMMITTEE**

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

#### **SUBMISSION FROM GLASGOW BAR ASSOCIATION**

##### **Evidence in Advance of a Criminal Trial**

###### General Observations

On review of the proposed amendments to the Criminal Procedure (Scotland) Act 1995 (CPSA) as detailed in the Vulnerable Witnesses (Criminal Evidence)(Scotland) Bill and with particular reference to section 271 BZA(3) and (4) we make the following observations:

1. It is clear from these subsections that the intention is to ensure that child witness' evidence in specific cases is to be given in advance of the trial.
2. Subsection 3 states that "The court must enable all of the child witness' evidence to be given in advance of the hearing...."
3. Subsection 4 is the enabling provision that inter alia authorises the use of one or both of the special measures listed in subsection 5, these being the taking of evidence by a commissioner and the giving of a prior statement.

Our concern with subsection 4 is that, as drafted, there may be no opportunity for the cross examination of a child or deemed vulnerable witness who has been afforded the opportunity to give their evidence in the form of a prior statement. This proposition would deprive any person charged with a criminal offence from examining (or having examined) vulnerable witnesses on his behalf. The risk of this approach is that the rights of an accused person under Article 6.3.d of the ECHR may not be observed.

###### Ground Rules Hearings

Concerns:

1. Solicitors and commissioners as a general rule do not have knowledge of the cognitive levels of a child or their developmental stages. To understand the dynamics of an interaction between a child and a questioner, it needs to be ascertained that there is an understanding between the two parties. It is crucial that the child understands the vocabulary used by the questioner and that the child possesses the language skills necessary to express themselves unambiguously and in a way that does not allow misunderstandings to arise. Both children and adults approach a conversation with certain assumptions, but given the differences in age and life experience, these assumptions are often incompatible. It is the Association's view that such problems could be overcome by the use of a qualified intermediary rather than an unqualified "supporter" as proposed with the insertion of 1ZD(c).

2. Equally, solicitors and commissioners have no specific information about an individual child's speech and language skills and the proposed amendments make no provision for obtaining such information.
3. Section 5(2) of the Bill proposes to amend the CPSA s271(l)(1ZA) to (1ZD) to introduce a new type of proceeding known as a ground rules hearing with section 5(4) of the Bill proposing that it is not necessary for an indictment to have been served prior to an order being made by the court allowing evidence to be taken from a vulnerable witness by a commissioner. This proposition again risks violation of an accused person's Article 6 rights, as they have the right to properly prepare their defence and have witnesses against them examined in relation to all the charges. The relevance of this concern is that the charges libelled on the indictment frequently go beyond what is presented in the petition at first calling of the case. Furthermore, the Crown frequently disclose evidence post-indictment, again denying the defence the opportunity to cross examine on issues arising from this evidence. The significance of this is that the defence may not be able to challenge the child or deemed vulnerable witness' position where such late disclosure has been received. It is accepted, however, that the ground rules hearing and commission should take place at the earliest opportunity after service of the indictment. Our view is that cases identified as falling into these categories should be fast-tracked with a view to ensuring that evidence is taken from vulnerable witnesses at the earliest point after service of the indictment. We accept the essence of these proposals is that children and "deemed vulnerable witnesses" should be spared the trauma of attending court however, exposing them to evidence on commission prior to an indictment being served may be a fruitless exercise as the accused may plead guilty or the case may be dropped.
4. As an Association we have been made aware that difficulties have been experienced in co-ordinating the accommodation, practitioners, technical staff all available at the appropriate time. There appears to be a lack of availability of audio visual technical experts in addition to the lack of availability of remote locations available for accused which, ultimately, will result in significant delays in the hearings and an increase in the costs of the process. As a further general observation, it is submitted that technical staff involved in these hearings should be accredited and vetted.

In summary, it is accepted by the Association that the longer term aim should be a presumption that child and deemed vulnerable witnesses should have their evidence taken in advance of the trial. However, there are concerns regarding potential breaches of ECHR provisions that protect the rights of an accused. Accordingly, further consideration should be given to the wording and potential implementation of the CPSA by this Bill. It is also the Association's view that further consideration be

given to the financial, logistical and practical ramifications to ensure that implementation is effectively managed and the new practices deliver the benefits sought by the Bill.