JUSTICE COMMITTEE

VULNERABLE WITNESSES (CRIMINAL EVIDENCE) (SCOTLAND) BILL

SUBMISSION FROM LAW SOCIETY OF SCOTLAND

Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Criminal Law Committee welcomes the opportunity to consider and respond to the Call for Evidence in relation to the Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill (Bill). The committee has the following comments to put forward for consideration.

General Comments

Witnesses' evidence is essential to secure criminal justice. That involves witnesses attending court and providing evidence. That system for any person is recognised as being stressful as it is for most persons a strange formidable and somewhat alien environment. For children and in due course, vulnerable witnesses, in relation to serious traumatic crimes where they are the complainers or witnesses, the experience of giving evidence, may well have long significant term effects on them.

The Bill's policy objectives clarify that it creates what is described as a new rule to provide for pre-recording of child witnesses' s evidence except where two circumstances apply.

We welcome the creation of this rule as we support that children and other vulnerable witness should have their evidence taken in advance of a trial. This is of overall benefit to the criminal justice system and builds on a number of policy initiatives that have been introduced to strengthen arrangements being made for children and other vulnerable persons to give evidence such as:

- The High Court of Justiciary Practice Note No. 1 of 2017, Taking of Evidence of a Vulnerable Witness by Commissioner and outlines when practitioners

consider that a commission is required, the necessary preparation to seek authorisation to take evidence by this means and the issues to be addressed in making such an application
- Extension of special measures[1] in court
- Greater access to remote video[2] links for summary and solemn cases
- Use of a closed court.[3]

As well as the use of these practical measures, there is a need to ensure that assistance and support is available for all vulnerable witnesses throughout the time that they are in contact with the justice system from provision of the initial statement to the conclusion of providing their evidence at court. These are monitored in the provision of under the Victims and Witnesses (Scotland) Act 2014.

All appearing encountering the criminal justice system need to be treated with respect. As Lady Dorrian[4] noted:

'For children and other vulnerable witnesses, this means finding ways to take their evidence in an environment and in a manner that does not harm them further but allows their evidence to be given and tested fully and appropriately."

While in full support of the policy intentions of the Bill, there are a number of issues which require to be addressed. These include an understanding of the practical challenges of the changes being made and the resource requirements for the changes to be made. More time and energy will inevitably be required in the investigatory stage of the process rather than at trial. That involves solicitors who must be fairly and adequately remunerated for such work. There requires to be a culture shift towards what may be understood to comprise an inquisitorial as opposed to an accusatorial approach. Paragraph 65 of the Bill's Policy Memorandum recognises that by indicating that it will represent a substantial shift in current practice. That resource must be supplied available.

If the changes are brought in with that resource, which includes proper funding which includes both the Crown and the defence, that will encourage parties to undertake the work at the relevant time. As recommended by Lord Bonomy at the time of the High Court reforms in order to achieve the primary objective of injecting greater certainty he recognised that payments were necessary 'designed to encourage those

[1] Sections 271A, 271C and 271D of the Criminal Procedure (Scotland) Act 1995 (1995 Act)

[2] Section 271J of the Criminal Procedure (Scotland) 1995 Act

[3] Section 271HB of the criminal Procedure (Scotland) Act 1995

[4] Scottish Court Service, Evidence and Procedure Review Report (September 2017)

instructed to commit themselves to cases and to ensure that they are properly remunerated whether the case proceeds to trial or is disposed of prior to the trial.'[5]

There are challenges that need to be addressed which include the speed of proceedings. There are problems around disclosure of evidence which unless fully produced and timeously available may well hinder the defence from being able to utilise the procedures fully. There are advantages in the relevant cases in evidence being recorded as soon as possible. But this does raise the challenge that unless the issue of disclosure is addressed in full, there will be inevitable delay.

There is also a need to consider that provision of evidence even through the methods outlined in the Bill may well still cause distress.

The approach of restricting the Bill to the most serious cases and High Court seems a sensible way forward as the impact of these measure needs to be properly assessed and evaluated before such provisions could extend potentially to children in all cases.

Ultimately, the interests of justice is about the balance of respective interests between the accused and the State so that the accused must be able to challenge the evidence against them, subject to any restrictions such as section 288 of the criminal Procedure (Scotland) Act 1995.

We are pleased to note at paragraph 60 of the Bill's Policy Memorandum that the proposals under the Bill do not extend the child accused being able to give pre-recorded evidence. We agreed that there are complex issues in relation to any such extension of these measures since the right of the child accused to remain silent must be fully respected.

Section 1 of the Bill

Providing a potential means to roll out the Bill's measures in due course to other categories of witnesses is a strength of the Bill. We note the intention merely to apply the provisions to child witnesses in the most serious of cases with a phased commencement implementation starting with the High Court. We would highlight that a few of the offences outlined in the new section 271BZA (2) would be potentially triable in the Sheriff and Jury court.

As far as the offences which have been identified are concerned, we note the powers of subsection (9) is concerned for Scottish Ministers to modify by way of regulations the list which would be subject to affirmative Scottish Parliamentary procedures. We wonder if offences involving domestic abuse should be included at

[5] Improving Practice The 2002 Review of the Practices and Procedure of the High Court of Justiciary by the Honourable Lord Bonomy https://www.gov.scot/Publications/2002/12/15847/14122

the outset. The Scottish Parliament would not wish to amend the list of offences frequently so including a degree of flexibility within the list of offences might be welcomed. There are of course safeguards in the exercise of the exemptions under subsection (7) and (8). We recognise to that this is a minor point since subsection (9) also allows the removal of the condition set out in subsection (1) (b) to allow these provisions to apply in all solemn proceedings, regardless of forum. This will no doubt be the ultimate policy objective of making it easier for child witnesses to give evidence without attending court.

Exceptions to the provisions that a child witness should give evidence in advance are set out in subsections (7) and (8) which does provide for the child witness's wishes to be considered when determining whether and in what means evidence should be given. If the court were to overrule the child's wishes, this might be problematic. The age limit of 12 or over would seem appropriate to the operation of any exception though in some cases, the imposition of an age restriction is somewhat arbitrary.

Section 3 of the Bill

Section 3 would provide, if regulations are enacted to commence, that similar provisions would apply to 'deemed vulnerable witnesses.' We support the phased implementation of these provisions to start with children which will allow for evaluation and monitoring of practices and identification of issues or problems at the outset.

Section 5 of the Bill

We support the introduction of new procedural type of hearing such as a ground rules hearing to be held before proceedings before a commissioner. There needs to be appropriate legal aid provision to ensure that the time spent by a solicitor in undertaking the preparation and attending such a hearing is appropriately remunerated.

We understand that it is rare for a commissioner to also preside at the trial. Not every commissioner is a judge though in relation to High Court practice, this is the case. We can see benefits to the same individual acting as the commissioner in determining such matters though this may not always be possible or practical.

The timing and relevance of the ground rules hearing will be crucial as too early will mean that all relevant information or investigations may not have been carried out. There must be enough time for preparation following full disclosure and clarity as to what charges are being made. That does not necessarily mean in every case that there must be service of the indictment but clarity and cooperation by the prosecution is vital before any such hearing should be held and would be fully effective. That is required in the interests of fairness and justice and to avoid multiple commissions.

Much depends on the facts and circumstances in each individual case.

The proposed section 271I (1ZD) sets out what matters that the commissioner should consider in a ground rules hearing.

Specific questions

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.

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?

Yes, in time and to adult deemed vulnerable witnesses. At present it is possible for the party citing to seek authorisation to use a commissioner as a non-standard special measure so in theory there is no reason why the new rule should not extend to the same group.

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?

If the new rule is to have any practical effect, the procedure for giving evidence to a commissioner should be made as straightforward and intuitive as possible. This may mean fairly significant capital expenditure to make sure that at the very least High Court and Sheriff and Jury centres are equipped to enable the witness to give their evidence to the commissioner and for the accused to see and hear that evidence by means of e.g. a live TV link. It will also require, as has been noted, an equally significant change in in culture and buy-in to the changes.

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

Yes. Ground rules hearings might be useful.

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?

We believe that there will be significant financial implications, such as making courts ready and user friendly for the witness and those conduction the commissions. As above, we believe that the provision of adequate and appropriate remuneration for work to prepare for and conduct commissions is crucial. If these measures are to be introduced, as we have argued previously, there must be a phased roll out, for

example, to child witnesses in High Court and possibly trials involving sexual offences in Sheriff and Jury cases.

After a suitable period and after evaluation, it could then be rolled out further to adult vulnerable witnesses in solemn cases and then to deemed vulnerable witnesses. It may be unrealistic to extend the new rule to summary cases but where appropriate applications could be made to use a commissioner.

We also highlight the risk that if steps are taken to try and secure a child witnesses' evidence at too early a stage, this could lead to multiple commissions in respect of the same witness because disclosure did not take place in time, or to the child having to give their evidence to a commissioner only to have the accused plead guilty. This may require further consideration.