

JUSTICE COMMITTEE

VULNERABLE WITNESSES (CRIMINAL EVIDENCE) (SCOTLAND) BILL

SUBMISSION FROM MISCARRIAGES OF JUSTICE ORGANISATION

1 Miscarriages of Justice Organisation - Approach to this Consultation

1.1 We approach this consultation from the perspective of an organisation whose function, and whose daily experience, is in the support of individuals who have suffered miscarriage of justice. Our position founds not only upon seventeen years' experience as an organisation, but also on the personal experience of our members (two of whom are exonerees who served sentences of imprisonment following wrongful conviction) and of our many clients. We also draw on the experience of our legally qualified staff, the senior of whom is a solicitor of some thirty-five years' standing.

1.2 Amendments to our criminal procedure, however well intended, inevitably have consequences which extend well beyond the intended scope of the specific measure or measures proposed. These will include unintended consequences which, being unintended, are unlikely to have been considered by the draughtsmen of the proposal. Our response to this consultation seeks to address the wider implications of the proposed measures, as we see them. We view the proposals in the wider context of the entire judicial process of which they are a constituent part. This, we submit, is the appropriate approach, since no part of the judicial process operates in isolation, and each part of the process impacts on the whole.

1.3 Our submission forms a response to the published Policy memorandum

2 The Specific Proposals

2.1 We take no issue with the underlying desire to improve the experience of children and vulnerable witnesses in their interaction with the criminal justice system.

2.2 We have serious reservations about the proposed measures. We are deeply concerned that they:

- a) will dilute the protections provided, of necessity, to those who have been accused of offences, in respect of which they are facing trial;
- b) represent an unjustified and unjustifiable diminution of the Crown's obligation to prove guilt beyond reasonable doubt;
- c) will inevitably result in an increase in the incidence of miscarriage of justice; and

d) represent a mechanism to increase conviction rates simply by making it easier to convict.

2.3.1 They are fundamental principles of our criminal justice system that no-one can be convicted of an offence unless and until his guilt is proved beyond a reasonable doubt, that every accused person is to be presumed innocent until his guilt is established in accordance with that test, and that the benefit of any doubt is accordingly to be afforded to the accused. The justification of that position is well established, to the extent that we do not consider it necessary to rehearse it here.

2.3.2 It is similarly fundamental to our system, which is an adversarial system as distinct from an inquisitorial system, that evidence adduced by the Crown is available to be tested, robustly, by the defence. The means by which evidence adduced by the Crown is subjected to such testing is by cross-examination. This right of the defence so to test the Crown's evidence is at the very heart of the adversarial system, it goes to the test of reasonable doubt, and is a *sine qua non* of the proper administration of justice within that system.

2.3.3 In our submission, the proposal that certain classes of witness be examined, cross-examined and re-examined outwith, and in advance of, the trial diet strikes at the essential nature of the adversarial process. We identify two distinct, fundamental requirements of the giving of oral evidence:

a) that the jury be able to see, and hear, the witness's evidence at first hand in order that they may weigh it in the context of the witness's demeanour, as well as reaction in response to questioning; and

b) that the witness may be cross-examined in the context not only of their evidence in chief, but also of the evidence of other witnesses adduced in the course of the trial. This principle appears to be recognised in the Policy Memorandum at paragraph 5. This specifically excludes child accused, presumably to enable their cross-examination in light of the entire Crown evidence.

2.3.4 We suggest that the requirement at a) above would not be satisfied in the circumstances envisaged by the current proposals. The currently adopted procedure whereby certain witnesses are examined by video link provides the desired protection to the witness but differs fundamentally from the now proposed procedure in that the jury is able to see the *contemporaneous* examination of the witness. The separation of this process from the trial, by time, would fundamentally strike at the necessary relationship between witness and jury, since the witness would be giving evidence in the absence of the jury both by place and time. In simple terms, the witness would not be speaking to the jury when giving evidence. The current

proposal thus removes the essential element of accountability of witness to jury in the giving of evidence.

2.3.5 It is, we believe, self-evident that the requirement at b) above would be left entirely unmet by the application of the current proposals. Defence counsel and, by extension, accused persons, would be significantly disadvantaged by their inability to cross-examine Crown witnesses on matters arising and information coming to light in the course of a trial. It has long been recognised, in part for this very reason, that the appropriate forum for the examination of witnesses is the trial itself. In this context we place on record our view that the *existing* provisions for the taking of evidence by Commissioner are an inappropriate dilution of the right of an accused to a fair trial.

2.4 We note at paragraph 5 of the Policy Memorandum the proposal for the taking of evidence by Commissioner in advance even of the service of an indictment. For the reasons identified at 2.3.5 above, we cannot see how this proposal can be reconciled with the interests of justice in securing a fair trial. This would require defence counsel to cross-examine in relation to a charge or charges which have not yet been specified.

2.5 It is our view that if our established and necessary protections of the rights of accused persons are to be diminished, then this should be the result only of unavoidable, or at least compelling, necessity. The case for such unavoidable or compelling necessity for the current proposals is not made. The existing special measures for vulnerable witnesses provide no less protection than is now proposed.

2.6 It is noted that the identified policy imperative is to improve the lot of witnesses and “victims”. We refer to the Policy Memorandum at paragraphs 19, 22 and 25. We have difficulty with the concept that the generic term “victim” is appropriate in the context of a general examination of service users, since this presupposes the commission of an offence and thus pre-empts (and, in fact, usurps) the function of the courts. It is a matter of serious concern to us that this term is consciously applied in preference to the correct designation “complainer”. The effect of this is to distort public perception by enhancing the ostensible legitimacy of this group’s entitlement to what amounts to (and is indeed described as) special treatment. More specifically, it is likely to encourage jury members to see complainers, afforded the proposed additional measures, as “victims” - and thus to dilute the presumption of innocence.

2.7 We are concerned to note that the Policy Memorandum is wholly lacking in specification in relation to certain of its fundamental proposals. Paragraph 8 provides for a “ground rules hearing” and “permissible lines of questioning” but provides no definition either of “ground rules” or of “permissible”. For any proposed new procedures to be fair, and seen to be fair, there must be clear definition of their

parameters and, indeed, appropriate consultation on where those parameters should lie.

2.8 From our long observation of the Scottish criminal justice system we have recognised a trend, developed over many years, towards the dilution and removal of the rights of accused persons as a means to “improving” conviction rates. The Moorov Doctrine, as originally identified in *Moorov v HMA* [1930] JC 68, a relaxation in the fundamental requirement of corroboration, was strictly defined and strictly limited in the circumstances in which it could be applied. Through the application of judicial precedent those circumstances have now been extended - to the extent that by 2007 the prevailing law was that “the test which must be applied, where it is contended that the Moorov doctrine ought *not* to have been applied, is whether it can be said, on no possible view, is there any connection between the charges in question.” (Lord Osborne at page 21, *FJK v HMA* [2007] HCJAC 28). The principle of “special knowledge” displayed in a statement by an accused, was originally identified in *Manuel v HMA* [1958] JC 41 and was another relaxation in the requirement of corroboration. The test now applied has been so diluted as to be almost unrecognisable from the original. Sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995 are now commonly misapplied so as to deny juries evidence of the bad faith of malicious and otherwise false accusers. In respect of each of these examples, insufficient regard has been had to the legitimate rights of accused persons - rights which we nonetheless profess to uphold. The resultant miscarriages of justice are too high a price for the mere appearance of effectiveness in our criminal justice system. Our deep concern is that the proposals now under review are another means by which a perceived weakness in our system is addressed simply by making it easier to convict.

3 Wider Considerations

3.1.1 It is alarming to note that in the Policy Memorandum there is a recurring correlation between the terms “complainer” and “victim” - words which have, in fact, entirely different meanings. Within the text of the Memorandum these words appear to be interchangeable. This represents, in our view, a dangerous extension to a clearly developing political narrative concerning “victim-centred” justice. Within this narrative, the interests of “victims” are to be regarded as of paramount importance. These “victims” are, however, commonly identified as such in advance of a verdict of conviction.

3.1.2 It is of critical importance that we recognise that this consultation takes place in the context of proposed amendments to the procedures employed in the prosecution of accused persons. Whilst in many instances it will be beyond dispute that a complainer is also a victim, this is most certainly not the case in others. The issue in dispute in many trials is that of whether an indicted offence has in fact been committed. In such cases, to afford a complainer (or, indeed, a witness) the status of

“victim” in advance of a verdict of conviction is not simply inappropriate, it is a perversion of the course of justice. It renders meaningless the presumption of innocence on which our criminal justice system founds, and it removes in substantial measure the onus on the Crown to prove its case. This represents a fundamental change in the very nature of our system of criminal justice. We can only hope that, if Parliament is to proceed to enact such fundamental change, the proposals will be the subject of rigorous scrutiny, and debate.

3.2 We would observe that the conferring of victim status in these circumstances is not simply a matter of semantics in the framing of proposed legislation. It is achieved, whether this is intended or not, by the manifestly different treatment of those complainers and witnesses who are deemed to merit the proposed *extended* “special measures”.

3.3 The definition of “vulnerable witness” offered at paragraph 62 of the Policy Memorandum, i.e. those for whom the proposed new procedures are to apply, following as it does on Section 271 of the Criminal Procedure (Scotland) Act 1995, is remarkably broad. We note that it requires no specific or objective measure of actual vulnerability. The proposed test of vulnerability appears simply to be the nature of the offence alleged. Given the undoubted reality that a proportion of these witnesses will not be truthful, the danger of miscarriage of justice arising from the processes now proposed is very real, and equally obvious. It is greater than is currently the case. It is alarming, therefore, that notable by its absence from the current proposals is any hint of a proposal to provide similar – or indeed any corresponding – protection to the accused. The express exclusion of accused persons from the proposed protections is eloquent testimony of this.

3.4.1 We note the proffered explanation for the exclusion of accused persons, at paragraph 60 of the Policy memorandum, i.e. that their inclusion might preclude an accused person from remaining silent or from electing not to give evidence. From this we offer the following observations:

3.4.2 It is recognised within the Policy Memorandum, again at paragraph 60, that further work requires to be undertaken on the provision of suitable (but different) support for this class of witness. It appears to us entirely self-evident that the interests of fairness, and of justice, require that this provision be identified, and incorporated in the proposed legislation, before the legislation is enacted.

3.4.3 Failure so to do would amount, in our view, to the conscious enactment of legislation which is inherently and actively unfair.

3.4.4 Put another way, it is entirely inappropriate that legislation be enacted unless and until it can be seen to be fair to all whom it will affect.

3.4 Equal treatment before the law is, theoretically, a cornerstone of our justice system. If that is to actually mean anything then equality of treatment must be seen to be applied in practice. The provision of unbalanced advantage to the Crown - in addition to the manifest inequality of arms that is the current reality - constitutes an unwarranted and unjustifiable erosion of the safeguards that we claim to provide for accused persons.

3.5 In summary, the effect *in cumulo* of the application of the proposed processes, with their inherent unfairness (both active and passive) to accused persons, and of the perceptions these processes will engender in jurors - particularly against the backdrop of the current "victim-centred" political narrative - will be to create a stark, unfair, imbalance between the treatment of prosecution and defence in our criminal justice system.

3.6 The inevitable consequence will be an increase in the incidence of miscarriage of justice.

4 Background Considerations

4.1 We would welcome any properly constituted steps to improve the experience of complainers, victims and witnesses in our criminal justice system. We say, however, that they must address the needs of all who are impacted by crime. Those who have suffered miscarriage of justice are also victims, yet we look in vain for either recognition of their status as such, or for any proposal to support or assist them. These are, indeed, the most damaged, traumatised and let-down category of victims within our criminal justice system. The wrong done to them was done by the state. Their interests must be recognised, and represented, in any review of our criminal justice processes. Similarly, the interests of their families and other, associated, secondary victims of the wrong done to them must be afforded equal importance to those of other victims of crime.

4.2 The objective identified at paragraph 19 of the Policy Memorandum is laudable and we would wish to see it met. We ask, however, what provision is to be made to support an appellant who may also be vulnerable?

4.3 In the context of paragraph 22, we ask what contact and consultation has been undertaken with those who represent miscarriage of justice victims, and appellants?

4.4 In the context of paragraph 29, have representatives of those wrongly convicted and exonerated, or of appellants, been invited to participate or been included in this process of examination?

4.5 In the context of Lady Dorrian's views as these are reported at paragraph 30, we ask how the proposed Bill will ensure that our client victims of miscarriage of justice will be treated with respect? In our bitter experience the opposite is the reality, the consequences of wrongful conviction are life-long, and no process exists, or appears to be in contemplation, to remedy this.

4.6 Paragraph 42 refers to steps currently being taken towards "a victim-centred model for information and support". We ask what consideration has been given in this to the victims of miscarriage of justice? What examination has been made of their needs, and what consultation has taken place with those who support exonerees to assess those needs? We look with envy at the resources provided to those organisations, such as Rape Crisis, Victim Support Scotland and Scottish Homicide Service, who have been recognised as having relevant experience in these matters. We recognise the value of the work that these organisations do, but would respectfully point to the lack of funding and support for those other victims whom we represent and support, whose needs are equally real and equally deserving. From the grotesque disparity in financial provision the inference is unavoidable that "our" class of victim is to be excluded from this model. If that is so, then we conclude that the exercise is neither truly victim-centred nor, indeed, justice-centred.

4.7 We note, at paragraph 44, reference to discussions towards the development of the Delivery Plan concerning sexual offence victims. We ask what examination, or consideration, was made of those exonerated of such offences, either at trial or at appeal? Further, what assistance and/or support is offered to accused persons, and to those ultimately acquitted?