JUSTICE COMMITTEE

VULNERABLE WITNESSES (CRIMINAL EVIDENCE) (SCOTLAND) BILL

SUBMISSION FROM: SCOTTISH COURTS AND TRIBUNALS SERVICE

The Scottish Courts and Tribunals Service (SCTS) welcomes the introduction of this Bill as a critical step in improving both the experience of witnesses and the quality of justice. SCTS is proud of its role in helping to raise awareness of the issues relating to vulnerable witnesses, and in facilitating the subsequent collaborative work undertaken, through the judicially-led *Evidence and Procedure Review* which is frequently referenced in the Policy Memorandum to this Bill.

At the heart of the Review's proposals and recommendations was the idea that justice would be best served if young and vulnerable witnesses could give evidence in a way that maximised the chances of it being comprehensive, reliable and accurate, and minimised any potential further harm or traumatisation from the evidence-giving process itself. It also recognised that traditional adversarial procedures and techniques did not appear to meet those requirements.

One of the reports under the Review, from the working group chaired by the Lord Justice Clerk, Lady Dorrian[1], set out a long-term vision for the future in which every child and vulnerable witness would be supported to give their evidence:

- as early as possible in the proceedings;
- in the course of one forensic interview, where appropriate, or in a pre-recorded evidence session; and
- in an environment away from the court.

That approach minimises the likelihood of subjecting the witness to further harm or trauma and allows them to give their 'best evidence' as early as possible, whilst recognising the need not to compromise the fairness of the trial or the rights of the accused.

By putting in place legislative support for the greater use of pre-recorded evidence in the criminal courts this Bill will greatly assist the courts in moving towards that long-term vision, and, most importantly, with immediate effect improving the experience of vulnerable witnesses.

The following comments are provided in response to the specific questions that were posed by the committee in its call for evidence:

[1] Evidence and Procedure Review: Child and Vulnerable Witnesses Project - Pre-Recorded Further Evidence Work-Stream Project Report SCTS, September 2017.

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 – It is essential that in a modern and civilised society we find ways to enable child witnesses to give their best evidence in an environment and in a manner that does not harm them further. Children and other vulnerable witnesses should therefore be kept out of a court environment where possible. Greater use of pre-recorded evidence is one of the most tangible ways we have to achieve that outcome.

Having the "new rule" set as a 'legal presumption' in primary legislation will reinforce the need to support witnesses in providing their 'best evidence' at an earlier stage in the process and will help reduce the potential that exists for further traumatising witnesses. It will support the introduction of the new approach in a way that will allow all those involved to adapt and develop good practice.

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 – The "new rule" should apply to all child witnesses providing evidence in serious crime cases in the High Court, and once that increased workload is handled successfully in practice it should be extended to child witnesses providing evidence in serious crime cases in the Sheriff Court.

The new rule should then be extended to other groups of vulnerable witnesses but that extension of the scope will need to happen in a controlled and managed way in order for this change to be successful. It should be understood that the current Evidence by Commissioner procedure is already available to vulnerable witnesses in certain circumstances, and this should continue to be the case. The ultimate aim should be to extend the benefits of the new approach to as many witnesses as possible whose vulnerability means that their ability to give full, reliable and accurate evidence is potentially constrained by current procedures, or that they may suffer harm as a result of the process.

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?

Yes - There is extensive evidence, particularly from England and Wales, that a "ground rules hearing" is a necessary part of the process, helping to ensure the commission itself is as effective and efficient as possible for all parties. In managing the current volume of "evidence by commissioner" applications we opt to use our

preliminary hearing courts to deal with the matters that need to be agreed in advance of the evidential hearing. That allows us to support the efficient disposal of business within our court programmes, and it supports both the prosecution and defence in making effective use of their time when handling multiple cases. That current procedure is set out in the High Court Practice Note (1 of 2017) on the taking of Evidence by Commissioner.

That type of discussion with the judiciary in advance of a commission is essential so that the nature of questioning is agreed in advance and the right balance can be struck between a) the actual vulnerabilities exhibited by each child or adult vulnerable witness and b) the interests of justice in maintaining the right to a fair trial for the accused.

Confirming the flexibility to combine a ground rules hearing with any other type of hearing would be an essential feature for the efficient programming of business in the courts.

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

Yes – Where a special measure has been categorised as a "standard special measure" then the need for that special measure is being taken as read. The judge has limited choice but to grant the application and there is no judicial discretion to take a different decision.

If the courts were to continue using the existing "standard" application process it would create waste in the system as an Application Form would still need to be placed in front of a judge. To avoid that unnecessary use of judicial time it is entirely appropriate to establish a separate notification process, which our staff would be able to handle administratively. It will take time to develop, test and implement that new process, but it will deliver savings in judicial time and staff time.

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?

Yes – The long-term changes envisaged by this Bill will require significant shifts in legal thinking, practice, technology and infrastructure. It is essential that all those participating in the criminal justice system are given the time, support and resource to make the adjustments necessary. It is very sensible to plan for a phased rollout so that the growth in the use of pre-recorded evidence does not simply overwhelm the capacities of our staff, the judiciary and the court estate, as well as the prosecution (COPFS), defence agents and advocates, and associated services such as victim

support. Success in the initial phase will pave the way for the introduction of this approach more widely, applying the lessons learned. There are a number of reasons underpinning this view, including:

- The need to create specialist venues to facilitate the pre-recording of evidence at a level that allows for greater resilience in a) the method of recording through having duplicate recording streams and b) the method of storing data as we look at alternatives to the current practice of using DVDs. We would wish to test new approaches in exemplar facilities before confirming our “methods of work” and gradually rolling that out to further venues.

- The need to fund and create the technical capabilities to store, transfer, retrieve, play and archive the digital recordings made, securely and in compliance with the strictest standards of data protection.

- The need to ensure that judicial training for those judges who are acting as commissioners is kept up to date and is sufficiently comprehensive. Experience in Scotland and elsewhere has shown the value of high quality training.

- The similar need for prosecutors and defence agents to be sufficiently trained in the new procedures and practices that will be required, particularly in the complex field of questioning vulnerable witnesses. There has already been excellent work in developing this kind of training, and it is a rapidly growing field.

- The need to train court staff to schedule the hearings, facilitate the pre-recorded interviews, play back that digital evidence in court, address technical issues as they arise, and support any post-commission edits of recordings.

- The need to fund the pace of change, and the need to deal with the adjustments to other services as the justice system evolves into a new way of working based on greater use of digital technologies.

- The need to ensure that this new approach to taking evidence is designed and implemented in a way that genuinely makes it a better experience for witnesses, allowing them to give full, comprehensive accurate and reliable evidence in a manner that minimises any further distress or damage. It must also ensure that the rights of the accused continue to be respected. This is not just a case of moving traditional court procedures and practices to an earlier point in the process; it is about moving to a significantly different way of conducting trials in the interests of justice for all concerned.