

JUSTICE COMMITTEE**VULNERABLE WITNESSES (CRIMINAL EVIDENCE) (SCOTLAND) BILL****SUBMISSION FROM THE SCOTTISH LEGAL AID BOARD****1. Do you agree with the 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 rule should be implemented?**

The current law, which was further supported by the High Court of Justiciary Practice Note No.1 of 2017 (Taking of Evidence of a Vulnerable Witness by a Commissioner), allows for vulnerable witnesses to give their evidence in advance of a criminal trial. The focus on children giving evidence, and the provisions of the Bill that would improve the experience of all vulnerable witnesses, are welcomed. It is recognised that the Bill is intended to drive further improvement in how the criminal justice system treats vulnerable witnesses.

The phased approach to implementation is supported in the answer to question 5 below. Given that the most sensitive types of evidence to be given by children, and perhaps the most intimidating court environment, is in a case where the case is heard before a jury then it is right that the rule applies to solemn cases with a focus on particular types of cases. The most sensitive will be in the High Court of Justiciary and so that should be a priority. The bulk of jury cases are heard at Sheriff Court level. So in terms of a wider impact that is where the benefits are. The practitioners in those courts (and the courts themselves) will not be so familiar with evidence being pre-recorded. It may be that to allow development that a pilot in one of the larger Sheriff Court jurisdictions take place that could be used as a model for roll out and training.

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?

The Board considers that it is logical and useful for the Bill to contain this provision to allow for future improvement in the taking of evidence from the most vulnerable. Subject to a phased approach this rule could be extended to all vulnerable witnesses with the exception of the accused. While it is possible for the accused to give evidence pre-trial there are factors relevant to the evidence of the accused that do not apply to other witnesses (not least the right to silence). For that reason such a rule would not be appropriate or necessary.

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?

The Board considers that this would be a logical and necessary change to the procedure in order for the policy objectives of the Bill to be met. There is an analogous procedure in place already in section 275 of the Criminal Procedure (Scotland) Act where either side of a criminal prosecution must make application to the court pre-trial to be allowed to ask questions of a complainer in sexual offence case that would otherwise be restricted by the Section 274 of the same Act.

As well as a consideration of the permissible lines of questioning at a ground rules hearing, it is welcomed that the presiding commissioner will decide on the form and wording of the questions to be put to the witness. It is recognised that as well as a line of questioning being inappropriate, an appropriate line of questioning could be asked in an inappropriate way. That is an issue that trial Judges, at present, will manage during a trial. However, in the case of a child witness (who may have an additional vulnerability beyond their young age) it may be thought useful to consider the best way to communicate with that child at the ground rules hearing rather than risk a disjointed, and still potentially stressful for the child, process during the taking of the evidence.

It is also recognised that the grounds rules hearing process for the questioning of vulnerable witnesses has become an integral part of the system for the taking of evidence pre-trial in England and Wales.

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

The Board agrees with a simplification of the process. The Board also recognises that Criminal Defence Solicitors are already well able to anticipate that a vulnerable witness application is likely to be made by the Crown from their consideration of the disclosed evidence.

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 phased roll-out of the provisions in this Bill?

The Board agrees that a phased roll-out of these provisions would be a useful and effective way to encourage the cultural change within the criminal justice system that will be required to meet the policy objectives of the Bill. As acknowledged above while the current law, which was further supported by the

High Court of Justiciary Practice Note No.1 of 2017 (Taking of Evidence of a Vulnerable Witness by a Commissioner), allows for vulnerable witnesses to give their evidence in advance of a criminal trial it is not a routine feature of the system. If the ultimate goal of Scottish Ministers is for this type of procedure to become commonplace for the evidence of vulnerable witnesses, at all levels of prosecution and court, then there is merit on the system being allowed to develop towards that aim. The risk in not doing so is that it is not effective in addressing the needs of vulnerable witnesses while maintaining public confidence in the criminal justice system and the overall interests of justice.