

JUSTICE COMMITTEE

VULNERABLE WITNESSES (CRIMINAL EVIDENCE) (SCOTLAND) BILL

SUBMISSION FROM SCOTTISH WOMEN'S AID

About Scottish Women's Aid

Scottish Women's Aid (SWA) is the lead organisation in Scotland working towards the elimination of domestic abuse and plays a vital role in campaigning and lobbying for effective responses to domestic abuse. We are the umbrella organisation for 36 local Women's Aid organisations across Scotland; they provide practical and emotional support to women, children and young people who experience domestic abuse. The services offered by our members include crisis intervention, advocacy, counselling, outreach, follow-on support and temporary refuge accommodation.

Background

SWA welcomes the opportunity to comment on the important issues raised in this consultation, and we have set out our observations below. Women, children and young people experiencing domestic abuse and rape and sexual assault are re-traumatised through, and during, their participation in the criminal justice system. The actual process of giving evidence is a major source of anxiety and distress for women, children and young people; measures to make this less intimidating in order to secure their best evidence are welcome and timely.

SWA was a member of the Pre-Recorded Further Evidence Workstream in the Scottish Courts and Tribunals Service (SCTS) Evidence and Procedure Review Child and Vulnerable Witnesses Project.¹ This Workstream considered the further work needed around taking the evidence of vulnerable witnesses by commissioner and the development of a future vision for taking the evidence of vulnerable child and adult witnesses that maximises the use of pre-recording of evidence and removes the need for these witnesses to attend trial. Recommendations from the Workstream's Report included amending the relevant provisions of the Criminal Procedure (Scotland) Act 1995 to encourage earlier submission of vulnerable witness applications. Similarly, we supported the proposals and policy intention of Scottish Government's 2017 consultation² paper on pre-recording evidence, which took these proposals a step further towards reality.

¹ <http://www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/reports-data/evidence-and-procedure-pre-recorded-evidence-report-28-09-17.pdf?sfvrsn=2>

² https://consult.gov.scot/criminal-justice/pre-recorded-evidence-for-criminal-trials/consultation/view_respondent?uuld=141537448

COMMENTARY

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?

Section 1 of the Bill creates a “new rule” which

- provides that the court must enable children under 18, who are complainers or witnesses in the most serious cases, to give all their evidence in advance of a criminal trial. This will be through using the special measures of either taking evidence by commissioner, where the witness is questioned in advance and a recording of that questioning is shown during the trial, or through the use of a prior statement, such as a recording of a police interview which can be played in court.
- The “serious cases” as defined in section 1 include murder, human trafficking, rape and other certain sexual offences.

We support the initial focus on child witnesses and complainers, and it is positive that the Bill applies these measures to 16 and 17 year olds, in line with the treatment of under 18s and compatible with the UN Convention on the Rights of the Child.

The amendment allows children over 12 the right to choose to give evidence in court. Therefore, so as long as the protective functions of sections 271A, B and D is adhered to and an appropriate assessment of the risk to the child through appearing in court is undertaken, children must be allowed and supported to give evidence in the way that will allow them to give their best testimony. An individual assessment on a case-by-case basis, underpinned by the initial presumption of automatic access to these special measures and protections, is vital.

Children and young people must be able to make an *informed* choice about giving evidence in court, and age-appropriate, accessible information about the process and what to expect is required. This is in line with the work underway to emphasise the right of the child to have their views heard in court and to participate fully in the proceedings. We would refer the Committee to both the “*Power Up/Power Down*” project undertaken between SWA and the Children and Young People’s Commissioner Scotland³ and the “*Everyday Heroes*” Scottish Government-funded participation project. The latter, which involved SWA, Barnardo’s, Rape Crisis Scotland, the Scottish Youth Parliament and the University of Edinburgh, facilitated the participation of children and young people in the development of the Scottish Government’s Equally Safe Delivery Plan. The findings and recommendations from the project will be launched later this year.

³ <https://www.cypcs.org.uk/policy/domestic-abuse/power-uppower-down>

Despite our overall support for the Bill, we believe that the proposals have some serious omissions that will dilute both the intention and operation of the Bill, as undernoted.

- **Offence under the Domestic Abuse (Scotland) Act 2018**

The list of “*most serious and violent offences*” to which this procedure must apply does not include the offence under section 1 of the Domestic Abuse (Scotland) Act 2018 and the connected aggravation under section 4 of that Act.⁴ We are disappointed that these have not been included in the list created for this Bill, despite our emphasising the need for their inclusion in the Scottish Government’s earlier 2017 consultation.

This is a crucial issue, given the trauma that can be caused to children and young people experiencing domestic abuse. In addition, the omission contradicts the Scottish Government’s own “*Equally Safe*” violence against women strategy. The prevalence of domestic abuse, the numbers of children involved, and the increasing number of cases involving domestic abuse under solemn procedure is a matter of record. Therefore, given the numbers of children likely to come under the auspices of the new offence, both as witnesses required to evidence the new coercive control offence and as victims under the aggravation under section 4 of the 2018 Act, make imperative that this offence is included in the statutory list.

- **Forced marriage related offences**

These reforms could also be further improved to give children and young people from black and minority ethnic communities support and encouragement to engage with the criminal justice system, again, in line with the Scottish Government’s “*Equally Safe*” strategy. The scope of offences covered by this automatic presumption should be widened to include forced marriage. Further additions are those suggested by the Evidence and Procedure Review and by SWA in our response to the 2017 consultation, namely

- An offence under section 9 of the Forced Marriage, etc. (Protection and Jurisdiction) Scotland) Act 2011 (offence of breaching order)
- An offence under section 122 of the Anti-Social Behaviour, Crime and Policing Act 2014 (Offence of forced marriage: Scotland)

To progress these recommendations, we suggest developing a pilot encompassing the various key elements of expert interviewing in an appropriate location with the required recording equipment. Offences involving violence, sexual offences, including historical abuse, and any offences involving domestic abuse should be prioritised.

⁴ <http://www.legislation.gov.uk/asp/2018/5/contents/enacted>

We note that the rule allows Scottish Ministers to add to, or even remove, the need for a list of specified offences and we would hope that once the pilots have been completed and the new system “beds in” that all child complainers and witnesses in any solemn case would be able to give their evidence in this way.

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?

In relation to adult witnesses, although the new section refers to children in solemn proceedings, section 3 gives Scottish Ministers a discretionary power to apply the provisions to adult witnesses: Scottish Ministers may apply the new rule to all adult deemed vulnerable witnesses or to subcategories of these witnesses and could make different provision for different purposes and /or courts.

We fully expect Scottish Ministers, in due course, to extend the rule to include solemn proceedings involving “deemed” vulnerable adult complainers and witnesses, (covering domestic abuse, sexual offences, human trafficking and stalking offences); this will be particularly supportive for victims of serious sexual and domestic abuse-related offences.

We are also seeking the expansion of the “deemed vulnerable adult witness” category to include victims of forced marriage. As with children, this is a means of giving women from black and minority ethnic communities support and encouragement to engage with the criminal justice system, and is in line the Scottish Government’s “*Equally Safe*” strategy.

Any pilot of these procedures should also focus on complainers in domestic abuse cases which are forming an increasing number of cases under solemn procedure.

In the longer term, we also envisage that the procedures set out in the Bill could be used to support deemed-vulnerable witnesses in summary procedure, meaning that they would be used by women experiencing domestic abuse, stalking, sexual offences, human trafficking and, potentially, forced marriage.

The Pre-Recorded Further Evidence Workstream Report recommended

“ix. Until the “Level 1” vision can be extended to all children, in the majority of cases tried in the solemn courts complainers aged 16 and 17 years old, child witnesses aged less than 18 years, vulnerable adult complainers and vulnerable adult witnesses should have their investigative interview or witness statement visually recorded for use as their evidence in chief. Cross-examination and further examination should be undertaken using procedures

for the taking of evidence by commissioner. Such witnesses should not be required to attend court to give evidence at trial unless they choose to do so.”

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 Bill also makes other changes to the current process for the pre-recording of evidence including introducing a new procedural hearing, to be known as a “ground rules hearing”, which will be used prior to a vulnerable witness’s evidence being taken by a commissioner.

The new High Court of Justiciary Practice Note effectively requires a Ground Rules Hearing to be held in any High Court case where evidence is to be taken by a commissioner.⁵ We support that, through the Bill, this will apply to every commission, not just those commissions where the new rule in favour of children under 18 applies; that the provisions will be extended to include sheriffs as commissioners and that the Ground Rules Hearing could be a separate hearing, or part of another hearing, such as the preliminary hearing.

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

We agree with the introduction of a new simplified notification process for the use of standard special measures to which child witnesses and deemed vulnerable witnesses are automatically entitled to (currently, the use of a screen, live link or supporter).

We note the proposed procedure that “...*Under the simplified procedure in the Bill, a party will notify the clerk of the court of the intention to use a standard special measure, rather than having to lodge a vulnerable witness notice. The standard special measure will be put in place administratively, without the need for a court order.*”

We also note that this will not extend to cases where the new rule requiring the pre-recording of evidence applies, and that “*a party will still have to lodge a vulnerable witness notice*” to the court, which will allow the court to oversee these procedures and ensure that they are working as intended.

⁵ <https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/practice-notes/criminal-courts/criminal-courts---practice-note---number-1-of-2017.pdf?sfvrsn=4>

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?

As paragraph 9 of the Financial Memorandum notes, “*In assessing the direct impact of the creation of the new rule in favour of children under 18, it is important to bear in mind that evidence by commissioner is not a new special measure. Evidence taken by way of commissioner can and does already happen in some criminal cases, although at present the numbers are fairly low.*”

None of this is new. All the proposed procedures already exist and have done so since the inception of the 2004 Victims and Witnesses (Scotland) Act 2004, and the Bill is improving and building on what is already there. In theory, therefore, there should be no “start-up costs.” Anecdotal evidence indicates that practitioners have been reluctant to submit applications for the taking of evidence by commissioner because commission hearings are regarded as being “onerous” to organise and conduct, and are therefore perceived as being a last resort when there is no other way of securing a vulnerable witness's evidence, as opposed to a mark of best practice.

This is a protection and method of support for vulnerable witnesses that should already be routinely in use for child witnesses and complainers. In fact, we note in paragraph 11 of the Bill's Financial Memorandum that the High Court Practice Note referred to above has had the positive impact of substantially increasing applications for evidence by commissioner in the High Court.

Final comments

Links between civil and criminal proceedings and good practice

While the Bill concentrates solely on criminal proceedings, enabling good practice in supporting vulnerable witnesses to give their best evidence in civil cases was also recognised. Indeed, the Pre-Recorded Further Evidence Workstream Report noted:

“xiv. While these discussions concentrated solely on criminal proceedings, the links between good practice in supporting vulnerable witnesses to give their best evidence in civil cases was also recognised. The Group would encourage further work to ensure that the best practice and procedures recognised in this paper are drawn upon to influence similar best practice and procedures to support and protect child and adult vulnerable witnesses give their best evidence in civil proceedings.”

More work is needed to ensure that the best practice and procedures recognised in this paper are used to expand those currently available to protect child and young person witnesses in civil proceedings and that access to special measures for vulnerable adults, particularly women experiencing domestic abuse, participating in civil proceedings is put on a similar automatic footing. The current disparity in protection between civil and criminal proceedings for children and young people, particularly where domestic abuse is an issue, is poignantly demonstrated by a quote from one of the young participants in the “*Everyday Heroes*” project who asked “*I get a screen in (criminal) court to protect me from him as I’m scared of him but now I have to fight to not have contact with him, why?*”

Availability of appropriate facilities

The availability of appropriate facilities within a reasonable distance for the use of both child and adult witnesses is crucial.

Training

Additionally, training is required on the skills necessary to undertake high-quality forensic interviews with children and vulnerable adults, accompanied by training on causes and dynamics of domestic abuse and wider violence against women issues such as honour-based violence and forced marriage.

Attitudinal Change

Unfortunately, legislative change alone will not be sufficient to ensure that these reforms work in practice and this will require not only a significant change of attitude, practice and culture towards the position of vulnerable complainers and witnesses but also a willingness to embrace the practical changes in process and questioning to facilitate this. SWA would be most interested in implementation planning to produce and sustain these changes across our partners such as the police, the Crown Office and Procurator Fiscal Service (COPFS), judiciary, court and agencies such as health and social work.