JUSTICE COMMITTEE

VULNERABLE WITNESSES (CRIMINAL EVIDENCE) (SCOTLAND) BILL

SUBMISSION FROM THE SENATORS OF THE COLLEGE OF JUSTICE

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?

We welcome the introduction of the "new rule".

As referred to in paragraph 28 of the policy memorandum which accompanies the bill, in 2015 Scottish Courts and Tribunal Service ("SCTS") published the first Evidence and Procedure Review report ("the Review"). It made the frank admission that, in respect of measures designed to make the experience of child and vulnerable witnesses less traumatic, *"Scotland is still significantly lagging behind those at the forefront in this field"*. This led to a programme of work resulting in the "Next Steps" report, the Pre-recorded Evidence Work Stream project, and eventual report (policy memorandum paragraphs 29 and 30).

It was acknowledged that it would take some time before a model along the lines proposed in the review could realistically be put into practice. The Review envisaged that until such a new model could be introduced the evidence of child complainers and witnesses should be captured in advance of the trial by means of a visually recorded statement as evidence in chief, accompanied by a commission to take any further evidence, including cross examination, prior to the trial, thus achieving the aim of avoiding the need for children to attend court to give evidence. The "new rule" would achieve this.

<u>"Solemn Proceedings" /" Solemn Cases"</u>

We note that it is proposed that new section 271BZA will apply where a child witness is to give evidence in "*relevant criminal proceedings which are solemn proceedings*". We note that "*solemn proceedings"* are not defined in the Bill. We point out that existing section 271 (3) of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") provides that, for the purposes of subsection 271(1)(a) and section 271B(1)(b) of the 1995 Act, *"proceedings shall be taken to have commenced when the indictment or, as the case may be, complaint is served on the accused."* We wonder, therefore, whether provision of a definition of *"solemn proceedings"* would be beneficial in this context.

The Review considered that commissions usually took place far too long after alleged offence and a change of legislation to enable them to occur sooner was recommended. The proposals in the Bill seem designed to enable that to occur. We therefore also support those elements of the Bill.

We note that section 5 (4) of the Bill makes provision for a party to lodge a vulnerable witness notice before service of an indictment *"in solemn cases".* We very much support that change. However, as there is no definition of *"solemn cases"* in the Bill it is not clear how *"solemn cases"* are to be identified if no indictment has yet been served, unless it is intended that this provision is to apply to all cases in which an accused person has appeared on petition.

Joint Investigative Interviews (JIIs)

We endorse the statements made at paragraphs 32 -34 of the policy memorandum regarding Joint Investigative Interviews (JIIs). Indeed, we regard maintaining and improving the quality of JIIs as a priority. An inexpertly conducted JII can, rather than contributing to improvement of the experience of a child witness, lead ultimately both to an increase in stress and anxiety experienced by the witness and a decrease in the efficiency of the proceedings. For example, if a JII is conducted by means of inappropriate leading questions this can, at the request of the defence, lead to a hearing at which the judge is required to rule on whether some or all of the JII is inadmissible in evidence. The use of a JII as evidence in chief or as part of such evidence means that a witness will not have to repeat in Court what was already said to the investigators. It will obviously take place nearer in time to the events in question and in many case shortly afterwards, when they will be fresher in the mind of the witness. While cross examination is not precluded, whether at trial or at a Commission prior to trial, the experience of the witness will be much easier than in the traditional format. If parts or all of the JII are ruled inadmissible the policy objectives will be frustrated, since the witness will be required to recount in chief information already given. Not only will this dash the expectations of the witness but the quality of the evidence runs the risk of being diminished, not least because of the further passage of time.

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 work stream project also considered that significant improvements could be made in the way in which the evidence of adult vulnerable witnesses was secured. It considered that the most intensive model, proposed for child witnesses would not be a suitable one to adopt for the majority of adult vulnerable witnesses, other than where there were multiple vulnerabilities, in which case the more resource intensive model might be considered as an option. Instead, the report considered that progress should be made on a phased basis to the introduction of a system whereby the evidence of vulnerable adults was captured by means of a visually recorded interview followed by a commission. We therefore support the provisions in the Bill which would enable the "new rule" to be extended in future to cover other categories of witness.

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 work stream project noted that current arrangements for taking the evidence of children and vulnerable witnesses by commission were under-utilised, somewhat *ad hoc* and lacking in consistency. Anticipating an increased demand for the use of commissions, and to improve consistency, the work stream project developed a new approach to the taking of evidence on commission, which led to the introduction of Practice Note no 1 of 2017 ("PN") (noted at paragraphs 38 and 39 of the policy memorandum), setting out detailed steps to be taken by all involved in preparation for the commission and introducing detailed methods of judicial management of the commission process, before, during and after the commission. The PN effectively introduced a grounds rule hearing ("GRH") for such commissions. Experience shows that detailed case management is required to enable commissions to proceed smoothly, and with minimal trauma to the witness. We therefore welcome the introduction of a mandatory GRH in such cases. At present any GRH takes place at the Preliminary hearing. The ability to amalgamate the GRH with other hearings provides an essential degree of flexibility.

Experience to date with the PN has demonstrated to Preliminary Hearing judges that for GRHs to be effective it is essential that the defence communicate the lines of questioning to the court. We suggest the requirement for the defence to specify "*the lines of inquiry to be pursued"* (paragraph 11 of the PN) in advance of all GRHs ought to be made the subject of specific statutory provision in this Bill.

We have noted the provision at new section 271I (1ZD) (d) that "*if the commissioner considers that there are steps that could reasonably be taken to enable the vulnerable witness to participate more effectively in the proceedings,* [the commissioner must] *direct that those steps be taken"*. We welcome this broad-ranging provision. We consider that it would permit such measures as appointment of an intermediary which, while common practice in other jurisdictions, is rare in Scotland.

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

Yes. Where only standard measures are sought this is a matter of routine for which an application should not be necessary. The current requirements utilise judicial and staff time for a matter which should be purely administrative.

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?

The report of the work stream project recognised that its proposed new model would be resource intensive and involve a significant culture change on the part of practitioners and judges. It recognised that even moving to a model of the kind specified in the "new rule" would be resource intensive, and would require culture change of this kind, as well as training of judges and practitioners. Significant training of judges has already taken place. The Next Steps report suggested that any new system should be introduced in a phased way to ensure there is not an '*unsupportable surge in demand on the justice system's limited resources'*. The Work Stream project report acknowledged that and considered that change should be introduced in a phased way so as not to overburden resources. We therefore agree that a phased roll out of change is an appropriate way to deal with the resource implications.