



Law Society
of Scotland

Stage 1 Briefing

Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill Stage 1

1 February 2019



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

In providing these comments, we hope that these will assist the Parliament's scrutiny in relation to the Stage 1 Debate on the Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill (the Bill) scheduled for 5 February 2019.

We support the principles of the Bill

- in improving and supporting how children and vulnerable witnesses give evidence
- in a phased implementation though highlight whether the category of domestic abuse should be included meantime
- that there is no inclusion of the child accused in these measures.

We highlight concerns around:

- early and effective identification of the relevant cases
- the practical implications arising from these changes and the required resources including proper funding for the Crown and defence
- maintaining a balance between the Crown and defence by ensuring adequate safeguards are included

General

Witnesses are required to give evidence to secure criminal justice in our adversarial system which require them to attend court and to give oral evidence. Inevitably, that is going to be stressful for those witnesses unfamiliar with the court environment and/or have been the victims of serious and traumatic crimes. Merely attending court for many may be a highly distressing occasion which will have long term and significant effects on them. The traditional nature of examination methods in obtaining evidence in court too may not

be the best or most effective when obtaining “comprehensive, reliable and accurate accounts of their experience¹.”

The main Bill’s policy intention is “to improve how children and vulnerable witnesses participate in the criminal justice system by enabling the greater use of pre-recorded evidence.²”

The Bill does not start from scratch. It builds on the existing current special measures which include the use of closed courts, taking evidence on Commission and access to video links. The operation of the current measures does much to assist witnesses to give evidence.

The Scottish justice system does not stand still. The Bill represents what can be achieved now much to improve the processes by which children and other vulnerable witness will have their evidence taken in advance of a trial.

For the future, we support the work being planned to follow the Justice Committee’s visit to the Statens Barnehus exploring the means of obtaining child witness’s evidence through a forensic interview approach³.

All who appear in the criminal justice system need to be treated with respect. As Lady Dorrian⁴ noted:

‘For children and other vulnerable witnesses, this means finding ways to take their evidence in an environment and in a manner that does not harm them further but allows their evidence to be given and tested fully and appropriately.’

The Bill is therefore a much-welcomed positive step for those involved. It will be of significant benefit in promoting the overall fairness and transparency of the Scottish criminal justice system in seeking to ensure that the ‘best’ evidence can be obtained from the witnesses.

There must be safeguards too maintained to ensure that the rights of the witness to express their views and to make informed decisions as to how to provide their evidence are preserved. If a court was to overrule the child’s wishes about giving evidence in person, this might be problematic. Any age limit of 12 or over though appropriate to the operation of any exception but in some cases, the imposition of an age restriction may be somewhat arbitrary.

¹ Paragraph [69] of the Stage 1 Report on the Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill <https://sp-bpr-en-prod-cdnep.azureedge.net/published/J/2019/1/24/Stage-1-Report-on-the-Vulnerable-Witnesses--Criminal-Evidence---Scotland--Bill/JS052019R1.pdf>

² Executive Summary of the Stage 1 Report on the Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill <https://sp-bpr-en-prod-cdnep.azureedge.net/published/J/2019/1/24/Stage-1-Report-on-the-Vulnerable-Witnesses--Criminal-Evidence---Scotland--Bill/JS052019R1.pdf>

³ Paragraph [385] of the Stage 1 Report on the Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill <https://sp-bpr-en-prod-cdnep.azureedge.net/published/J/2019/1/24/Stage-1-Report-on-the-Vulnerable-Witnesses--Criminal-Evidence---Scotland--Bill/JS052019R1.pdf>

⁴ Scottish Court Service, Evidence and Procedure Review Report (September 2017)

It is paramount in making any proposed changes that a balance must be maintained between the Crown and the defence. Adequate safeguards must be built into the new processes to protect the accused and to avoid any potential miscarriages of justice⁵.

Where, for instance, it was suggested that draft section 2(2) (a) of the Bill⁶⁷ concerning child witnesses under 12, might preclude their cross-examination, there must be careful scrutiny of the legislation. That ensures as outlined in the Bill's policy intention that the defence right to challenge is fully preserved. Any unintended consequences must be avoided.

The commitment to keep an "open mind"⁸ is to be encouraged since any fettering the defence examination is not the purpose of this Bill.

Early identification

Crown Office and Procurator Fiscal Service (COPFS) have to ensure that cases involving the child and vulnerable witnesses are identified to the defence at the outset and in any event, as early as possible. Full disclosure of the evidence must then follow.

Effective communication with COPFS is also vital as information to allow the defence to fully prepare may be somewhat broader than merely disclosure of evidence. That information may allow the case to resolve early by a plea or indeed, proceedings being discontinued where obtaining the witness's evidence on commission will not be required. The 'holding' charges outlined in the petition may not represent the full story which becomes clearer once an indictment is served. That does not necessarily mean in every case that there must be service of the indictment before a commission is held. Clarity and cooperation by the prosecution is vital before any such commission hearing is held and is to be fully effective.

The timing and relevance of the ground rules hearing will be crucial as too early will mean that such relevant information or investigations may not have been carried out.

Much will depend on the facts and circumstances in each individual case.

⁵ Paragraph [96] of the Stage 1 Report on the Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill <https://sp-bpr-en-prod-cdnep.azureedge.net/published/J/2019/1/24>

⁶ The Bill as introduced [https://www.parliament.scot/S5_Bills/Vulnerable%20Witnesses%20\(Criminal%20Evidence\)%20\(Scotland\)%20Bill/SPBill34S052018.pdf](https://www.parliament.scot/S5_Bills/Vulnerable%20Witnesses%20(Criminal%20Evidence)%20(Scotland)%20Bill/SPBill34S052018.pdf)

⁷ Paragraph [101] of the Stage 1 Report on the Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill <https://sp-bpr-en-prod-cdnep.azureedge.net/published/J/2019/1/24/Stage-1-Report-on-the-Vulnerable-Witnesses--Criminal-Evidence---Scotland--Bill/JS052019R1.pdf>

⁸ Paragraph [132] of the Stage 1 Report on the Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill <https://sp-bpr-en-prod-cdnep.azureedge.net/published/J/2019/1/24>

These circumstances illustrate the disclosure and information required to allow the defence to thoroughly prepare their case adequately so that the witness's evidence can be tested fully and appropriately.

We echoed these concerns in our written submission.⁹ What must be avoided is any duplication of evidence on Commission sessions being required through lack of available information as that would defeat the Bill's purposes in obtaining evidence early in the proceedings.¹⁰ Furthermore, failure to provide disclosure will involve inevitable delay to the system and ultimately, prejudice the good policy intentions of the Bill with regard to the witnesses.

Assurances should be provided on how the requirements of disclosure and liaison are to be best secured¹¹.

Practical implications

There is a need to understand the practical challenges of the changes being made and the inevitable resource requirements for these changes. More time and energy will inevitably be required in the investigatory stage of the process rather than at trial. That involves solicitors who must be fairly and adequately remunerated for such work. Lord Bonomy at the time of the High Court reforms in order to achieve the primary objective of injecting greater certainty recognised that payments were necessary 'designed to encourage those instructed to commit themselves to cases and to ensure that they are properly remunerated whether the case proceeds to trial or is disposed of prior to the trial.'¹²

Proper funding for both the Crown and the defence is required to encourage the relevant parties to undertake that work. There are training implications for all to ensure that the questioning of witnesses at commissions is carried out appropriately within the ground rules hearings.

The Bill requires a culture shift in "legal thinking, practice, technology and infrastructure"¹³ which involves all the criminal justice organisations in introducing what is perhaps to be seen as a move to an inquisitorial

⁹ https://www.parliament.scot/S5_JusticeCommittee/Inquiries/VW-LSS.pdf REF NO.

J/S5/18/VW/22

¹⁰ Paragraph [223] of the Stage 1 Report on the Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill <https://sp-bpr-en-prod-cdnep.azureedge.net/published/J/2019/1/24>

¹¹ Paragraph [170] [https://sp-bpr-en-prod-cdnep.azureedge.net/published/J/2019/1/24/of the Stage-1-Report-on-the-Vulnerable-Witnesses--Criminal-Evidence---Scotland--Bill](https://sp-bpr-en-prod-cdnep.azureedge.net/published/J/2019/1/24/of%20the%20Stage-1-Report-on-the-Vulnerable-Witnesses--Criminal-Evidence---Scotland--Bill) <https://sp-bpr-en-prod-cdnep.azureedge.net/published/J/2019/1/24>

¹² <https://www.gov.scot/Publications/2002/12/15847/14122>

¹³ Paragraph [121] of the Stage 1 Report on the Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill <https://sp-bpr-en-prod-cdnep.azureedge.net/published/J/2019/1/24>

as opposed to an accusatorial approach to evidence obtaining¹⁴. All criminal justice organisations need to play their part.

Phased approach

We support the phased approach to implementation as being appropriate with the initial focus being on child witnesses in the most serious cases.¹⁵

The approach of restricting the Bill to the most serious cases and High Court seems a sensible way forward as the impact of these measures needs to be properly assessed and evaluated before such provisions could extend potentially to children in all cases. Distress to the witnesses may still arise which needs to be carefully assessed.

This will provide an opportunity for the Scottish Government to monitor the costs of implementation, including the impact on other parts of the criminal justice system, to ensure that sufficient resources as highlighted above are in place for each phase of implementation.

Regulations

Scottish Ministers may make modifications¹⁶ by way of regulations to the list of offences which would be subject to affirmative Scottish Parliamentary procedures. There has been a call for offences of domestic abuse to be included which we also queried at the Bill's introduction. This merits careful consideration as the Scottish Parliament would not wish to amend the list of offences frequently. However, including a degree of flexibility within the list of offences which can be amended by Regulations is welcomed and may be the best way to proceed on an incremental basis.

If seeking to extend the provisions of these special measures, there is a need for information to be produced on how these measures are working. Permitting sufficient parliamentary scrutiny to ensure that any such extension will deliver benefits for witnesses in practice, whilst still protecting the rights of the accused is also required¹⁷.

¹⁴ Paragraph 65 of the Bill's Policy Memorandum

¹⁵ Paragraph [172] of the Stage 1 Report on the Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill <https://sp-bpr-en-prod-cdnep.azureedge.net/published/J/2019/1/24>

¹⁶ Section 1(9) of the Bill as introduced
[https://www.parliament.scot/S5_Bills/Vulnerable%20Witnesses%20\(Criminal%20Evidence\)%20\(Scotland\)%20Bill/SPBill34S052018.pdf](https://www.parliament.scot/S5_Bills/Vulnerable%20Witnesses%20(Criminal%20Evidence)%20(Scotland)%20Bill/SPBill34S052018.pdf)

¹⁷ <https://sp-bpr-en-prod-cdnep.azureedge.net/published/J/2019/1/24/ of the Stage-1-Report-on-the-Vulnerable-Witnesses--Criminal-Evidence---Scotland--Bill/JS052019R1.pdf>

Ultimately, the interests of justice are about the balance of respective interests between the accused and the State so that the accused must be able to challenge the evidence against them, subject to any restrictions such as section 288 of the Criminal Procedure (Scotland) Act 1995.

Child accused

We support the absence in the Bill¹⁸ of any provisions relating to the child accused being able to give pre-recorded evidence. There are complex issues in relation to any such extension of these measures since the right of the child accused to remain silent must be fully respected.

For further information, please contact:

Gillian Mawdsley

Policy Executive

Law Society of Scotland

DD: 0131 476 8206

gillianmawdsley@lawscot.org.uk

¹⁸ Paragraph [161] of the Stage 1 Report on the Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill <https://sp-bpr-en-prod-cdnep.azureedge.net/published/J/2019/1/24>