

Vulnerable Witnesses (Criminal Evidence) Bill (2018)

JUSTICE COMMITTEE

VULNERABLE WITNESSES (CRIMINAL EVIDENCE) (SCOTLAND) BILL

SUBMISSION FROM SCOTTISH CHILDREN'S REPORTER ADMINISTRATION

General Comment

The Children's Hearings System is Scotland's distinct system of child protection and youth justice. Among its fundamental principles are:

- the needs of children or young people in trouble should be met through a single holistic and integrated system, whether concerns relate to their welfare or behaviour
- a preventative approach is essential, involving early identification and diagnosis of problems
- the welfare of the child remains at the centre of all decision making and the child's best interests are paramount throughout
- the child's engagement and participation is crucial to good decision making

SCRA operates the Reporter service which sits at the heart of the system. SCRA employs Children's Reporters who are located throughout Scotland, working in close partnership with panel members and other professionals such as social work, education, the police, the health service and the courts system. SCRA's vision is that vulnerable children and young people in Scotland are safe, protected and offered positive futures. We will seek to achieve this by adhering to the following key values:

- The voice of the child must be heard
- Our hopes and dreams for the children of Scotland are what unite us
- Children and young people's experiences and opinions guide us
- We are approachable and open
- We bring the best of the past with us into the future to meet new challenges.

SCRA welcomes the opportunity to respond to this call for evidence.

The drafting of this legislation is hugely complicated. For example, there are in effect two versions of section 271A depending on whether section 271BZA applies.

SCRA's view is that the drafting could be simplified.





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?

SCRA supports the new rule as an improvement to present practice.

SCRA urges that the new rule is seen as an intermediate step to a Barnahus-type system, whereby a high quality interview is used as evidence in chief, any further questioning is authorized by the court and carried out by an interviewer at the earliest opportunity in the proceedings.

In the meantime, SCRA believes that the list of offences should either now or as soon as possible be extended to include:

- offences involving stalking or domestic abuse;
- any offence against a person under the age of 18;
- an offence of forced marriage.

Further, the new rule ought to apply to any child witness whose prior statement is a JII carried out for child protection purposes - as such witnesses are likely to be amongst the most vulnerable. This change should be made as soon as possible.

SCRA urges that a similar new rule (with appropriate modifications) is applied as soon as possible to children’s hearings proof proceedings. Children’s hearings proceedings can also deal with some of the most serious offences against the most vulnerable children. Given the relatively small number of children’s hearings proof proceedings, this could be used as a pilot in relation to a wider change for summary proceedings.

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?

It is extremely important that progress for vulnerable witnesses does not stop here; that the list of children who would benefit from the new rule is quickly extended and that adult vulnerable witnesses benefit from the new rule as soon as possible.

The new rule should quickly be extended to children for the offences and in the situations (JII for children protection purposes) set out above. Extension to adult vulnerable witnesses should proceed as quickly as possible.





It is also important that the new rule is extended to benefit witnesses in summary criminal proceedings, which can also deal with very serious offences, with very vulnerable witnesses, and those in children's hearing proof proceedings. Indeed the culture and practice in summary proceedings may be more in need of change than in solemn proceedings.

SCRA views this Bill as the start of a wholesale change to criminal trials for vulnerable witnesses, and for victims of crime: progress must not cease simply because the Bill has been introduced.

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?

A ground rules hearing (GRH) is in principle helpful on any occasion a vulnerable witness gives evidence. It is a simple and effective tool to reduce the harm to witnesses whilst at the same time increasing court efficiency. Therefore, ground rules hearings should be extended to all vulnerable witnesses as quickly as possible.

The new Section 271I(1ZD) does not go far enough in promoting proactive judicial scrutiny of questioning of vulnerable witnesses. The legislation should specifically require the prosecutor and the accused to submit the list of proposed questions to the judge or commissioner in advance. This will promote a practice of proactive judicial scrutiny. This is the norm in English proceedings where pre-recording of evidence is to take place, and has been described as the success of the system. It is difficult to see any argument against proactive judicial scrutiny of questioning other than an unwillingness to change culture and practice. As in England, alternative questions can be suggested depending on possible witness responses.

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

We agree with a simplified notification procedure, but section 271E ought to be amended so that any party lodging a vulnerable witness notice or a notice under section 271AA must make reasonable attempts to ascertain the views of the witness. This is currently unclear and by removing the requirement to include such views, this may mean that the views of the witness will not be sought. It is extremely important that witnesses have input into special measures. Anecdotally, witnesses views are not always being sought and screen and supporter are used as a "default" special measure.

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 evaluation and research¹ into the value of the section 28 pilot shows in England show that the benefits of pre-recording questioning of vulnerable witnesses (when implemented correctly) brings benefits beyond

¹ See Ministry of Justice (2016) – Process evaluation of pre-recorded cross-examination pilot (Section 28). At: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/553335/process-evaluation-doc.pdf; Plotnikoff, J. and Woolfson, R. (2016) - Worth waiting for: The benefits of section 28 pre-trial cross-examination. Archbold Review, Issue 8. At: <https://www.archbold.co.uk/PDF/2016/Archbold%20Issue%208%20PRESS.pdf>





that even initially anticipated. This pilot scheme involves the use of Achieving Best Evidence (ABE) interviews as evidence in chief and expedited, pre-recorded cross examination.

The benefits include:

- Making it easier for vulnerable witnesses to recall events, produce more reliable evidence, and making the process fairer for all involved.
- Making the experience less traumatic for witnesses.
- Questions asked of witnesses are more focused and relevant (due to the scrutiny of Grounds Rules Hearings).
- Cross examination takes place for a shorter period.
- Trial durations of shorter length.
- Fewer “cracked” trials and more guilty pleas before trial.

Successfully implementing pre-recording evidence in advance of trial cannot be achieved by legislative change alone. This has to be accompanied by rigorous case management and judicial control, and heightened awareness of inappropriate questioning. Change requires to be embraced by the criminal justice system.

In England:

- There is free pan-professional training on vulnerable witness advocacy (delivered by judges and experienced barristers),
- the Advocacy Gateway Toolkits are explicitly recognized as best practice,
- Advocates must confirm they have read the Advocate’s Gateway toolkit on questioning vulnerable witnesses in advance of the GRH and provide their questions to the judge in advance.
- Civil and criminal rules and practice directions contain specific and detailed requirements in relation to vulnerable witnesses, including a ground rules hearing in every case.
- There is an intermediary service for witnesses with communication difficulties.

Consideration should be given as to what other measures are needed to ensure that the new provisions are implemented successfully in Scotland.



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