



Law Society
of Scotland

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Stage 3 Briefing

Vulnerable Witnesses (Criminal Evidence) Bill

7 May 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.

We provide the following comments regarding the Vulnerable Witnesses (Criminal Evidence) Bill (the Bill) which we hope will assist the Parliament's scrutiny at the Stage 3 Debate scheduled for Thursday, 9 May 2019.

Our comments fully support the principles of the Bill:

- in improving and supporting how children and vulnerable witnesses give evidence
- the planned phased implementation of these measures
- the inclusion of domestic abuse as a relevant category of offence
- no inclusion of the child accused.¹

The concerns which we have relate to the practical implications around implementation of the Bill in that there needs to be:

- timely early identification of the relevant cases requiring the use of these measures by the Crown
- provision of adequate resources including funding for the Crown and the defence (through legal aid) to ensure that these measures can be utilised fully.

¹ Paragraph [71] of the policy memorandum to the Bill outlines that the Scottish Government decided not to extend the Bill's measures to the child accused as there would be practical differences and issues involved. The Scottish Government considered that there could be many unintended consequences if the new rule for pre-recording evidence was to apply to the accused before these issues had benefitted from further consideration.

[https://www.parliament.scot/S5_Bills/Vulnerable%20Witnesses%20\(Criminal%20Evidence\)%20\(Scotland\)%20Bill/SPBill34PMS052018.pdf](https://www.parliament.scot/S5_Bills/Vulnerable%20Witnesses%20(Criminal%20Evidence)%20(Scotland)%20Bill/SPBill34PMS052018.pdf)

Comments

The Bill was introduced on 13 June 2018². The main policy objective of the Bill is:

“to improve how children and vulnerable witnesses participate in the criminal justice system by enabling the much greater use of pre-recording their evidence in advance of a criminal trial.”³

Improving obtaining evidence from children and vulnerable witnesses

The adversarial nature of the Scottish criminal justice system requires witnesses to attend court and to give oral evidence. Children and vulnerable persons may be witnesses in any criminal cases being prosecuted in court.

Attending court is a stressful experience for anyone, especially for those who are unfamiliar with the court environment and/or have been the victim of serious or traumatic crimes. That includes children and vulnerable persons.

We recognise that attending court for children and vulnerable witnesses may result in long term and significant effects as a result of that experience. Moreover, the current approach of obtaining oral evidence may not be the best or most effective where “comprehensible, reliable and accurate accounts of their experience”⁴ are what serve the criminal justice system best.

The Scottish criminal justice system should not remain static. This Bill is seeking:

- to improve the practices and processes (and taking account of good practices existing in other countries such as the Barnehus approach which explores how to take a child witness’s evidence through a forensic approach).⁵
- To build on existing measures that can be used to support witnesses in court. These include the current special measures such as closed courts, evidence on commission and access to video links.
- To find means to ensure that evidence from children and vulnerable witnesses can be taken in a way that does not harm them further.

We recognise that though special measures currently exist, they are not always being used to their fullest extent. The Bill as well as publicity when its provisions come into force should assist in encouraging and promoting the enhanced use of such measures.

² [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)

³ Paragraph 4 of the Policy Memorandum of the Bill

[https://www.parliament.scot/S5_Bills/Vulnerable%20Witnesses%20\(Criminal%20Evidence\)%20\(Scotland\)%20Bill/SPBill34PMS052018.pdf](https://www.parliament.scot/S5_Bills/Vulnerable%20Witnesses%20(Criminal%20Evidence)%20(Scotland)%20Bill/SPBill34PMS052018.pdf)

The Cabinet Secretary has published a letter dated 30 April 2019 on work going forward with regard to the next steps in this work.

http://www.parliament.scot/S5_JusticeCommittee/Inquiries/20190430CSfJtoMM_Barnahus.pdf

⁴ Paragraph [69] of the Stage 1 Report on Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill

⁵ Paragraph [365] of the Stage 1 Report on Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill

The Bill is a positive step. It has many benefits in securing the overall fairness and transparency of the Scottish criminal justice system.

Where such measures are involved, there must be adequate safeguards to protect the interests of the accused and to avoid any miscarriages of justice. A balance needs to be struck between the interests of the accused and the child and vulnerable witnesses. We highlighted in our recent report on the vulnerable person accused that:

“the greater protections being developed for vulnerable witnesses are welcome, but we must not lose sight of how vulnerable people accused of criminal offences themselves experience the criminal justice system”⁶.

Implications of the Bill

Domestic Abuse cases: We welcome the inclusion of child witnesses in solemn domestic abuse cases.⁷ This takes account of cases involving the new offence of abusive behaviour towards a partner or ex-partner under section 1(1) of the Domestic Abuse (Scotland) Act 2018, offences under Part 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 and offences occurring before 24 April 2017, when the new domestic abuse aggravator came into force, and where the aggravator would have applied if the offence had occurred more recently.

Children in these types of cases would generally no longer have to give evidence in court but will benefit from the pre-recording of their evidence ahead of the trial. This will end their involvement in such trials sooner and reduce the possible implication and effect of making such an appearance.

We welcome the amendments being suggested after section 8 of the Bill at Stage 3 to introduce a requirement on Scottish Ministers to report on sections 1 and 5 to ascertain how the measures have helped witnesses participate in the criminal justice system.

Such a report could usefully consider how many domestic abuse cases have included child witnesses. The report could also monitor the phased implementation approach to the provisions of the Bill.

This seems a sensible approach as the impact of these measures should be assessed and evaluated before they extend to all children and vulnerable witnesses given the significance of the changes being made.

Early identification of cases: The Crown Office and Procurator Fiscal Service need to ensure that cases involving children and vulnerable witnesses are identified at the outset or as soon as possible.

⁶ Law Society of Scotland President Alison Atack <https://www.lawscot.org.uk/news-and-events/news/greater-consistency-needed-for-vulnerable-accused-people/>

⁷ <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11993> Stage 2 Debate

Making full use of the Bill's provisions does depend on other steps such as full disclosure of evidence by the Crown to the defence.

Clarity and cooperation by the prosecution is vital to securing the success of the measures being brought forward by the Bill. That requires assurances that the requirements of disclosure are made and that effective liaison takes place between the Crown and defence. Failure to do so will have implications inevitably for the criminal justice system in delays which does not serve the interests of anyone involved, especially those, being children and vulnerable witnesses, whom the Bill is designed to protect.

Practical implications: There is a need to understand the full practical challenges of the changes being brought forward in the Bill and the potential resource implications.

Proper funding of both the Crown and the defence is required as the Bill does involve, as recognised earlier, "a culture shift in legal thinking, technology and infrastructure."⁸

- Culture means encouraging both the Crown and defence to actively use the measures and for proper fair and adequate remuneration to be made. Energy, time and resource is required from all at an earlier stage of the proceedings than at present in pre-recording of evidence. Such payments will encourage those instructed to commit themselves to cases to ensure proper remuneration whether the case proceeds to trial or is disposed of prior to the trial.⁹
- Legal thinking involves the training of all persons including the judge and commitment to the practices involved in pre-recording evidence
- Technology and infrastructure require the processes and facilities to work and to be accessible to all such witnesses and the Crown and defence.

All involved need to play their part so that as the provisions of the Bill are commenced children and vulnerable witnesses can benefit from these measures.

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⁸ Paragraph [12] of the Stage 1 Report on Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill

⁹ Lord Bonomy – High Court reforms <http://www.gov.scot/Publications/2002/12/15847/14122>