



Response by the Faculty of Advocates
on
Call for views - Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill

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?

The Faculty of Advocates’ general position

In principle, the Faculty of Advocates has no opposition to the introduction of such a rule. It is now well established that child witnesses benefit significantly from giving evidence in a different environment: away from the antiquated, and sometimes intimidating, environs of the courtroom; by answering questions that are simple and unambiguous; and by doing so as near in time as possible to the events in question. It is also expected that capturing the “best” evidence of the child is in the wider interests of justice. However, the Faculty considers it vital that sufficient safeguards are in place to enable the rule to operate fairly, and to ensure that there is no scope for an increase in miscarriages of justice. It is therefore essential that the evidence of the child can be tested sufficiently and on an informed basis.

Scope of implementation

By virtue of sections 1 and 11, the Bill proposes a commencement provision that provides for a staged introduction of the legislation by the Scottish Ministers by Regulations. The Faculty considers that this provision is essential to secure the success of the legislation. A stepped process of introduction, which permits the development of good law and practice, would be more likely to engender success for a greater category of witnesses and offences in the future; eventually resulting in successful outcomes throughout the Criminal Justice system.

In its consultation response to the Scottish Government (at Answer 3), the Faculty of Advocates stated;-

“ “Next Steps” suggested that it would be appropriate to limit the first stage of this approach to children under the age of 16, although some flexibility should be allowed to account for exceptional circumstances. The Faculty of Advocates accepts the sense of such a proposal in relation to the category of witness, and suggests that it would also make sense, in order to ensure that the change in practice and procedure proposed is successful and there is careful and consistent development of case law, to further limit the initial focus to cases involving sexual and serious violent offences that merit indictment in the High Court.”

The Faculty remains of the view that, to start with at least, the legislative provisions should only apply to child witnesses in cases of sexual and serious violent offences that merit indictment in the High Court, since an initial expansion from the outset might well be too much for the current system to cope with, increasing the likelihood that the underlying purpose of the legislation could be defeated.

As currently drafted, the Bill would allow for an initial limitation of the rule to children under the age of 16 in the High Court. Although the Faculty believes this would be a cautious and sensible approach, it appreciates that this is a matter of balance and others might be better placed to analyse what can, realistically, be achieved.

The forum

Since the Bill envisages a staged approach, it would be sensible to commence with child complainers speaking to the most serious offences in the High Court, before the scheme is rolled out to the lower courts.

In our experience, there is a significant (possibly much higher) volume of cases in the Sheriff Court involving complainers under 16 in relation to sexual offences which, although extremely serious and challenging, fall short of rape and other more serious forms of penetrative abuse. However, the impact of the sexual offending on these vulnerable children - often presenting with learning and emotional difficulties - is often just as serious as those who come before the High Court. In addition, Sheriff Court proceedings for those who have a disposition to sexual offending against children often represent a prelude to their coming before the High Court, as more serious offences and/or earlier offences come to light at a later stage. We would therefore support extension to all solemn cases, when the time is right.

If, and when, proper statistical analysis demonstrates that limiting the category of case to the High Court for sexual offending has been a manageable change, further analysis of Sheriff Court cases for the same categories of offence would, to our mind, be an essential undertaking at that stage.

Deciding on further implementation

The Faculty is concerned that allowing the Minister to extend the scope of the rule might not allow for sufficient scrutiny of the way in which the legislation is working in practice and, in particular, whether this would provide a sufficiently rigorous review of the Crown's response. The process by which new

categories of witness, charges and courts should be introduced must be examined with great care at every stage and a framework for such change must be properly established from the outset. Additionally, once the changes are made, it will be difficult to have them “rolled back”. In the circumstances, and standing the importance of the proposed changes, the Faculty, on balance, considers that it should be for the Parliament to determine these matters.

The categories of offence

Section 271BZA covers sexual and serious violent offences. With regard to violent offences, there is reference (at 1(2)(c)) to the crime of “assault to the danger of life”. There are, however, other forms of serious assault, such as assault and robbery or assault to permanent impairment. If it is felt that this category should apply, it could perhaps be covered by the term “aggravated assault.”

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?

As described above, the Faculty recommends a careful and analytical approach to the extension of the “new rule”. This also applies to the categories of witness. While it is accepted that a child should be subject to this rule and that the only factor to be considered is the age of the witness, the designation - or deeming - of a vulnerable adult may be based on a more subjective assessment. Care must therefore be taken before the rule is extended beyond the scope of the child 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 Faculty supports the changes to the procedure for taking evidence by commissioner.

The policy objectives of the Bill are set down in the Policy Memorandum published in accordance with Rule 9.3.3 of the Parliament's Standing Order "PM". The PM explains that the main policy objective of the Bill is to improve how children and vulnerable witnesses participate in our criminal justice system by enabling much greater use of pre-recording their evidence in advance of a criminal trial.

To facilitate this policy objective, the Bill proposes certain procedural changes in order to improve the current court processes. The most significant changes are, (a) the fixing of a ground rules hearing ("GRH") and (b) enabling evidence by a commissioner to happen in advance of the service of the indictment.

Ground Rules Hearing "GRH"

The Faculty recognises that a GRH is essential in every case where there is to be a pre-recording of a child or other vulnerable witness. In our response to the Consultation on Pre-Recording evidence of Child and Other Vulnerable Witnesses, we answered the question on GRH in some detail and we would refer again to that response.

The purpose of the GRH is to ensure that the pre-recording runs smoothly and that the form of questioning is appropriate. The principles and purpose behind the Bill would be defeated if this was not achieved. It is for this reason that the Faculty is concerned that there is no provision in the Bill for the introduction of Intermediaries, who are skilled in ensuring that questions asked are worded in a way that the witness can understand, in order to permit the witness to give their best evidence.

It has long been accepted by experts in the field that neither lawyers nor the court are best placed to consider the communication abilities and needs of child and vulnerable witnesses and that trained Intermediaries are far better placed to carry out such an assessment. It was for that reason that Intermediaries were introduced in England and Wales by Section 29 of the Youth Justice and Criminal Evidence Act 1999. Following a pilot scheme introduced in 2003, the use of Intermediaries was rolled out across England and Wales.

The role of the Intermediary is to facilitate communication with the child or vulnerable witness. In order to do this the Intermediary carries out an assessment of the witnesses' communication abilities and needs. He or she then prepares a report for the court. This report will provide advice and make recommendations, with examples, to the parties who will question the witness about the most effective way in which to ask their questions. In England & Wales, this report is provided to the Crown Prosecution Service who attach it to their Application for a Special Measures Direction. In cases where there is an Intermediary, the Intermediary attends the GRH and will participate in the discussion in relation to how the questions will be put to the witness to allow the witness to properly understand them, and how the Intermediary will alert the court if the witness has not understood the question or needs a break during the course of their evidence. The manner and nature of any proposed questioning remains, of course, a matter for the court.

As the Bill is currently drafted, the judge presiding over the GRH must, to the extent that it is considered appropriate to do so, decide on the form and wording of the questions that are to be asked of the child or vulnerable witness. This is no different to current practice, where there is a recognised lack of consistency in approach to the form and content of questions allowed or rejected across the Judiciary at Preliminary Hearings or Pre-Trial Hearings.

If the research and understanding of the needs of child and vulnerable witnesses that underpinned the introduction of Intermediaries in England & Wales continues to be accepted, then it is legitimate to ask whether, in the absence of the introduction of skilled Intermediaries, the aims of the Bill can actually be delivered in practice.

The Faculty supports the introduction of Intermediaries. This is reflected in the fact that the approach to the questioning of child and vulnerable witnesses as set out in *The Advocate's Gateway* is predicated upon the use of Intermediaries. The Faculty considers that in addition to delivering the expert support and advice on the questioning of child and vulnerable witnesses, the use of Intermediaries would also allow for a greater certainty for those involved in the examination of child and vulnerable witnesses.

We understand that the Scottish Government is currently considering the potential benefits and operational requirements of introducing Intermediaries. The Faculty considers that the Scottish Government should carry out their considerations as a matter of urgency and that provisions should be made in the Bill for the use of intermediaries.

Commission before the service of the indictment

The Faculty also recognises the importance of the procedural change that permits the taking of evidence by commissioner before an indictment is served. The Faculty considers that this change is critical to ensure the policy objectives of the Bill are successful and help to ensure that the evidence of child and vulnerable witnesses is captured at the earliest available opportunity.

It is was therefore of some concern that we noted the following statement at paragraph 76 of the PM;-

*“However, in the short to medium term it is considered that applications for evidence by commissioner in advance of the indictment **are likely to be rare** as it is only at the point at **which an indictment is served that it will become clear what requires to be proven in a specific case**. It is unlikely to be in the best interests of the witness to have their evidence recorded at too early a stage. The defence may not be certain of the exact charges the accused is facing and this could result in a further evidence taking session with the witness being required, particularly if further avenues of cross-examination are identified once the exact charges the accused is facing are certain. Removing the pre-indictment barrier does however give flexibility and future proofs the legislation so that at least a commission could be held pre-indictment if that was considered appropriate in a specific case.”*

We consider that as a matter of policy this is the wrong approach. It is not necessary to wait for the service of an indictment to understand what the charges against an accused are likely to be. It is possible to be reasonably well informed of this position much earlier, for example, at the stage a complaint is made and certainly by the time an accused appears on petition. Where an accused appears on petition, the charge that is presented to the court at that stage requires to have been framed by the COPFS staff with care and based properly on the evidence reported to them by the police. The strong prosecutorial experience within the Faculty of Advocates is that, particularly in relation to sexual cases, the form and content of the charge does not change significantly from petition to indictment and could easily be identified on an analysis of the content of a complainer’s police statement or JII.

Applications pre-indictment should not be rare. The presumption should be in favour of an application as soon as is possible after the initial complaint, so long as the best interests of the child and vulnerable witness are served by

such a process. In support of this assertion, the Faculty notes that the Evidence and Procedure Review Report, published by the Scottish Courts and Tribunal Service, identified “*a compelling case*” that the evidence of a child or vulnerable witness should preferably be obtained as soon as possible after **the initial complaint**.

As was recognised in the findings of the 2017 Thematic Review of Investigation and Prosecution of Sexual Crimes “the Review”, delays in the progress of the prosecution of sexual crimes, which often involve child and vulnerable witnesses, is a significant problem. Currently, there can often be a significant time lapse, reported as a period of about 10 to 12 months in 45% of cases, between a complaint being made to the police and the decision to place an accused on petition. Further, it can take a considerable time for the Crown to serve an indictment, often up to a period of 10 months after an accused first appears on petition. The Review found that where there had been pre-petition investigation there was no expedition of the case thereafter, and by and large, the procedure was simply to follow the statutory timescales that applied to High Court cases. These statutory timescales are regularly extended on application to the court.

If the policy is to be that a commission will not take place until after the service of an indictment then that would, particularly in relation to the prosecution of sexual offences against children and vulnerable witnesses, undermine the purpose and effect of both the Evidence and Procedure Review and the Bill. A realistic consequence of this approach is that as a matter of routine, a child or vulnerable witness’s evidence will not be recorded for a lengthy period after initial complaint, ranging from a period of many months to the order of 2 years after the initial complaint.

The Faculty considers that it is crucial, particularly in cases where a child has been sexually assaulted, that their evidence is captured as near as possible to

the time of the offence. A child's memory of events can become confused and fade with the passage of time. In addition, a child's demeanour, physical characteristics and intellectual capacity can change significantly over a short period of time. As a child grows and develops they may not appear as vulnerable as they were at the time an offence was, or offences were, committed. It is the strong experience of members of Faculty that where a child complainant does not present in the manner in which they did at the time of the offences, then there is a real potential for the outcome of the trial to be prejudiced.

In support of our position we would point to what Lord Reed said in the case of **HMA v P & SM 2001 SLT 924**. This was a case in which he highlighted the time requirements of the Convention on the Rights of the Child 1989 (United Nations) and the Beijing Rules when considering the reasonable time requirement within Art.6(1). The case concerned the issue of delay in the prosecution of a juvenile offender. His comments were heavily relied on by Lord Bingham and Lord Hope in the important case of **K v Lord Advocate 2004 1 AC 349**, and whilst they refer to a juvenile offender, what he said about the consequences of prosecutorial delay and the particular impact this has on cases involving children, must be seen to have a broader application to all child complainants and witnesses. Indeed, what he said at paragraph 12 of his judgment is enlightening and we considered it helpful to re-produce this as an extract in this response.

"[12] Where a child of 13 is accused of committing a serious offence, it is plainly desirable that the child should be brought to trial (if criminal proceedings are considered appropriate) as quickly as is consistent with the proper preparation and consideration of the case. For a period of two years to elapse between the child's being charged with the offence and the child's being placed on trial has a number of undesirable consequences. Without attempting to list them exhaustively, the following may be mentioned. A child of 13 may be very different from the same child when he or she is 15 years

*old, both in terms of physical development and in terms of maturity and understanding. If the trial is to be held before a jury, as in the present case, the jury may have a very different impression if a 15 year old boy is in the dock, from the impression which they would have had if they had seen the same individual when he was 13. It may be much more difficult to assess the state of a child's understanding, when he was 13, of sexual matters and sexual relationships, if the child is not placed on trial, and is not able to give evidence, until he is two years older. For the child himself (or herself), a period of two years awaiting trial will form a significant part of childhood, and more particularly of the period of secondary schooling, which cannot be compared with the significance of a two year period to an adult. If the 13 year old child is in fact guilty of an offence and requires the sort of reformatory measures which disposals in respect of child offenders are intended to include, then again it is undesirable that the initiation of such measures should be delayed by a period of years. Reverting to the aims of the "reasonable time" requirement, for a period of two years to elapse before justice is rendered in a case involving a child of 13 is for these reasons liable to jeopardise its effectiveness and credibility; and for the child to remain for that period in a state of uncertainty about his fate may have especially harmful consequences. I have mentioned matters which relate to the child accused, because such matters are particularly relevant in the context of art 6 (1); **it is scarcely necessary to add that prolonged delay in bringing a case to trial may also have seriously harmful effects upon a child complainer, especially (as in the present case) in a case of alleged rape.**"*

The Faculty accept that at present there are barriers to the taking of evidence on commission before the service of an indictment, particularly in relation to disclosure of evidence. The Faculty's views on these barriers, and the possible steps needed to overcome them are found in the Faculty's response to the Scottish Government's consultation.

The Faculty suggests that if the policy is to be that the commission is to be expected after the indictment is served then a real and sustained effort must be made to bring cases involving child and vulnerable witnesses to court within far shorter timescales than are adhered to currently.

Application for further commission

The Faculty notes that there is no provision in the Bill for a further commission to take place in the event that new evidence is disclosed by the Crown, or otherwise comes to light. We consider that this is a potential lacuna in the law and that consideration should be given to resolving this, including what the test for any further commission would be.

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

Yes, the Faculty of Advocates agrees with the introduction of the simplified notification procedure for standard special measures.

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?

PRACTICAL IMPACTS

Disclosure

It is considered essential that there is timeous disclosure of all available and relevant evidence prior to cross-examination. The Faculty believes that a systemic failure to do so represents the single most significant obstacle to the success of this legislation. It is essential that this matter is not overlooked, and that the issue is resolved before the legislation is brought into force. The Crown should be asked to produce clear evidence that its current system of disclosure is fit for purpose and meets its statutory obligations under the Criminal Justice & Licensing (Scotland) Act 2010. Unfortunately, at the present time it is not uncommon for late disclosure, particularly of material such as telephone and computer records, or medical and social work records, to be made available to the defence at a very late stage in the proceedings. This problem is identified as regularly occurring in sexual offence cases. Provision of this late material undoubtedly impacts on the ability to cross examine witnesses, as it often results in the need to instruct expert reports and to make applications under sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995. Such late disclosure would be difficult for any Judge to ignore and would undoubtedly delay any commission.

It would also assist if enquiry was made of the Justiciary Office of the High Court, in order to identify the numbers and types of cases in which there is late disclosure by the Crown. The Justiciary Office holds a great deal of statistical information relating to the manner in which proceedings before the High Court are managed, and direct engagement with the Justiciary Office would assist in this regard.

The use of evidence in chief contained in a prior statement

The Faculty is concerned about the potential implications of section 2(4) of the Bill; which appears to provide that the provision of evidence in chief (by pre-recorded statement) might be sufficient to constitute “all of the child witness’s evidence”.

In our view, there can be no equivalence between an unchallenged pre-recorded statement and evidence on commission. There must always be scope for cross-examination and the subsection may have to be re-visited to make sure this is clear.

Accused as a vulnerable witness

The Faculty notes that the Bill is silent on the position of an accused who is a child or vulnerable witness. It is however essential, in order to prevent legal challenges founded upon arguments such as inequality of arms and discrimination, that the level of trauma and difficulty in giving evidence is limited as much as possible for a child or vulnerable accused as it is for a child or vulnerable witnesses; the Council of Europe's guidelines identify non-discrimination and the best interests of the child as two of the fundamental principles that are required in order to deliver justice to children - (see also the 2017 EU Agency for Fundamental Rights report on delivering child friendly justice entitled, "*Perspectives and experiences of children involved in justice proceedings as victims, witnesses or parties in nine EU member states*").

The driving force behind the Bill is to permit a child and vulnerable witness to give evidence at as early a stage as possible. In comparison, so far as an accused person is concerned, they receive disclosure of the evidence against them in advance of trial in order to prepare and present his or her defence to the Crown case. If an accused chooses to give evidence in the trial process, he or she does so in response to the evidence **presented in court**. The trial is of course an adversarial process conducted in the accused's presence. The decision to give evidence is made following on an assessment of the evidence that has been presented at the close of the Crown case. (We looked at these issues in detail in Answers 6 & 7 of our earlier response.)

If an accused person were to choose to give evidence before trial, it should be recognised that this would be a fundamental change in the current adversarial

system, and one that could result in the inversion of the onus of proof. If evidence is given by an accused before trial the Crown would have detailed knowledge of his or her position on the evidence in advance of the trial. Therefore, it is the view of the Faculty that the decision as to how a child and vulnerable accused should give evidence in his or her trial would rarely, if at all, be taken in advance of the trial.

The consequence of the timing of the decision by a child or vulnerable accused as to whether he should give evidence being delayed to the trial process means that consideration will require to be given at a far later stage as to the method by which he or she should give evidence and what special measures are appropriate. This may result in a delay in the trial process if adjournments are required for specialist expert input and the decision is made to proceed by commission. The Faculty consider that this an important issue that would benefit from some analysis and discussion, with ultimately direction being given to practitioners and the courts through a further Practice Note. In this context the Faculty welcomes the fact that the position of the accused and the support/special measures available to them are under active consideration by the Scottish Government.

FINANCIAL IMPACT

The financial impact of the proposals in the Bill has been very carefully considered in the detailed Financial Memorandum “FM” produced under Rule 9.3.2 of the Parliament’s Standing Orders and published to accompany the Bill. It is clear from the terms of the FM, as summarised at pages 11 to 12, that the costs of the proposals are significant.

The Faculty would wish to raise a note of caution as to the assumptions that have underpinned the analysis in the FM. These assumptions appear to be that applications for evidence by commissioner in advance of the indictment are likely to be rare and that the current preliminary hearing system will

continue to act as the GRH. On the basis of these assumptions future costs are based on the cost of extending the preliminary hearing and as such it is identified there would be very limited extra costs for the SCTS and SLAB.

Given what the Faculty have stated in Answer 3, we consider that a further financial analysis should also be undertaken on the basis that applications for evidence on commission should be made in line with the recommendations of Lady Dorrian's Evidence and Procedure Review Report, which is "*as soon as possible after the initial complaint*". If the provisions of the Bill were to be implemented in this manner there would have to be an additional hearing out-with the current Preliminary Hearings system with the consequent knock on effects on the SCTS and SLAB.