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Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill

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This Scottish Government bill sets out reforms relating to the use of special measures in criminal cases. In particular, it seeks to improve the way in which the evidence of child and other vulnerable witnesses is dealt with by encouraging greater use of pre-recorded evidence.

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Executive Summary

The Scottish Government's Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill [1] sets out reforms relating to the use of special measures in criminal cases. Current statutory provisions allow for the use of a range of such measures, with the aim of assisting vulnerable witnesses in giving evidence.

Depending on the circumstances, a vulnerable witness may be able to use one or more of the following special measures:

- a screen in the courtroom stopping the witness from having to see the accused
- a live television video link allowing the witness to give evidence from somewhere outside the courtroom
- a supporter who can sit with the witness whilst the witness gives evidence
- excluding the public from the court whilst the witness gives evidence
- allowing the witness' evidence in chief to be given in the form of a prior statement taken before the trial (this may be a written statement or a recorded interview)[i]
- allowing the evidence of the witness to be taken in advance of the trial by a commissioner (a sheriff or High Court judge) - questioning of the witness is still carried out by defence and prosecution lawyers, with a recording being played during the trial

The first three forms of special measure are known as standard special measures. Both child and deemed vulnerable witnesses (ie witnesses who are the complainers in cases involving a sexual offence, human trafficking, domestic abuse or stalking) have an automatic entitlement to use them.

Use of a prior statement and the taking of evidence by a commissioner are both ways in which it is currently possible for a witness to give evidence prior to any trial. A prior statement can be used to cover some or all of a person's evidence in chief. The taking of evidence by a commissioner can, in addition, cover cross-examination and re-examination of the witness.

The Bill sets out a number of reforms aimed at improving current court processes for pre-recording evidence. In addition, it sets out a rule applying to child witnesses involved in certain very serious cases, which would generally require the court to make provision for all of the child's evidence to be given in advance of the trial. The Scottish Government would have the power to extend the application of the rule by regulations. This could involve extending it to cases involving other serious offences and/or adult vulnerable witnesses.

The Bill also seeks to streamline the process for arranging the use of standard special measures, where there is an automatic entitlement to use them, by making it an administrative rather than a judicial one.

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i Evidence in chief is the testimony first given by a witness on behalf of the prosecution or defence (depending who called the witness), prior to any cross-examination by the other side in the case.

Introduction

The Scottish Government introduced the Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill [1] in the Parliament on 12 June 2018.

The policy memorandum [2] notes that the main objective of the Bill is, by encouraging greater use of pre-recorded evidence at trial, to improve the way in which the evidence of child and other vulnerable witnesses is dealt with in criminal cases.

More use of pre-recorded evidence would reduce the need for vulnerable witnesses to give evidence in court. Reasons advanced in favour of removing vulnerable witnesses from the court setting include:

- the potential distress for vulnerable witnesses in giving evidence in court
- research indicating that traditional examination and cross-examination in court is not a good way of obtaining accurate evidence from such witnesses

The Bill sets out a number of reforms aimed at improving current court processes for pre-recording evidence. It also sets out a rule, applying to child witnesses involved in certain very serious cases, which would generally require the court to make provision for all of the child's evidence to be given in advance of the trial. The rule would apply to most child witnesses involved in such cases, including child complainers (ie alleged victims). It would not, however, cover child accused. The Scottish Government would have the power to extend the application of the rule by regulations. This could involve extending the rule to cases involving other serious offences and/or adult vulnerable witnesses.

Procedures allowing the evidence of a vulnerable witness to be recorded in advance of trial are an example of what are known as special measures. Other special measures include the use of:

- a screen in the courtroom stopping a witness from having to see an accused
- a live television video link allowing a witness to give evidence from somewhere outside the courtroom
- a supporter who can sit with a witness whilst giving evidence

The three examples set out above are referred to as standard special measures. Under existing rules, child and deemed vulnerable witnesses (see below) are automatically entitled to use them. The Bill seeks to streamline the process for arranging the use of standard special measures, where there is an automatic entitlement, by making it an administrative rather than a judicial one.

In addition to consultation undertaken by the Scottish Government, the policy memorandum notes that the reforms set out in the Bill were informed by work carried out by the Scottish Courts and Tribunals Service (SCTS) as part of its Evidence and Procedure Review. [3] The Review was set up to consider how criminal court proceedings might be improved by changes to the rules of evidence and procedure. Areas covered have included the treatment of witnesses, including child and other vulnerable witnesses.

Current Support for Vulnerable Witnesses

Vulnerability

The Victims and Witnesses (Scotland) Act 2014 made changes to provisions dealing with support for vulnerable witnesses. Relevant provisions were brought into force in September 2015. These included a new definition of vulnerable witness in criminal cases. That definition (inserted into the Criminal Procedure (Scotland) Act 1995) covers:

- child witnesses (under the age of 18)
- witnesses who are the complainers in cases involving a sexual offence, human trafficking, domestic abuse or stalking
- witnesses where there is a significant risk that the quality of their evidence will be diminished by reason of mental disorder, or fear or distress in connection with giving evidence
- witnesses who are considered to be at significant risk of harm by reason only of the fact that they are to give evidence

Witnesses covered by the second bullet point are referred to as deemed vulnerable witnesses for the purposes of accessing special measures.

The Scottish Courts and Tribunals Service (SCTS) report Evidence and Procedure Review: Next Steps, published in February 2016, noted that the definition of a vulnerable witness: [4]

> “ covers differing types of vulnerability in terms of age; vulnerability due to pre-existing conditions that impair a witness' ability to process questions or to communicate; the nature of the offence and circumstances in which the relationship between the witness and the accused might mean that giving evidence present particular challenges for the witness. There were, as might be expected, some concerns raised about this definition, with arguments both that it is potentially too broad, allowing protections for witnesses who appear to be perfectly capable of giving evidence and being subject to cross-examination; and that it does not adequately cover the full range of vulnerabilities that may affect witnesses' ability to engage with the justice process. (para 53)”

In some cases it may be clear that a witness is vulnerable (eg where that witness is a child or the complainer in a domestic abuse case). However, this may not always be the case. The above report stated that:

> “ There were a number of questions around the capacity of the police and the Crown to be able to identify vulnerability. Both witness support agencies and the Police themselves made the point that the identification of vulnerability in witnesses is not always straightforward. This was particularly true in relation to vulnerable adults, where assessments of vulnerability and the implications for the witness participation in interviews and court proceedings often require specialist knowledge. Feedback from those working to support adults with cognitive impairment suggests that there is scope for greater understanding in the justice system of the impact of a learning disability or autism on social and sexual relations, and how best to access professional advice. (para 56)”

The definition and identification of vulnerability is also raised in written submissions to the Justice Committee's call for evidence on the Bill. [5] A response from Action on Elder Abuse Scotland highlights the fears and difficulties which can be faced by victims of elder abuse and elderly witnesses more generally. One from the Equality and Human Rights Commission notes the fact that a witness may be vulnerable due to learning difficulties or mental health problems. However, it also notes that the large range of mental health issues affecting people may argue against having a standard approach to evidence taking.

Special Measures

The Criminal Procedure (Scotland) Act 1995, as amended by various pieces of legislation including the Victims and Witnesses (Scotland) Act 2014, provides for a number of special measures. They are intended to assist vulnerable witnesses in giving evidence in criminal cases.

The following special measures may be available to a vulnerable witness:

- a screen in the courtroom stopping the witness from having to see the accused
- a live television video link allowing the witness to give evidence from somewhere outside the courtroom
- a supporter who can sit with the witness whilst the witness gives evidence
- excluding the public from the court whilst the witness gives evidence
- allowing the witness' evidence in chief to be given in the form of a prior statement taken before the trial (this may be a written statement or a recorded interview)[ii]
- a commissioner (a sheriff or High Court judge) taking the evidence of the witness in advance of the trial (questioning of the witness is still carried out by defence and prosecution lawyers), with the evidence being recorded and played during the trial

The first three forms of special measure are known as standard special measures. Both child and deemed vulnerable witnesses (ie witnesses who are the complainers in cases involving a sexual offence, human trafficking, domestic abuse or stalking) have an automatic entitlement to them. Although there is an automatic entitlement, a process for notifying the court of the desire to use a particular special measure must still be followed.

ii Evidence in chief is the testimony first given by a witness on behalf of the prosecution or defence (depending who called the witness), prior to any cross-examination by the other side in the case.

Where there is no automatic entitlement to use a special measure (either because of the type of special measure or category of vulnerable witness) the party seeking its use must apply to the court for approval. The decision on whether to approve its use is taken by the court on the basis of information supplied in the application and any objection made by another party in the case.

Use of a prior statement and the taking of evidence by a commissioner are both ways in which it is currently possible for a witness to give evidence prior to any trial. A prior statement can be used to cover some or all of a person's evidence in chief. The taking of evidence by a commissioner can, in addition, cover cross-examination and re-examination of the witness.

The first report [6] published (in March 2015) as part of the SCTS Evidence and Procedure Review, was written before the special measure reforms in the Victims and Witnesses (Scotland) Act 2014 were brought into force (in September 2015). It stated that the:

> " Take-up of the special measures available to children and vulnerable witnesses has significantly increased over the period since their introduction in 2004. As might be expected, the vast majority of applications for special measures have been for the standard special measures of a supporter, screen or remote TV link. (para 2.12)"

And that:

> " According to the statistics available to the Scottish Court Service, the standard special measures of screen, supporter or video link account for 99% of the 23,000 applications made for special measures over the period July 2011 to June 2014. (para 2.14) "

In light of reforms being made by the Victims and Witnesses (Scotland) Act 2014, it went on to note that:

> " With the expansion of the scope of the definition of vulnerable witness, it is expected that there will be a significant increase in the number of applications for special measures in court proceedings. The Scottish Government has estimated that the changes to the definition of a vulnerable witness will mean that the number of those eligible for special measures in each year will increase by around 18,500 – 6,000 of that number being 16 and 17-year olds, and the rest complainers in the specified offences (the vast majority of which being domestic abuse cases). How that additional number of witnesses will translate in an increase in the use of special measures is hard to predict, but modelling work carried out by the Scottish Court Service suggests that the volume of case which will require the use of special measures could reach as high as 16,800 each year. (para 2.16)"

Another report, [7] published in September 2017 as part of the SCTS Evidence and Procedure Review, commented that:

> " The data available on vulnerable witness notices indicate that it is unusual for defence lawyers to submit vulnerable witness notices in respect of child or other witnesses. (...) Anecdotal evidence presented to the Group indicated that, on occasion, defence lawyers failed to give proper consideration to special measures and some vulnerable witnesses attended court with no special measures in place. (p 23) "

One of the reforms made by the Victims and Witnesses (Scotland) Act 2014 requires a number of bodies, including the SCTS, to set and publish standards of service for victims and witnesses. The standards are monitored, reviewed and reported on annually. The relevant annual report for 2017-18 [8] includes the following figures for special measure applications/notices received during the years 2015 to 2017:

- 2015 = 13,541 (2,617 in solemn cases and 10,924 in summary cases)
- 2016 = 34,123 (3,986 in solemn cases and 30,137 in summary cases)
- 2017 = 33,300 (4,610 in solemn cases and 28,690 in summary cases)

Applications for standard special measures (screen, supporter or television video link) still accounted for the vast majority of applications (between 98% and 99%). However, there was an increase in the number of applications for other special measures, rising from 175 in 2015 to 695 in 2016 before falling back to 550 in 2017. The fall in 2017 resulted from a reduction in summary procedure applications. Applications in solemn procedure cases went up.

It should be noted that the granting of an application for a special measure does not mean that it will actually be required in a case (eg as a result of an early plea or a witness not being called).

Pre-Recording of Evidence

Current Law and Practice

As noted above, it is currently possible for a vulnerable witness to give evidence prior to any trial using the following special measures:

- prior statement - allowing evidence to be given in the form of a written statement or recorded interview
- evidence by commissioner - using a recording of evidence taken before a sheriff or High Court judge (questioning of the witness is still carried out by defence and prosecution lawyers)

A prior statement can be used to cover some or all of a person's evidence in chief (ie the testimony first given by a witness on behalf of the party citing that witness). The witness still needs to be available for cross-examination at trial.

The taking of evidence by a commissioner can, in addition to evidence in chief, cover any cross-examination and re-examination. So, in the case of a prosecution witness, this could involve the witness being examined in chief by the prosecutor, cross-examined by a defence lawyer and, if necessary, re-examined by the prosecutor.

Where a prior statement takes the form of a recorded interview, the recording may be of:

- an interview between a witness and the police
- an interview of a child witness by a police officer and social worker as part of a child protection investigation - known as joint investigative interviews

In relation to sexual offence victims, the Bill's policy memorandum notes that:

> “ the Scottish Government, COPFS, Police Scotland and Rape Crisis Scotland, are exploring a pilot of recording a complainer's initial statement to the police, and the potential for this to be used in appropriate cases as evidence in chief in any subsequent trial. These visually recorded interviews could be combined with applications to take evidence by commissioner thus avoiding the need for the complainer to give evidence during any subsequent trial. (para 45)”

Further information on joint investigative interviews and taking evidence by a commissioner is set out below.

Joint investigative interviews

Reports published as part of the Scottish Courts and Tribunals Service (SCTS) Evidence and Procedure Review included, in June 2017, a Joint Investigative Interviews Work-Stream Project Report. [9] It noted that joint investigative interviews (JIIs):

> “ are carried out jointly by police officers and social workers with some children under the age of 16 years at the time of initial interview in relation to whom there is a concern that they are both a victim of or witness to criminal conduct and where there is information to suggest that the child has been or is being abused or neglected or may be at risk of significant harm. They can also be carried out with 16 and 17 years olds who are already subject to a supervision order made by a children's hearing. The concerns can have been raised by any agency or individual and 'core agencies' (police, social work and health) will have conducted a multi-agency discussion in respect of the child in order to share information, assess risk and determine whether a JII is required. JIIs are visually recorded unless the child does not consent to recording or there are particular circumstances associated with the case which would make visual recording inappropriate. (p 9)”

And that:

> “ It is important to note that JIIs are carried out only where child protection concerns – whether for the child in question, or any other child - exist alongside a potential offence. They are not carried out with child witnesses or victims for whom there are no child protection concerns and they are not carried out with vulnerable adult victims or witnesses. Single agency interviews are carried out with these witnesses and such interviews are not generally visually or audio recorded (although they may be in some circumstances). At present, therefore, visually recorded investigative interviews that can potentially be used as evidence in chief are routinely conducted with only a specific subset of all potential child witnesses. (p 9)”

In considering barriers to the wider use of JII recordings as evidence at trial, the report concluded that:

> “ the primary barrier to the use of JIIs as evidence in chief is the quality of the interviews, either in terms of the way in which the interview is conducted by the joint investigative interviewers or in terms of the audio-visual quality of the recording. (p 2)”

It put forward a range of recommendations for improvement, including: better training for interviewers; funding for new equipment; and updating guidance. The policy memorandum published along with the Bill states that:

> “ These recommendations are now being taken forward by relevant organisations including Police Scotland, Social Work Scotland, SCTS, the Crown Office and Procurator Fiscal Service (COPFS) as well as the Scottish Government. A joint project led by Police Scotland and Social Work Scotland will create a revised model for JIIs and develop a training programme which recognises the depth of knowledge and skills required for this interview process. The project will also design national standards for quality assuring JIIs, and develop key principles for new statutory guidance. (para 34)”

Taking evidence by commissioner

In relation to taking evidence by a commissioner, the Bill's policy memorandum notes that:

> “ The court will appoint someone to act as the commissioner (the person who will hear the evidence) and depending on which court is dealing with the case, this will either be a judge or sheriff. The witness will be asked questions in the usual way. The accused involved in the case is entitled to see the witness and hear their evidence, but is not usually allowed to be in the same room as the witness during proceedings. The evidence is recorded and this is then played during the trial or court hearing. Evidence in chief, cross-examination and re-examination can be done in advance using this method. (para 17)”

Another report published as part of the SCTS Evidence and Procedure Review focused on taking evidence by a commissioner - Pre-Recorded Further Evidence Work Stream Project Report (September 2017). [7] It noted that:

> “ Data collected on behalf of the Group indicate that while procedures for the taking of evidence by commissioner have not been widely used to date, their use is becoming more common, particularly in proceedings being dealt with in the High Court involving child witnesses. Anecdotal evidence indicates that practitioners have been reluctant to submit applications for the taking of evidence by commissioner because commission hearings are regarded as being onerous to organise and conduct and are therefore perceived as being a last resort when there is no other way of securing a vulnerable witness's evidence. (p 4)”

As part of the work undertaken during the Review, a revised High Court practice note on the taking of evidence of a vulnerable witness by a commissioner was developed. [10] The approach set out in the practice note includes guidance on topics the High Court will expect to be addressed at procedural hearings held in advance of any commission authorised by that Court. These include the form of questions to be asked and lines of inquiry to be pursued at the commission. The Lord Justice Clerk gave a speech to launch the revised practice note, which she described as a "significant step in improving the way in which vulnerable witnesses are treated in our criminal justice system". [11]

The practice note is intended to encourage greater use of taking evidence by a commissioner. A decision was taken to focus, in the first instance, on the High Court. This was justified on the basis of: the desirability of developing a coherent and consistent approach; and resource implications. However, the project report said that:

> “ the growing expectation that child witnesses should be kept out of court will make it inevitable that evidence will require to be taken by commissioner from witnesses cited in cases being tried in the sheriff solemn courts. The Group considered, therefore, that in due course a comparable practice note for the sheriff solemn courts should be developed. (p 17-18)”

Case for Reform

The policy memorandum published along with the Bill states that:

> “ In recent years, significant changes have been made to the criminal justice system to recognise the interests of vulnerable witnesses. These have included strengthened arrangements to extend access to special measures in court and, where appropriate, to help keep children and other vulnerable witnesses out of court, for example through greater access to remote video links for both summary and solemn cases. However, the Scottish Government believes strongly that more can and should be done to support child and other vulnerable witnesses, whilst protecting the interests of people accused of crimes. (para 7)”

The first report published (in March 2015) as part of the SCTS Evidence and Procedure Review, stated that: [6]

> “ It is now widely accepted that taking the evidence of young and vulnerable witnesses requires special care, and that subjecting them to the traditional adversarial form of examination and cross-examination is no longer acceptable. (para 2.1)”

It outlined two main reasons for this:

- the potential distress for vulnerable witnesses in giving evidence in court
- research indicating that traditional examination and cross-examination in court is not a good way of obtaining accurate evidence from such witnesses

With regard to pre-recording evidence, the report noted:

> “ It has been the core premise from the outset of this review that there are significant benefits to be gained through the extended use of pre-recorded statements from witnesses. The evidence from other jurisdictions where they are used in relation to child and vulnerable witnesses suggests that these benefits can be realised. It is clear that the technology is now sufficiently advanced in terms of the quality of reproduction that it can provide testimony for the finders of fact as a genuine substitute for live appearance. There are benefits in the ability to schedule the recording of witness statements and examination for the courts, for witnesses and jurors and for the parties; there are efficiencies in the final trial deriving from a procedure that means original statements are edited and appropriate controls placed on cross-examination. And, critically, there is every reason to think that the evidence gathered and presented will be more accurate and reliable if taken substantially closer to the incidents in question than the trial diet - in other words, it will make a positive contribution to the ascertainment of the truth. (para 5.3) ”

The report outlined developments in the approach to pre-recorded evidence in a number of other countries. In particular:

- the pre-recording of both evidence in chief and cross-examination of child and other vulnerable witnesses in Australia and in England and Wales[iii]
- the Barnahus (or Children's House) system used in Norway, under which a child witness is interviewed by a single person, in a purpose-built facility, under the guidance of a judge and with the mediated participation of relevant legal representatives[iv]

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iii This approach is sometimes referred to as the Full Pigot after the chair (Thomas Pigot QC) of an advisory group, established by the UK Government in 1988, to look at the use of video evidence.

In relation to the latter, the report stated that its adoption in Scotland would "require a major shift in legal practice and culture" (para 2.110).

The first report was followed by publication of the report Evidence and Procedure Review: Next Steps in February 2016. [4] It recommended that:

> " initially for solemn cases, there should be a systematic approach to the evidence of children or vulnerable witnesses in which it should be presumed that the evidence in chief of such a witness will be captured and presented at trial in pre-recorded form; and that the subsequent cross-examination of that witness will also, on application, be recorded in advance of trial. (para 74)"

A further report (September 2017), [7] published as part of the SCTS Evidence and Procedure Review, also expressed support for a phased approach:

> " If implemented in full the Group's vision should eventually lead to no child or vulnerable adult witness having to wait until trial to give their evidence in solemn proceedings, or attend court to give evidence at trial unless they choose to do so. However, realisation of this vision will have resource implications, including a shift in resourcing to the front end of investigations and it will, therefore, require to be implemented in a phased way. Priority should in the first place be given to implementing through use of a pilot scheme the vision for children aged less than 16 years who are complainers in High Court proceedings concerning the most serious crimes. (p 6)"

That report included consideration of possible longer term reforms, stating that:

> " In setting out a longer term vision for taking the evidence of child and vulnerable witnesses, the Group considered that children under the age of 16 years who are complainers in cases involving the most serious crimes should be spared involvement in the court process altogether. Such children should have their complete evidence taken in the course of visually recorded forensic interview(s) conducted by highly trained, expert forensic interviewers who are skilled at taking the evidence of children. There should be no direct questioning of such children by lawyers. (p 5)"

It described this as a Level 1 vision and noted that it would:

> " require increased investment to establish a body of highly trained, skilled and experienced interviewers and to upgrade equipment and facilities in which to conduct and visually record forensic interviews. (p 5)"

Commenting on this Level 1 approach, the Bill's policy memorandum states that it is a:

> " longer term vision which would require fundamental changes to our current adversarial criminal justice system. It is however inspiring work in creating a vision of how ultimately our system could evolve over time. (para 31)"

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iv Further information on the Barnahus system is set out later in the briefing - in the context of written submissions to the Justice Committee's call for evidence on the Bill.

Reforms in the Bill

The Bill provides for a number of changes affecting the pre-recording of evidence. The principal reforms are outlined below.

Rule requiring pre-recording of evidence

The Scottish Government's policy memorandum states that:

> " The Cabinet Secretary has made his ambition for children not having to give evidence in criminal courts clear and the Government committed to introduce this legislation to encourage the greater use of pre-recorded evidence. This will be phased in and will initially focus on child witnesses in the most serious cases first. (para 20)"

Section 1 of the Bill provides for a rule, applying to child witnesses involved in certain serious cases, which would generally require the court to make provision for all of the child's evidence to be given in advance of the trial. This could be done by the use of a prior statement and/or taking evidence by a commissioner.

The rule would apply to most child witnesses under the age of 18, including child complainers (ie alleged victims). It would not, however, cover child accused. In relation to the latter, the policy memorandum notes that:

> " The Scottish Government also considered whether to have the new rule apply to children accused of crime. Such a reform was supported by the majority of respondents to the Scottish Government's consultation. However, some practical differences and issues were raised in doing so. For example, a child accused has a right to legal representation and has a choice about whether or not to give evidence. There is also the risk that having a child accused of a crime give pre-recorded evidence when all the evidence in the case against them has not yet been led could ultimately undermine their defence. (para 71)"

The section states that the rule would apply to prosecutions under solemn procedure (ie High Court or sheriff and jury cases) for the following offences:[v]

- murder or culpable homicide
- assault to the danger of life
- abduction or plagium (theft of a child)
- various sexual offences (eg rape, sexual assault and communicating indecently)
- various offences relating to human trafficking and exploitation
- various offences relating to female genital mutilation

The rule also applies to attempts to commit the above offences. The Scottish Government would have the power, by means of regulations, to extend the application of the rule to cases involving other offences prosecuted under solemn procedure. This power could be used to extend the rule to all such offences. It would also be possible to remove an offence from the list covered by the rule.

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v Solemn procedure (as opposed to summary procedure) is used in relation to the most serious cases.

Although the rule, as provided for in section 1 of the Bill, relates to child witnesses (under 18) involved in both High Court and sheriff and jury cases, the commencement provisions allow for a more phased approach. Thus, for example, the rule could initially be brought into force in respect of younger child witnesses involved in High Court cases only.

Where the rule does apply, it allows for a number of exceptions where a court may depart from the requirement for all of the child's evidence to be given in advance of the trial. Section 1 states that an exception is justified where:

- pre-recording all of a child's evidence would give rise to a significant risk of prejudice to the fairness of the trial, or the interests of justice more generally, and that risk significantly outweighs any risk of prejudice to the interests of the child
- a child witness aged 12 or more wishes to give evidence during the trial (eg by live television link) and it would be in the child's best interests to do so

The Scottish Government seeks to justify the rule's focus on child witnesses in terms of initial prioritisation, with the policy memorandum stating that:

> " There will be a number of practical and operational implications for justice sector partners in the introduction of the new rule. In order to ensure that any changes to how evidence is taken can be phased in a controlled and achievable way, targeted first at those who are the most vulnerable, a narrow and focussed approach has been taken in the Bill. However, the Bill provides the framework for a progressive extension of the arrangements to other categories of vulnerable witnesses, including, in due course, adult deemed vulnerable witnesses. Over time, the Scottish Government anticipates that it will provide the basis for pre-recording evidence to be used much more regularly in the Scottish criminal justice system. (para 68)"

The possibility of extending the rule to adult deemed vulnerable witnesses involved in solemn procedure cases is provided for in section 3 of the Bill. The Scottish Government would have the ability to do so by way of regulations. As noted earlier, deemed vulnerable witnesses are complainers in cases involving a sexual offence, human trafficking, domestic abuse or stalking.

The explanatory notes (paragraph 21) [12] to the Bill include an explanation of the action a court may take if, during the course of a trial, it becomes necessary to take further evidence from a child whose evidence had been pre-recorded.

Taking evidence by commissioner

Section 5 of the Bill includes provisions on:

- the holding of a court hearing to consider arrangements for taking evidence by a commissioner
- the timing of commissions in solemn procedure cases

Application of the provisions is not limited to situations where the rule requiring pre-recording of evidence applies.

As noted earlier, a revised High Court practice note [10] on the taking of evidence of a vulnerable witness by a commissioner was developed as part of the SCTS Evidence and Procedure Review. It came into effect in May 2017. The approach set out in the practice note includes guidance on topics the High Court will expect to be addressed at procedural hearings held in advance of any commission authorised by that Court. The Bill contains statutory provisions for this procedural hearing, referring to it as a ground rules hearing.

The Bill's provisions on the holding of a ground rules hearing are not restricted to High Court cases. They also allow for the possibility of the ground rules hearing being held separately from any other procedural court hearing held in the case. The policy memorandum states that:

> " The Bill lists matters which must be considered at the ground rules hearing. The Bill does not list all the matters contained in the Practice Note but it requires that (in addition to considering the matters listed in the Bill), consideration must be given to any other matter that could be usefully dealt with before the proceedings before the commissioner take place. This allows some flexibility. If the Practice Note is modified to include new matters, these are likely to be matters that could be usefully dealt with at ground rules hearings. (para 82)"

Matters which are listed in the Bill, as issues which must be addressed at a ground rules hearing, include:

- the length of time the parties expect to take for examination in chief and cross-examination
- to the extent that the commissioner considers it appropriate to do so, taking a decision on the form and wording of the questions that are to be asked of the vulnerable witness

In relation to the timing of commissions in solemn procedure cases, the Bill allows for the possibility of a commission taking place before an indictment has been served on the accused.

The indictment is a court document setting out the charges faced by the accused in a solemn case. At the initial stage of proceedings in solemn cases, charges are set out in another document called a petition. However, the facts of the case may not have been fully investigated at that point in time. Thus, the charges set forth in the petition can differ materially from those subsequently set out in the indictment. The policy memorandum argues that, whilst there should not be a legal barrier to pre-indictment commissions in appropriate cases:

> " 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. (para 76)"

Resources

The SCTS report Evidence and Procedure Review: Next Steps (February 2016) [4] noted that:

> " it was widely recognised that introducing and expanding the pre-recording of evidence would entail a considerable increase in resource, time and investment. Some therefore argued that it may not be appropriate immediately to make pre-recording automatically available to all those considered to be vulnerable. A staged or phased approach may be required in order to make the transition manageable. (para 51)"

As indicated above, the Bill does provide for a phased approach in relation to the rule on pre-recording of evidence.

The financial memorandum [13] identifies estimated costs, associated with all the reforms to the pre-recording of evidence, impacting on the: SCTS; Crown Office and Procurator Fiscal Service; Scottish Prison Service; and Scottish Legal Aid Board. It notes that additional costs should be partially offset by anticipated savings arising from the proposed simplified notification process for standard special measures:[vi]

> " The estimated financial impact of the Bill's provisions in respect of the new rule in favour of pre-recording the evidence of children under 18 in the most serious cases, the ground rules hearing and the new simplified notification process is summarised in tables 12 and 13 below. The annual recurring costs are estimated to total between £519,000 (based on the existing 215 children estimated to provide evidence at trial) and £3,551,000 (based on an absolute maximum where all children cited are required to provide evidence via commission). As commissions are already taking place, no additional set up costs are anticipated from implementation of the new rule in favour of children under 18. The overall anticipated costs of the bill are expected to be partially offset by anticipated savings arising from the new simplified notification process totalling £283,000. (para 35)"

The above estimates are based on the new rule applying to child witnesses in both High Court and sheriff and jury cases. Given that the Bill allows for a more gradual roll-out of the rule, the financial memorandum (see para 36) also provides cost estimates if applied to High Court cases only.

The Bill also allows for the extension of the rule on pre-recording evidence to cover adult deemed vulnerable witnesses. The financial memorandum points out that:

> " Regulations may apply the new rule to all adult deemed vulnerable witnesses or to subcategories of adult deemed vulnerable witnesses in solemn cases only. The regulations may make different provision for different purposes, including for different courts or descriptions of courts or different descriptions of deemed vulnerable witnesses. (...) The potential cost impact associated with commencement and implementation of the secondary legislation power will very much be dependent on how that power is commenced and what provisions are included. (para 37)"

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vi The Bill's proposed reforms relating to the notification process for standard special measures are outlined later in this briefing.

Written Submissions

Relevant issues raised in written submissions [5] to the Justice Committee's call for evidence on the Bill are outlined below.

Overall policy objective

Submissions expressing support for the reforms seeking to expand the use of pre-recorded evidence include ones from various organisations involved with children. Barnardo's Scotland notes that:

> " From our experience supporting child victims and witnesses, in particular in our work around child sexual exploitation, we know that the process of giving evidence is extremely difficult for children, and that at worst it can exacerbate the trauma that children experience. We are therefore very supportive of this policy objective. "

In expressing its support, Children 1st highlights both the potential for distress and impact on the quality of evidence where a more traditional approach is taken to obtaining the evidence of child witnesses:

> " Over and over again child victims and witnesses have told us that Scotland's justice system – designed for adults and rooted in the Victorian era – often causes them greater trauma and harm. At the same time, as scientific understanding of child development – and recently our understanding and awareness of the impact of adverse childhood experiences – has grown, it has become overwhelmingly evident that Scotland's traditional approach to justice is the least effective for eliciting consistent, reliable accounts from child victims and witnesses. Our current system's ability to re-traumatise children and to fail to gather their best evidence is therefore detrimental not only to child victims and witnesses, but also to accused children and adults. Giving better support to children and young people will enable them to give better evidence to the benefit of all parties including the accused. "

The submission from Children 1st also refers to observations made by the United Nations Committee on the Rights of the Child in relation to child victims and witnesses of crime: [14]

> " The Committee is seriously concerned that children who are victims or witnesses of crimes have to appear in court to be cross examined. The Committee recommends that the State party introduce, as a standard, video recording of the interview with a child victim or witness during investigation and allow the video recorded interview as evidence in court. (paras 80-81) "

A response from Social Work Scotland makes similar points, stating that it:

> " believes that changes in law and practice need to focus on creating child centred conditions to elicit best evidence. We do not believe that these conditions can be created in a court setting. Traditional forms of examination in chief and cross examination do not produce reliable evidence and are often traumatic and potentially abusive for the vulnerable witnesses concerned. Social Work Scotland believes that this situation is not compliant with the principles of UN Convention on the Rights of the Child. "

Qualified support is expressed in some submissions, with one from Scottish Women's Aid saying:

> “ Despite our overall support for the Bill, we believe that the proposals have some serious omissions that will dilute both the intention and operation of the Bill.”

It goes on to argue for a number of changes, including: adding domestic abuse to the list of child witness offences; and expanding the definition of deemed vulnerable witness to include complainers in forced marriage cases.

Other responses expressing qualified support include some from the legal profession. A submission from the Faculty of Advocates notes the potential for improving the way in which evidence is taken from vulnerable witnesses, whilst also highlighting the need to safeguard against miscarriages of justice:

> “ 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. ”

A response from the Law Society of Scotland notes:

> “ While in full support of the policy intentions of the Bill, there are a number of issues which require to be addressed. These include an understanding of the practical challenges of the changes being made and the resource requirements for the changes to be made. 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. There requires to be a culture shift towards what may be understood to comprise an inquisitorial as opposed to an accusatorial approach. ”

More critical responses include one from Miscarriages of Justice Organisation, which argues that the proposal to expand the use of pre-recorded evidence strikes at the essential nature of the adversarial process:

> “ The currently adopted procedure whereby certain witnesses are examined by video link provides the desired protection to the witness but differs fundamentally from the now proposed procedure in that the jury is able to see the contemporaneous examination of the witness. The separation of this process from the trial, by time, would fundamentally strike at the necessary relationship between witness and jury, since the witness would be giving evidence in the absence of the jury both by place and time. In simple terms, the witness would not be speaking to the jury when giving evidence.”

Phased implementation

As noted above, the Bill provides for a phased approach to rolling out the rule on pre-recording of evidence. A submission from the Crown Office and Procurator Fiscal Service argues that this is necessary:

> " This reform will have a very marked impact on the organisation of the business of the criminal courts. It is inevitable that the rule will require to be implemented in a phased manner. Deliberate decisions should be taken sequentially over time to extend the presumption to additional categories of witnesses. Those decisions can only safely be made once the necessary resources are in place – not merely the facilities to record evidence on the scale envisaged, but also the resources to provide the capacity in the system on the part of the Crown, the court and the defence (via the Scottish Legal Aid Board). Phasing will allow the system to absorb change while minimising risk both to the system and to individual cases. It will also enable any difficulties which arise in the operation of the rule to be identified and addressed before the rule is extended."

In relation to the possibility of the rule applying to solemn procedure cases in the sheriff courts, a submission from the Scottish Legal Aid Board notes that:

> " The practitioners in those courts (and the courts themselves) will not be so familiar with evidence being pre-recorded. It may be that to allow development that a pilot in one of the larger sheriff court jurisdictions take place that could be used as a model for roll-out and training."

Whilst acknowledging the case for a phased approach to implementation, some submissions express concerns about delays in extending the rule to other vulnerable witnesses (eg to adult deemed vulnerable witnesses and child witnesses in domestic abuse cases). For example, a response from NSPCC Scotland states:

> " We are aware that a move towards the greater pre-recording of evidence will have implications for the criminal justice system and may necessitate a phased approach. However, limiting the first phase of reform solely to solemn cases means that very large numbers of vulnerable children, potentially giving evidence in domestic abuse cases, will not benefit and be protected within the system. Indeed, our reading of the Bill as introduced at stage 1 suggests that the provisions will not be available for child witnesses in any domestic abuse cases, even in the tiny minority of domestic abuse cases being heard in solemn court proceedings. "

The response from the Faculty of Advocates raises a different concern, arguing that allowing the Scottish Ministers to extend the rule by the use of regulations may allow for insufficient parliamentary oversight.

Impact of recorded evidence

A submission from three academics at the universities of Glasgow and Warwick (professors Chalmers, Leverick and Munro) notes that:

> “ Concerns have been expressed that watching a video rather than observing live testimony might influence jurors' assessments of the credibility of child witnesses and ultimately impact on verdict decisions. On the one hand, it has been suggested that this might place the accused at a disadvantage by presenting the child as especially vulnerable or affected by events. Conversely, it has also been suggested that video evidence might lack the emotional impact of live testimony, thereby reducing the likelihood of a child witness being believed and empathised with by a jury who are not able to observe them 'in the flesh'.”

The submission goes on to say:

> “ Research with mock juries has demonstrated that – contrary to many people's misplaced confidence in their ability to do so – jurors are not in fact significantly better able to discern deception when children testify in open court as compared to via live-link or pre-recorded testimony. Likewise, there is no compelling evidence that the use of pre-recorded evidence by child witnesses has a significant effect on verdicts in criminal trials. Individual jurors may harbour a preference for evidence delivered live and in person, but the research suggests that this does not translate in any consistent or reliable way into collective verdict outcomes.”

It does, however, emphasise the importance of any video recording being of good audio/visual quality and appropriately edited, and that playback arrangements in the court are adequate.

Timing of evidence taking

One of the arguments advanced in favour of pre-recorded evidence is that taking evidence closer to the alleged incident tends to make it more reliable. Earlier recording of evidence may also help in limiting the distress caused to vulnerable witnesses.

In relation to prosecution witnesses, the submission from the Crown Office and Procurator Fiscal Service outlines its planned approach to complying with a rule requiring a child's evidence to be given in advance of trial:

- where there is a good quality audiovisual recording of a statement made to the police, or of a joint investigative interview carried out by police and social work, it would seek to rely on that as the child's evidence in chief
- cross-examination and re-examination would be dealt with through the taking of evidence by a commissioner
- where there is no audiovisual recording, or the quality is not adequate, it would seek to take all of the child's evidence by a commissioner

The submission notes that the Crown Office and Procurator Fiscal Service does not generally favour the use of a written statement as evidence in chief, stating that:

> “ If the jury is to assess the credibility and reliability of a witness' evidence, it is of value for the jurors to see and hear the witness as they give their evidence. ”

As indicated above, some or all of the witness' evidence would be taken by a commissioner. Thus, the probable timing of commissions is relevant in assessing the benefits which might be realised in practice.

The Crown Office and Procurator Fiscal Service's submission indicates that it expects the vast majority of commissions to take place after an indictment has been served on the accused. Its reasoning is in line with that set out in the policy memorandum (para 76). However, the submission from the Faculty of Advocates argues that such an approach threatens to undermine the hoped for benefits. It states that it is possible to have a reasonable degree of certainty about the charges at a much earlier stage, noting that:

> “ 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.”

The Faculty of Advocates' response goes on to say that:

> “ 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 two years after the initial complaint.”

On the other hand, the response from the Law Society of Scotland cautions against the risk that:

> “ if steps are taken to try and secure a child witnesses' evidence at too early a stage, this could lead to multiple commissions in respect of the same witness because disclosure did not take place in time, or to the child having to give their evidence to a commissioner only to have the accused plead guilty. ”

Child accused

As noted earlier, under the provisions of the Bill the proposed rule on pre-recording of evidence would not apply to child accused. The response from NSPCC Scotland states that it is:

> “ disappointed that the protective provisions around pre-recorded evidence do not pertain to the child accused, further shining a light on the fundamental contradiction in the way the law deals with children in Scotland. ”

However, the exception was welcomed in a range of submissions, with the Law Society of Scotland noting that "the right of the child accused to remain silent must be fully respected". The submission from the Crown Office and Procurator Fiscal Service adds that:

> “ Two of the key benefits of pre-recording evidence are that it removes the need for the witness to attend at the trial and removes the need to give evidence in the presence of the accused person. Clearly neither of these outcomes can apply to accused persons.”

Resources

As indicated above, the financial memorandum identifies costs impacting on a number of organisations, including the: SCTS; Crown Office and Procurator Fiscal Service; and Scottish Legal Aid Board.

A response from the SCTS highlights various resource issues relating to technology and infrastructure, as well as for training a range of professionals. In welcoming plans for phased implementation, it notes that:

> “ The long-term changes envisaged by this Bill will require significant shifts in legal thinking, practice, technology and infrastructure. It is essential that all those participating in the criminal justice system are given the time, support and resource to make the adjustments necessary. It is very sensible to plan for a phased roll-out so that the growth in the use of pre-recorded evidence does not simply overwhelm the capacities of our staff, the judiciary and the court estate, as well as the prosecution (COPFS), defence agents and advocates, and associated services such as victim support.”

The submission from the Crown Office and Procurator Fiscal Service (COPFS) states:

> “ Pre-recording evidence has not previously been undertaken in Scotland on the scale that is proposed in the Bill. Several organisations in the criminal justice system, including COPFS, will require significant additional resources in order to comply with the new rule. It will be necessary to establish high quality facilities for pre-recording evidence and for playing it back at trial, as well as suitable technical solutions for editing, transcribing, storing and transporting recordings. At the same time, the pre-recording of evidence, and the ‘Ground Rules Hearing’ which will precede it, will impose additional demands on COPFS, SCTS and the defence. ”

Some responses suggest that the effective implementation of the proposed reforms would have some resource implications not identified in the financial memorandum. For example, the response from Social Work Scotland argues that:

> “ financial provision should be made for additional training required of the legal profession to make decisions and practise in a way that is both trauma informed, child centred and legally competent. This does not appear to have been addressed at present.”

Whilst one from Police Scotland notes that, if there were to be a significant increase in the audiovisual recording of statements made to the police by vulnerable witnesses, further consideration would have to be given to resources (eg for training and appropriate interview facilities):

> “ It is assessed that any expansion out with the initial narrow criteria will have noteworthy financial implications for Police Scotland, both in terms of capital and revenue spend.”

Additional measures

Written submissions highlight a range of measures which, although not directly covered by the proposed reforms, might be seen as necessary support for the underlying policy. For example, submissions from Barnardo's Scotland and Children 1st argue that child witnesses must receive support and information throughout the process.

The use of intermediaries, to help inform how vulnerable witnesses will be questioned during commissions, is also raised in responses. The one from the Faculty of Advocates outlines how they might be used to provide advice, which could be considered during the proposed ground rules hearing:

> " 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. (...) 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."

The response goes on to note that:

> " 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. "

Other ideas include the suggestion that the use of ground rules hearings should be extended to other cases involving vulnerable witnesses - not just those where evidence is to be pre-recorded at a commission.

Barnahus system

The Barnahus (or Children's House) system in Norway involves child witnesses being questioned by a specialist interviewer, in a purpose-built facility, under the guidance of a judge and with the mediated participation of relevant legal representatives.[vii] The SCTS Evidence and Procedure Review stated that its adoption in Scotland would require a major shift in legal practice and culture.

A number of written submissions express support for developing such a system in Scotland. A response from the Scottish Association of Social Work notes that it was introduced in Norway, in response to criticism of low prosecution and conviction rates in relation to child abuse, and that it:

> " provides a purpose-built, child-friendly location for all interviews and cross-examination of children, using a multi-disciplinary model which allows for gathering of best evidence alongside assessment of the child's support needs. "

vii A number of countries have developed Barnahus type models with somewhat different approaches.

The response from NSPCC Scotland lists various elements which, it argues, should be part of any Scottish model. These include:

- the child providing evidence at a single forensic interview which takes place, in a child-friendly centre, as soon as possible following the complaint
- all questioning being undertaken by a specialist interviewer, with expertise in child development and communication, following a structured approach which seeks to minimise cross-examination questions
- conduct of the interview being guided by a judge and observed by relevant legal representatives
- support for the child and family (eg advocacy workers and therapeutic support)

Procedures for Standard Special Measures

Current Rules

As outlined earlier in this briefing, there are a range of special measures intended to assist vulnerable witnesses in giving evidence. These include the following standard special measures:

- a screen in the courtroom stopping the witness from having to see the accused
- a live television video link allowing the witness to give evidence from somewhere outside the courtroom
- a supporter who can sit with the witness whilst the witness gives evidence

Both child and deemed vulnerable witnesses (ie witnesses who are the complainers in cases involving a sexual offence, human trafficking, domestic abuse or stalking) have an automatic entitlement to use standard special measures. Although there is an automatic entitlement, a process for notifying the court of the desire to use a particular special measure must still be followed. This involves lodging a vulnerable witness notice with the court which is then placed before a sheriff/judge for formal approval.

Reforms in the Bill

Section 6 of the Bill seeks to streamline the process for arranging the use of standard special measures, where there is an automatic entitlement, by making it an administrative rather than judicial one. The streamlined process would not apply where a mix of standard and other special measures are sought. However, as noted earlier, applications for standard special measures account for the great majority of all applications.

In outlining the case for reform, the policy memorandum states:

> “ Given that the provisions do not appear to give judicial discretion on granting standard special measures in these cases, the current process does appear to be overly bureaucratic and cumbersome by still requiring judicial oversight and a delay before the order is made. It was therefore suggested that the process be simplified by making it an administrative rather than judicial process. (para 94)”

Where the streamlined process does apply, instead of lodging a vulnerable witness notice, the party seeking use of the standard special measure(s) would provide the clerk of court and other parties to the case with the following information:

- the standard special measure(s) considered to be most appropriate
- whether the witness is a child or deemed vulnerable witness
- the age of a child witness

- any other information required by criminal court rules

Where this is done within the required timescale, the witness is entitled to use the standard special measure(s) sought. The policy memorandum notes that any mechanism for alerting the clerk of court and other parties "should be secure and available to all parties including all defence solicitors" (para 97).

In addition to the above reform, sections 7 and 8 of the Bill contain provisions seeking to make some changes to the timescales for vulnerable witness notices.

The financial memorandum [13] anticipates savings arising from the proposed administrative notification process for standard special measures[viii] - for both the Scottish Courts and Tribunals Service and the Crown Office and Procurator Fiscal Service.

Written Submissions

Where they address this aspect of the Bill, written submissions [5] to the Justice Committee's call for evidence are broadly supportive of proposals to streamline the process for arranging the use of standard special measures.

For example, a response from Children 1st states that:

> “ Existing over-complex processes can often be perceived as a barrier to children and young people easily accessing special measures. ”

Whilst one from the Senators of the College of Justice notes that:

> “ The current requirements utilise judicial and staff time for a matter which should be purely administrative.”

A response from the Scottish Children's Reporter Administration, whilst welcoming the simplified notification procedure, argues that there should be a clearer requirement on the party lodging the notice to ascertain the wishes of the witness:

> “ 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. ”

viii Offsetting some of the costs associated with other reforms in the Bill.

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