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Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill: Consideration prior to Stage 3

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The Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill will be debated at stage 3 on 9 May 2019. This briefing summarises the main issues considered at stages 1 and 2.



25 April 2019
SB 19-24

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Executive Summary

The Scottish Government's Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill provides for reforms relating to the use of special measures for vulnerable witnesses in criminal cases. In particular, it seeks to encourage greater use of pre-recorded evidence at trial.

The current definition of vulnerable witness includes: child witnesses (under the age of 18); and complainers in cases involving a sexual offence, human trafficking, domestic abuse or stalking (referred to as deemed vulnerable witnesses)

Current statutory provisions allow for the use of the following special measures, with the aim of assisting vulnerable witnesses in giving their evidence:

- 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 evidence provided in advance of the trial, either in the form of a prior statement or recorded during special proceedings before a commissioner (a sheriff or High Court judge), to be used as the evidence of the witness at the trial

The Bill provides for a rule, applying to child witnesses involved in certain serious cases prosecuted under solemn procedure, 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 Justice Committee's stage 1 report welcomed the proposed rule, whilst noting that the rights of the accused must also be safeguarded. The report also expressed support for adding domestic abuse to the list of offences covered by the rule. An amendment giving effect to this was agreed at stage 2.

The possibility of extending the proposed rule to adult deemed vulnerable witnesses involved in solemn procedure cases is also provided for in the Bill. Again, the stage 1 report indicated the Justice Committee's support for this.

Proposed amendments considered but not agreed at stage 2 included ones dealing with:

- training for those involved in the taking of vulnerable witness evidence by commission
- the protection of vulnerable witnesses after the conclusion of court proceedings
- a statutory requirement to review the operation of the legislation

A significant part of the Justice Committee's work during stage 1 scrutiny of the Bill involved consideration of what additional steps, beyond those in the Bill, might be taken to improve the way in which vulnerable witnesses are dealt with. In particular, it took evidence on the use of Barnahus (or child's house) systems for child witness. It expressed support for the adoption of this type of system in Scotland.

Introduction

Parliamentary scrutiny

The [Vulnerable Witnesses \(Criminal Evidence\) \(Scotland\) Bill](#) was introduced in June 2018.¹ It sets out reforms relating to the use, in criminal cases, of special measures - a range of provisions to assist vulnerable witnesses give their evidence. In particular, it seeks to encourage greater use of pre-recorded evidence at trial.

The Parliament's Justice Committee was designated as lead committee for parliamentary consideration of the Bill. Its [stage 1 report](#), recommending that the general principles of the Bill be approved, was published on 24 January 2019.² The Lord Advocate provided a written [response](#) to the stage 1 report on 1 February.³ The Scottish Government provided a [response](#) on 4 February.⁴

The Bill completed stage 1 with the [stage 1 debate](#) on 5 February,⁵ following which the general principles of the Bill were agreed without a vote.

Stage 2 included consideration of proposed amendments dealing with:

- the range of offences in relation to which a new rule, generally requiring the pre-recording of vulnerable witness evidence, would apply
- training for those involved in the taking of vulnerable witness evidence by commission
- the protection of vulnerable witnesses after the conclusion of court proceedings
- a statutory requirement to review the operation of the legislation

This was followed by publication of the [Bill as amended at stage 2](#).⁶

Stage 3 proceedings (final consideration) are scheduled to take place on 9 May 2019.

Key dates in the Parliament's consideration of the Bill are set out below:

- Bill introduced - 12 June 2018
- Stage 1: Justice Committee evidence sessions - 20 and 27 November 2018; 4 and 18 December 2018; and 8 January 2019
- Stage 1: Justice Committee report published - 24 January 2019
- Stage 1: plenary debate - 5 February 2019
- Stage 2: Justice Committee - 12 March 2019

An earlier [SPICe briefing](#) provides additional information on the Bill as introduced.⁷

Current support for vulnerable witnesses

The Victims and Witnesses (Scotland) Act 2014 made changes to provisions dealing with support for vulnerable witnesses. Relevant measures 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.

Current statutory provisions allow for the use of the following special measures, with the aim of assisting vulnerable witnesses in giving their evidence for a trial:

- 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 evidence in chief of the witness 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 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.

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.

Pre-Recording of Evidence

Rule requiring pre-recording of evidence

As indicated above, current rules applying to all vulnerable witnesses allow for the possibility of evidence being taken in advance of trial.

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. The proposed rule covers most child witnesses under the age of 18, including child complainers (ie alleged victims), but not child accused.

The Justice Committee's stage 1 report welcomed the proposed rule, whilst noting that the rights of the accused must also be safeguarded. The Committee agreed that greater use of pre-recorded evidence would reduce the distress caused to child witnesses and improve the quality of justice.

The stage 1 report noted concerns that extending the proposed rule to child accused - thereby generally requiring all of a child accused's evidence to be given before any trial - could prejudice the right to silence and ability to respond to the evidence produced at trial.

The proposed rule would apply to child witnesses involved in solemn procedure cases - both High Court and sheriff and jury - but not summary cases. Solemn procedure is used in more serious cases.

Application of the proposed rule to child witnesses is further limited to their evidence in cases involving particular offences. The Bill as introduced listed a range of serious offences including murder and various sexual offences. Under the provisions of the Bill, 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. However, in its stage 1 report, the Justice Committee expressed support for adding domestic abuse to the list of offences on the face of the Bill. It highlighted the "trauma that children can experience in such cases" (para 173). The Scottish Government lodged an amendment giving effect to this at stage 2. It was agreed without division.

Commencement provisions allow for a phased approach to the application of the rule. Thus, for example, the rule could initially be brought into force in respect of child witnesses involved in High Court cases only.

The possibility of extending the proposed rule to adult deemed vulnerable witnesses involved in solemn procedure cases is also provided for in the Bill. The stage 1 report indicated the Justice Committee's support for this. The Scottish Government would have the ability to do so by way of regulations. As noted earlier, deemed vulnerable witnesses are complainers (not other witnesses) in cases involving a sexual offence, human trafficking, domestic abuse or stalking.

In its stage 1 report, the Justice Committee accepted the need for a phased approach to implementing the proposed rule. It noted both the costs and changes to legal practice associated with implementation. Given this, it expressed support for an initial focus on child witnesses in the most serious cases.

During stage 1 scrutiny, the Scottish Government provided the Justice Committee with a [draft implementation plan](#) relating to the phased introduction of the proposed rule,⁸ starting with child witnesses in High Court cases from January 2020. The Justice Committee agreed that the plan "provides a useful starting point for considering the timetable for extending the rule", but that a "more detailed implementation plan should be developed as soon as possible" (stage 1 report, para 179). In its written response to the Committee's report, the Scottish Government said that it "will be working with justice partners on detailed plans for monitoring of the implementation of the proposed reforms" (p 5).

The Bill does not provide for the extension of the proposed rule to other categories of vulnerable witness, or to any witnesses in summary procedure cases. The Justice Committee's stage 1 report acknowledged the Scottish Government's reasons for this (eg that extending the proposed rule to summary cases would have significant resource implications). However, it also recommended greater use of pre-recorded evidence, in appropriate cases, where not required by the rule.

Taking evidence by commissioner

One of the existing procedures for pre-recording evidence is taking evidence by commissioner. As outlined above, this involves the evidence of the witness being 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 video recording being played during the trial.

Provisions in the Bill, aimed at improving current court processes for the pre-recording of evidence, include ones on the holding of a court hearing to consider arrangements for taking evidence by a commissioner. This type of discussion already happens in practice, but the Bill provides a statutory basis - referring to it as a ground rules hearing.

The Justice Committee, in its stage 1 report, welcomed the proposed reform - highlighting evidence that "the preparation undertaken at these hearings is essential to ensure that the process of taking evidence by a commissioner works effectively" (para 262). The Committee did, however, question whether more should be done in the Bill to ensure that ground rules hearings address relevant issues. In particular, it recommended that the court should seek to ensure appropriate support for the witness. In its written response to the stage 1 report, the Scottish Government noted that a ground rules hearing is specifically concerned with arrangements for taking evidence by commissioner. Wider issues of support for vulnerable witnesses could go beyond this focus.

A similar issue was considered at stage 2, with Liam Kerr MSP lodging an amendment which would have required the court, during a ground rules hearing, to consider any reasonable steps for the protection of the witness after the conclusion of the case. The Cabinet Secretary for Justice stated that he appreciated the intent behind the amendment. However, he added that the Scottish Government would resist it on the basis that the Bill was not an appropriate mechanism to achieve the aim. He indicated that the [Victims Taskforce](#) (established in 2018)⁹ will consider ways to "improve end-to-end support for victims and witnesses throughout the criminal justice system and beyond".¹⁰ Following debate, the proposed amendment was withdrawn.

Another stage 2 amendment, lodged by Margaret Mitchell MSP, sought to add a statutory requirement for professionals involved in taking evidence by commission to undertake relevant training. In outlining the purpose of the amendment, she explained that it was a probing amendment to allow discussion of what needs to be done to ensure there is appropriate training in questioning vulnerable witnesses.

The importance of such training was noted by other Committee members and the Cabinet Secretary for Justice. However, again it was felt that the Bill was not an appropriate mechanism to achieve the aim. The Cabinet Secretary noted that the Judicial Institute and relevant professional bodies are responsible for training and outlined relevant developments. Following debate, the proposed amendment was withdrawn.

Procedures for Standard Special Measures

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.

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.

The Justice Committee welcomed this reform in its stage 1 report, noting evidence that it would produce savings in terms of judicial and court staff time, as well as allowing relevant staff more time to engage with witnesses.

The Committee did, however, seek reassurance that the choice of any special measures would be based on the informed views of the vulnerable witness concerned. In its written response, the Scottish Government noted that current provisions require consideration of the best interests and views of the witness. And that this would not change. From the perspective of the prosecution, the response from the Lord Advocate highlighted the work staff do with vulnerable witnesses. It acknowledged that more could be done, noting that it was reviewing how staff communicate with witnesses to ensure that options for support are clear.

Barnahus Principles

A significant part of the Justice Committee's work during stage 1 scrutiny of the Bill involved consideration of what additional steps, beyond those in the Bill, might be taken to improve the way in which vulnerable witnesses are handled. In particular, it took evidence on the use of Barnahus (or child's house) systems for some categories of child witness. The Committee's stage 1 report noted that:

“ In the simplest terms, the Barnahus is often described as a child-friendly house with four rooms: (1) criminal investigation (2) child protection (3) physical health (including forensic examination) (4) mental health and well-being and recovery and support needs, including family support. This multi-disciplinary approach means that all services are provided 'under one roof', with relevant professionals coming to the child. The Barnahus has the joint aim of facilitating the legal process and ensuring that the child receives necessary support and treatment. A key role of the Barnahus is to produce valid evidence for judicial proceedings in a way that means the child does not have to appear in court, should the case be prosecuted. This reduces the risk of the child experiencing further trauma and enables them to start recovering from their experiences much more quickly. There is, however, no one single model of the Barnahus. As the approach has been adopted across Scandinavia and other parts of Europe, countries have taken different approaches. (paras 336-338)”

The Committee's report went on to note that a range of witnesses expressed support for the implementation of the Barnahus principles in Scotland. Whilst full implementation might be a longer-term goal, it was suggested that some elements could be adopted more quickly:

“ In particular, the Committee heard that child-friendly facilities, where all services are provided to the child 'under one roof', could be established in the short-term to pre-record all of a child's evidence – from the joint investigative interview with police and social work to the taking of evidence by a commissioner. (para 362)”

An important element of the Barnahus approach is that all the evidence of the child may be obtained through questioning by a single specialist interviewer. This is sometimes referred to as the one forensic interview model. The Committee's report explained that:

“ The interviews are routinely carried out by one single professional specialising in forensic interview, using evidence based practices and protocols, with other relevant professionals observing from another room. If the defence wish to pose questions to the child, this is done through the forensic interviewer. Most children will only undergo one forensic interview, usually within weeks of the incident being reported, although there can be scope for further forensic interviews if necessary. These will usually be carried out by the same professional who conducted the initial interview. (para 342)”

Some of the evidence received by the Justice Committee highlighted difficulties in adopting this approach in Scotland - at least in the near future. It was seen as a significant departure from the current adversarial approach taken in criminal cases, under which both sides are able to question witnesses.

The Justice Committee stated, in its stage 1 report, that:

“ The Committee considers that there is a compelling case for the implementation of the Barnahus principles in Scotland, as the most appropriate model for taking the evidence of child witnesses. The Committee recognises that there is no single model of the Barnahus and that its implementation would have to be adapted in the context of Scotland's adversarial criminal justice system. However, the Committee does not consider that this should prevent the Scottish Government from moving towards full implementation of the Barnahus principles, specifically a 'one forensic interview' approach. (paras 383-384)”

The Committee went on to acknowledge that adopting a single forensic interview approach would involve "a significant shift in current legal culture and practice" (para 386) and require a substantial investment of resources. Thus, it was right to approach it as part of a longer-term vision. However, it recommended the taking of more immediate steps to adopt other elements of Barnahus.

In its written response to the stage 1 report, the Scottish Government noted that:

“ The challenges in fully implementing a Barnahus model, including a single forensic interview, in an adversarial justice system are significant. The development of Scotland-specific standards for Barnahus by Healthcare Improvement Scotland and the Care Inspectorate will help us to fully understand what is required to improve our collective response to child victims, across the justice and health systems and local authorities. This will enable us to set out a roadmap for improvements. These Scotland-specific standards will be based on the European PROMISE Quality standards for Barnahus. It is anticipated that the scoping stage will begin in early 2019. Work to develop standards will take around 12 months, incorporating time for extensive consultation. (p 17)”

Monitoring the Impact of Reforms

The Scottish Government's draft implementation plan, for the phased introduction of the proposed rule on giving evidence in advance of trial, provides for periods of evaluation.ⁱⁱ

During stage 2, a number of proposed amendments sought to create a statutory requirement to review measures for vulnerable witnesses. None of the amendments were agreed. However, the Cabinet Secretary for Justice did express sympathy for an amendment on the topic lodged by Liam Kerr MSP. The Cabinet Secretary stated that:¹¹

“ We need to retain flexibility in the timing of the evaluations, so it would not be appropriate to set that out in primary legislation. However, that is different from having an overarching provision in the Bill to review and report to the Scottish Parliament on how the new pre-recording rule is working in practice. I understand that that is the intention behind Liam Kerr's amendment and I can see the merits of such a provision. I am very much minded in favour of such an addition to the Bill. Unfortunately, there are issues in relation to amendment 9 that mean that I cannot support it at this time.”

He went on to say that he would be happy to work with interested members on an alternative amendment in advance of stage 3 . On this basis, Liam Kerr withdrew his amendment.

ii The draft implementation plan is considered above, under the heading of 'Rule requiring pre-recording of evidence'.

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