Justice Committee

Victims and Witnesses (Scotland) Bill

Written submission from Scotland’s Commissioner for Children and Young People

I am pleased to have the opportunity to comment on the proposals contained in the Victims and Witnesses (Scotland) Bill. I understand this Bill will implement EU Directive 2012/29/EU in relation to minimum standards on the rights, support and protection of victims of crime and forms part of the wider justice reform programme aiming to support victims and witnesses.

My office was established by the Commissioner for Children and Young People (Scotland) Act (2003) which lays out the general function of the Commissioner ‘to promote and safeguard the rights of children and young people’. I have a remit to review law, policy and practice relating to the rights of children and young people with a view to assessing their adequacy and effectiveness in line with the United Nations Convention on the Rights of the Child (UNCRC). The UK ratified the UNCRC in 1991, committing itself to bringing its law, policy and practice in line with this Convention.

Access to justice is an important children’s rights issue, enshrined in both domestic and international law. As Victim Support tell us, young people are significantly more likely to be victims of crime than the general population, yet get limited support in the aftermath of crime - their views are seldom sought and their needs not always met. Supports afforded to child witnesses are also inconsistently applied and not always in the best interests of the young person.

Children’s Rights Impact Assessments (CRIA)

In its 2008 Concluding Observations on UK compliance with the Convention, the UN Committee on the Rights of the Child stressed the importance of conducting Children’s Rights Impact Assessments (CRIA) as a useful aid to implementation. I would encourage the Committee to undertake or commission a CRIA on the proposals. Children are largely excluded from the decision making process and have limited advocacy powers, except through adults. I believe a CRIA will help make the child’s perspective more visible and ensure that their views are taken into account in decisions affecting them.

There are a number of relevant UNCRC articles relating to the Bill. Article 3, which underpins the whole Convention, notes that in all actions concerning children, whether undertaken by public or private social institutions, courts of law, administrative or legislative bodies, the best interests of the child shall be a primary consideration. Article 12 assures to the child capable of forming his or her own views, the right to express those views freely in all matters affecting them and due weight should be given accordance with their age and maturity. Other relevant articles are article 2, the principle of non-discrimination; article 19, rights to protection from all forms of violence; article 23, the rights of disabled children and
article 37 which focuses on the rights of children and young people in the youth justice system.

**General Principles**

The persons to which the duty to have regard to the general principles applies are clearly set out on the face of the Bill and there is scope for Scottish Ministers to modify by order the list of persons to whom the duty applies. The ability to obtain information, the safety of victims and witnesses, access to appropriate support and the ability to participate in investigations and proceedings are essential components of a fair and equitable justice system.

I do however have concerns around how ‘appropriate’ in S 1 (3) (c) and (d) may be defined by relevant organisations, given the lack of a legal definition and would suggest that further guidance is issued in this regard. Ensuring the effective participation of children and young people requires a skilled approach and understanding what is ‘appropriate’ for a child or young person may not be immediately apparent to an unskilled practitioner. Notwithstanding the implementation of the Vulnerable Witnesses (Scotland) Act 2004 Act, significant barriers still exist for child witnesses and the level of resources required to allow for effective and meaningful participation is often underestimated: inaccurate assumptions may also be made about the capacity of a child to give evidence based on age or on the child's demeanour. For children with disabilities, the barriers may be more acute. Care and consideration is needed to allow them to be supported appropriately so they can give their best evidence in relation to investigations or criminal proceedings.

The policy memorandum refers to studies, surveys and stakeholder engagement which have informed the ‘key principles’ in relation to improving the experiences of victims and witnesses. I suggest that further consideration of child /young person specific needs is required, especially regarding the type of information about what is happening in the investigation and how such information is relayed to the child or young person. This should be articulated in future guidance and informed by young people and organisations working with and for them.

**The proposal to create a duty on relevant justice organisations to set clear standards of service for victims and witnesses**

I support the intention behind the duty. Clarity is essential if victims and witnesses are to be kept fully informed about what they can expect from the relevant justice organisations in terms of service delivery and the extent to which this can be provided. Best practice should be the goal rather than minimum standards. I was pleased to see the best interests principle emphasised in Article 1 (2) of the EU Directive which calls on Member States to ensure that ‘where the victim is a child, the child's best interests shall be a primary consideration and shall be assessed on an individual basis’. It is essential that such considerations are included in the standards.
In the current Bill, the development of standards is left to the named organisation without a duty to consult with victims or witnesses of crime or those organisations supporting them. I believe that there should be a requirement on these organisations to seek the views of children and young people when developing these standards. The Children’s Charter (2001) provides a useful example of engaging with young people in the development of standards and illustrates what is important to young people and what they expect from child protection agencies.

Further detail is also needed on how the standards will be monitored, evaluated and reported on and there should be measurable standards to enable robust benchmarking on performance. In doing so, it will be essential to ascertain the experiences of children and young people (both as victims and witnesses) and organisations supporting them to assess whether the standards are making a difference to children’s lives. Consideration should also be given around enforcement and the consequences for organisations failing to meet the standards, who people can complain to and how complaints will be handled. Prescribed bodies should be proactive in ensuring that victims and witnesses are made aware of the standards and a duty to promote these standards would be welcome. I note the intention to introduce draft regulations during the passage of this bill and I will consider and provide comment on those as appropriate.

It is also worth highlighting that there are currently no standards to govern the quality of service provided to those taking part in civil proceedings. Consideration should be given to this to ensure consistency.

The proposal to give victims and witnesses a right to certain information about their case

I welcome the proposal under S. 3 which requires the Chief Constable of the Police Service, Scottish Court Service and any prosecutor to disclose information to victims and witnesses about criminal or alleged criminal offences in relation to investigations or proceedings. This is an important proposal: it is easy to underestimate the distress a lack of or unexpected information can have on a child e.g. a discontinuation of charges, change of date, change of location of pre-trial hearings. Prosecutors also need to carefully consider the type of information provided to the child, the method of communicating that information and the timescales involved.

Article 25 of the EU Directive states that officials likely to come into contact with victims, such as police officers and court staff, should receive both general and specialist training to a level appropriate to their contact with victims to increase awareness of the needs of victims and to enable them to deal with victims in an impartial, respectful and professional manner. This is essential when working with children and young people. Those charged with transmitting such information must undertake training in how to engage with children and young people, including how to check understanding.

Section 3(4) of the Bill indicates that the request need not be complied with if disclosure is considered "inappropriate". I suggest that a statement of reasons for non disclosure is
provided explaining when and why this would be inappropriate. I expect that the relevant bodies will develop and publish guidance on how they intend to comply with this.

**Proposal to give vulnerable witnesses a right to access certain special measures when giving evidence**

The Bill will amend some of the standard special measures (SSMs) and special measures (SMs) defined in the Vulnerable Witnesses (Scotland) Act 2004 Act in relation to criminal proceedings, to take account of additional groups of witnesses who will be entitled to use SSMs. Extending the definition of child to 18 is welcome and will bring Scotland in line with the rest of the UK, the EU Directive and the UNCRC. It is also worth noting that Lord Carloway’s Report into criminal law and procedure also recommends that a child should be defined as anyone under 18 “for the purposes of arrest, detention and questioning”.

As the child will be able to access special measures, these measures must be clearly explained to the child or young person. This could include familiarisation visits to the court or remote sites and explanations of how the equipment works. By getting a full picture of what is available, the child or young person can decide what best suits their needs and make an informed decision about the choices they make. It can also help instil confidence at an enormously stressful time. Whilst it will be impossible to eliminate all the anxiety, a proactive, sensitive and tailored approach which considers the child’s needs and wishes, will help to alleviate some of the fear around giving evidence. Child witnesses can often change their views about giving evidence using particular special measures so it is important that discussions are ongoing and certainly revisited prior to the trial date.

I would further suggest that the use and effectiveness of special measures is monitored and the views of children and young people taken into account as part of this. I am not aware of any evaluation since the 2004 Act and urge the Scottish Government to fund research with children and young people about their experiences of being witnesses. Listening to their experiences, will help establish what young people find helpful and what needs to change.

I also welcome the proposal to extend the automatic right to use SSMs to victims of domestic abuse. I believe that the extension will bring much needed relief to victims of domestic abuse and reduce their fears about appearing in court and having to face the alleged perpetrator. This will in turn help to limit the distress of their children.

**Removal of presumption that child witnesses will give evidence away from court building**

Part 1 of the 2004 Act amended S. 271b of the 1995 Act to include a presumption that child witnesses under 12 should give evidence away from court in trials concerning specific offences. The Bill proposes amending this, creating a presumption that child witnesses will give evidence in the court room if they express a wish to do so. The Policy Memorandum highlights feedback from some justice partners which suggested that the
current presumption was being applied too rigidly by the courts with little regard given to the needs and wishes of the child.

I support this proposal and am pleased to see flexibility introduced in the child witness provisions. I understand the intention is to maintain the presumption of non attendance at court but allow flexibility by introducing a requirement to consult with the child to seek their views on the issue and whether he or she wishes to be present. My view is that these proposals will strengthen the position of children who want to give evidence in court but are having to give evidence remotely and that it will further support children in giving evidence remotely. It also chimes with the concept of the ‘evolving capacities’ of the child embodied in articles 5 and 12 of the Convention. This recognises the changing relationships between children and adults as they grow up and focuses on capacity and children’s increasing autonomy rather than age alone. It also gives the State a role as facilitator in helping to achieve appropriate protection for the child and in encouraging their participation in decisions that affect them.

The presumption that a child will not give evidence in court must be the first option for protection of children in all cases and I would stress that appropriate safeguards be put in place to ensure this is the case. This can only work effectively if the child or young person is fully involved and has the options explained to them. The child should always be told that the presumption is they will give evidence away from court unless the child does not wish this. I suggest that this proposal is accompanied with a requirement to increase awareness of children’s rights across the judiciary, particularly with regard to listening to children’s views and taking these into account.

The proposal to introduce a victim surcharge and restitution orders, so that offenders contribute to the cost of supporting victims

I support the idea of a victim’s surcharge in principle and see this as having the potential to provide practical support immediately after a crime. I would be very interested to hear the views of young people on this subject and the benefits they feel they could gain from this. There are many unknowns at this stage – e.g. how courts will assess the ‘surcharge,’ whether it will be means tested and what happens in the case of non payment? It would be helpful to have more information about this in regulations.

Early intervention and support is essential. All victims should have access to support and assistance after a crime and children and young people are no exception. Their needs should be assessed by appropriately trained professionals to allow them to recover as quickly as possible. The police will have a significant role in signposting young people to appropriate services and perhaps there is scope for a duty on the police to undertake this function.
Additional comments

Objections (Section 9)

I have serious concerns about this proposal as it risks undermining the spirit and tone of the positive measures taken in the Bill and the original legislation. I note this proposal did not feature in the earlier Making Justice Work consultation on the proposals for the Victims and Witnesses (Scotland) Bill, nor in the EU Directive. It is not clear how this provision would operate in practice, and on what basis the courts would determine whether or not an objection should be upheld. It may therefore add to the fears and anxieties around attending court which may also have a detrimental effect on the evidence of some witnesses. I would therefore ask the Committee to closely scrutinise this proposal and seek clarity from Ministers and practitioners as to how it may operate in practice, and what its practical effects may be for child witnesses and other vulnerable witnesses.

Victim statements (Section 19)

At present only children under 14 are entitled to have a victim statement made on their behalf by a carer if they are a direct victim of a crime. The Bill extends the entitlement to children under 14 who are not direct victims. However, I note that in any civil matter, a child is presumed old enough to be able to instruct their own solicitor from the age of 12 and even younger if the child is deemed competent. I believe the focus should be on facilitating and supporting young people’s involvement and views, rather than assuming a child is not capable and relying on parents and carers to make these on the child’s behalf. I suggest the proposal to extend the reach should be accompanied by a lowering of the age of entitlement.

Conclusions

I support the introduction of the Victim & Witnesses (Scotland) Bill and the principles behind it and will work with the Parliament and the Scottish Government to enhance the protections and support afforded to children and young people.

I trust that the information provided assists the Committee in its consideration of the proposals, taking account of the rights of children and young people.

I am happy to comment on any of the points raised in my submission.

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Scotland’s Commissioner for Children and Young People
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