

VULNERABLE WITNESSES (CRIMINAL EVIDENCE) (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. As required under Rule 9.3.3 of the Parliament's Standing Orders, this Policy Memorandum is published to accompany the Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill introduced in the Scottish Parliament on 12 June 2018.
2. The following other accompanying documents are published separately:
 - Explanatory Notes (SP Bill 34-EN);
 - a Financial Memorandum (SP Bill 34-FM);
 - statements on legislative competence by the Presiding Officer and the Scottish Government (SP 34-LC).
3. This Policy Memorandum has been prepared by the Scottish Government to set out the Government's policy behind the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

POLICY OBJECTIVES OF THE BILL

4. The main policy objective of the Bill is to improve how children, in the first instance, and vulnerable witnesses participate in our criminal justice system by enabling the much greater use of pre-recording their evidence in advance of a criminal trial.
5. The Bill is focussed on child witnesses with the main provision creating a new rule¹ that there should be pre-recording for child witnesses including complainers (not child accused) in the most serious solemn cases. There should be pre-recording unless one of the two exceptions applies. The other provisions of the Bill however take forward reforms to improve the current court processes for pre-recording evidence so will be of benefit to all vulnerable witnesses and are intended to encourage the greater use of pre-recording for adult vulnerable witnesses too. This includes the fixing of a ground rules hearing (in order that the pre-recording runs smoothly and the questioning is appropriate) and enabling evidence by a commissioner to happen in advance of service of the indictment. A rule in favour of certain categories of witness giving pre-

¹ In the Scottish Government consultation on Pre-Recording Evidence of Child and Other Vulnerable Witnesses, this new rule was referred to as a "presumption in law" however, henceforth references will be to "the new rule".

recorded evidence will be a change to the way our criminal justice system currently operates. It will require practical changes to be made to venues and technology. The Bill also contains a power which will enable the Scottish Ministers to extend the new statutory rule to adult “deemed vulnerable witnesses”.² The Scottish Government does not underestimate that such a move is a major change and implementation needs to be phased over time to ensure these reforms are introduced in a manageable and effective way. In the first instance, Scottish Ministers intend to introduce the new rule for child witnesses in the most serious cases.

BACKGROUND

6. An effective criminal justice system secures justice for the victims of crime, and punishes those who are convicted of crime, while securing a fair trial to those who are accused of crime. The criminal justice system cannot fulfil its functions unless witnesses come forward and give evidence. However, there is a risk that witnesses – especially child and other vulnerable witnesses of the most serious and traumatic crimes – may be re-traumatised through their participation in the criminal justice process. This does not benefit those witnesses or the interests of justice. Giving evidence in court long after events have taken place also does not support witnesses to provide the best evidence to allow courts to establish the facts of the case in the interests of fair and balanced outcomes.

7. 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.

8. The recording of a witness’ evidence in advance of trial can help to reduce the risk that the witness will be re-traumatised. Pre-recording evidence does not specifically address the issue of the length of time between events and the ultimate trial. But in certain circumstances it can be an appropriate way to give more certainty to a vulnerable witness that their evidence will be taken at an earlier stage, and it enables the evidence to be taken at a specific time, without the uncertainties which arise from the programming of trials. It is anticipated that where evidence is pre-recorded, the recording session will be preceded by a “ground rules hearing”, at which a judge will determine the permissible lines of questioning. This should give confidence to witnesses that they will not be asked inappropriate questions.

Support for Vulnerable Witnesses – Current position

9. The Scottish Government recognises that some witnesses may find it difficult to give evidence during a criminal trial. They may be particularly vulnerable because of their circumstances or the nature of their evidence. As set out in sections 271A, 271C and 271D of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”), the court can take extra steps (called

² “Deemed vulnerable witnesses” means a vulnerable witness as defined in section 271(1)(c) of the Criminal Procedure (Scotland) Act 1995.

‘special measures’³) to help vulnerable witnesses give the best evidence they can. Vulnerable witnesses are automatically entitled to use certain special measures (this means the court must allow them to use them) if:

- they are under 18; or
- they are an alleged victim of a sexual offence, human trafficking, domestic abuse or stalking.

10. The special measures these vulnerable witnesses are automatically entitled to use are:

- a screen in the courtroom;
- a live TV link allowing them to give evidence from somewhere outside the courtroom during the trial;
- a supporter who can sit with them while they give their evidence.

11. Other special measures (such as taking evidence by a commissioner in advance of trial) are available too, but only if an application to the court is made and approved. A witness also has the right to apply to use a special measure if:

- the quality of their evidence might be affected because the person has a mental illness or disorder or they would find giving evidence unusually stressful; or
- they are at risk of harm because they are giving evidence or are to give evidence.

Types of Special Measures

Using a Screen⁴

12. A screen or curtains stop the witness from having to see the accused. The rest of the court is still able to see the witness on a TV when they give their evidence.

Using a Television Link⁵

13. The witness will be in a different room from the courtroom (called a ‘TV link room’) which may be out with the court building. The TV is linked to the courtroom so everyone inside – including the accused or other people involved in the case – can see and hear the witness giving evidence.

Using a Supporter⁶

14. A supporter is someone who stays with the witness when they give their evidence. A supporter cannot help the witness give evidence, or interfere or influence the evidence in any way. They can be:

- someone the witness knows;

³ Section 271H of the 1995 Act.

⁴ Section 271K of the 1995 Act.

⁵ Section 271J of the 1995 Act.

⁶ Section 271L of the 1995 Act.

- a person from a support organisation; or
- a person from the social work department.

Using a Prior Statement⁷

15. In criminal cases, this is an interview or a statement which was taken beforehand, which could be:

- a visually or audio recorded interview between the witness and the police;
- a visually recorded interview of a child by a police officer and social worker as part of a child protection investigation (referred to as a ‘Joint Investigative Interview’); or
- a written statement that is read out.

16. The witness’s evidence-in-chief⁸ can consist entirely of the prior statement, but they would still need to be available for cross-examination.

Taking Evidence by a Commissioner⁹

17. It is already possible for a witness to give evidence at a different time other than during the actual court case on application by the party calling the witness. 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.

Closed court¹⁰

18. There is also the special measure of having a closed court, which involves excluding the public during the taking of evidence from the vulnerable witness. Certain people, for example, members or officers to the court, parties to the case before the court, counsel or solicitors, and representatives of news gathering or reporting organisations are allowed to remain.

THE BROADER CONTEXT

19. The Bill is an important step towards achieving the vision of the Cabinet Secretary for Justice that, where possible, child witnesses should not have to give evidence during a criminal trial. But it is also part of a much wider and ambitious programme of work currently being undertaken by the Scottish Government and justice agencies to improve the experience of victims and witnesses in the justice system – particularly for vulnerable people who have been

⁷ Section 271M of the 1995 Act.

⁸ “Evidence-in-chief” is the stage in criminal proceedings in which a witness is questioned by the party who has cited them to give evidence before cross examination by the other party to the proceedings.

⁹ Section 271I of the 1995 Act.

¹⁰ Section 271HB of the 1996 Act.

the subject of the most serious crimes. This work focusses on strengthening and improving the rights and experiences of victims and witnesses in Scotland, which will enable our criminal justice system to be more focussed on the people affected by it rather than the processes surrounding them.

20. 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.

21. Legislation already allows for the pre-recording of evidence from child and other vulnerable witnesses – known as evidence by commissioner – as well as other ‘special measures’. Ministers intend to introduce the new rule for child witnesses in serious cases in the first instance. For example, the rule could potentially be implemented first for child complainers in the High Court as the start of a phased roll out of the reform. At the same time, the Scottish Government continues to work with partners to seek to strengthen the assistance and support available for all vulnerable witnesses throughout their contact with the justice system, and to seek to address features of the justice system which may re-traumatise witnesses.

22. Ministers have been clear that the justice system as a whole, and where appropriate other public services, such as health and core agencies responsible for child protection, must continue to improve how victims and witnesses are treated and we are working in partnership with justice agencies to make that happen.

Justice in Scotland: Vision and Priorities

23. In June 2017, the Scottish Government published “Vision and Priorities for Justice in Scotland”. This updated the Scottish Government Justice Strategy which was published in 2012. Using the latest evidence it describes recent successes, highlights key challenges and sets out key priorities for the future. These shared priorities are for everyone involved in keeping our communities safe and delivering civil, criminal and administrative justice. They will be achieved by people and organisations working together across the justice system and beyond to deliver improvement and focus on shared outcomes.

24. Whilst the Justice Vision and Priorities sets out our longer term vision, the accompanying Delivery Plan sets out the key actions that the Scottish Government, justice organisations and partners will take in 2017-18. The Plan will be reviewed and updated annually and the Justice Board, which includes Scottish Government Directors and the heads of justice agencies, will monitor progress against the Justice Vision and Priorities.

25. One of the key priorities for 2017-18 is to “improve the experience of victims and witnesses, minimising court attendance and supporting them to give best evidence”. This commitment takes forward one of the main priorities of the Cabinet Secretary for Justice to enable the much greater use of pre-recording for child witnesses as a step towards achieving his ultimate vision that child witnesses will have their evidence recorded as early as possible in the process. This in time should mean that wherever possible a child should not have to wait to attend the actual criminal trial to give their evidence. One of the key actions flowing from that

priority is that “justice partners will test and take forward new models to better support child and other vulnerable witnesses, including through the greater use of pre-recorded evidence, strengthened Joint Investigative Interviews and exploring the application of the collaborative Barnahus concept for child victims in Scotland.”

26. In addition, the Scottish Government and COSLA’s Equally Safe Strategy published a delivery plan in November 2017. This plan, which sets the work to eradicate violence against women and girls within a broader context of gender inequality, includes a specific action to improve the experience of vulnerable witnesses in criminal justice cases, initially focusing on child complainers and witnesses by bringing forward legislation to enable the greater use of pre-recording of their evidence.

27. This Bill, in part, takes forward these key actions by enabling the greater use of pre-recorded evidence.

Scottish Courts and Tribunals Service Evidence and Procedure Review

28. This Bill also builds on the important work carried out by the Scottish Courts and Tribunals Service (“SCTS”) in their Evidence and Procedure Review. In March 2015, SCTS published their Evidence and Procedure Review Report,¹¹ calling for Scotland to harness the opportunities that new technologies bring to improve the quality and accessibility of justice. The Review proposed a number of ideas that could help transform the conduct of criminal trials. In particular, in relation to the evidence of children and vulnerable witnesses.

29. Since that time, SCTS has published a “next steps” report¹² and established a number of working groups to consider in more detail the proposals in their Review including those on the pre-recording of evidence. One of those working groups led by the Right Honourable Lady Dorrian, Lord Justice Clerk, examined how existing processes could be improved, with a focus on taking evidence by a commissioner.

30. In September 2017, the working group produced their project report.¹³ This was a comprehensive report which set out how the current procedures for taking evidence by a commissioner could be improved. The report also outlined a future vision for visually recording evidence in advance of trial. As Lady Dorrian noted in the foreword to the report:

“There is a widespread recognition that, in a civilised and modern society, all those who come into contact with the criminal justice system must be treated with respect, and be allowed to engage meaningfully with it. For children and other vulnerable witnesses, this means finding ways to take their evidence in an environment and in a manner that does

¹¹ Scottish Court Service, *Evidence and Procedure Review Report* (March 2015) available at <http://www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/reports-data/evidence-and-procedure-full-report---publication-version-pdf.pdf?sfvrsn=2>.

¹² Scottish Courts and Tribunals Service, *Evidence and Procedure Review – Next Steps* (February 2016) available at <http://www.scotcourts.gov.uk/docs/default-source/SCS-Communications/evidence-and-procedure-report---next-steps---february-2016.pdf?sfvrsn=2>.

¹³ Scottish Courts and Tribunals Service, *Evidence and Procedure Review Child and Vulnerable Witnesses Project – Pre-Recorded Further Evidence Work-Stream: Project Report* (September 2017) available at <http://www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/reports-data/evidence-and-procedure-pre-recorded-evidence-report-28-09-17.pdf?sfvrsn=2>.

not harm them further, but allows their evidence to be given and tested fully and appropriately. We have recognised that our current methods, while always improving, do not meet the highest mark, and we need to develop our own, Scottish, solutions to the challenge.”

31. The report sets out a longer term vision for children under 16 who are complainers in cases involving the most serious crimes (called Level 1 vision in the Report). The recommendation is that these children should have their complete evidence taken by means of a single visually recorded forensic interview conducted by highly trained, expert forensic interviewers who are skilled at taking the evidence of children. This 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. The greater use of pre-recording will be an important first step in the journey towards achieving such a vision. As well as this longer term vision, the SCTS review also considered more immediate and medium term work that could be undertaken to improve the two current main ways of giving pre-recorded evidence in Scotland (Joint Investigative Interviews and evidence by a commissioner.)

Joint Investigative Interviews (JII)

32. A JII is the formal interview process carried out by police and social work investigative interviewers mainly for evidential purposes and to assess if necessary whether the child (or any other child) is in need of protection. The interview is conducted in a way that treats the best interests of the child as a primary consideration and includes the gathering of evidence when it is suspected a crime may have been committed against the child and gathering of evidence which may lead to a ground or referral to a children’s hearing being established. The Evidence and Procedure Review Next Steps Report emphasised the importance of ensuring such interviews are of a consistently high standard and follows a methodology that produces the best possible outcome in terms both of the witness’s experience and the quality of evidence elicited.

33. The Report found that whilst there were areas of good practice in joint investigative interviewing, there were differing approaches in different parts of the country. The Report recommended that the current guidelines for interviewing children, which were issued in 2011, should be reviewed and updated. The working group, referred to above, made further recommendations for how the current model for JIIs and the initial interview process could be strengthened.¹⁴

34. 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

¹⁴ Scottish Courts and Tribunals Service, *Evidence and Procedure Review Child and Vulnerable Witnesses Project – Joint Investigative Interviews Work-Stream: Project Report* (June 2017) available at <http://www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/reports-data/evidence-and-procedure-review.docx?sfvrsn=4>.

statutory guidance. Improving the quality of these interviews should lead to their increased use as a child's evidence in chief in criminal proceedings.

Taking Evidence by a Commissioner

35. As referred to in paragraph 17, legislation already enables a child complainant or witness involved in a criminal case to give pre-recorded evidence. This may occur by means of a police manuscript recorded statement or a visually/audio recorded statement (both ways would be considered to be the "prior statement" of the witness) followed by the special measure called "taking evidence by a commissioner". Alternatively, the whole of the child's evidence including the cross-examination may be taken using the same procedures for taking evidence by a commissioner. This special measure is provided for by section 271I of the 1995 Act.

36. Taking of evidence by a commissioner involves proceedings before a commissioner appointed by the court. This special measure must be specifically requested by application to the court and, as it is not a "standard" special measure under the 1995 Act, it requires the court to be satisfied that it is appropriate to enable the witness to give their evidence. All of the evidence of the child or vulnerable witness could be taken by means of this special measure. These proceedings are visually recorded and that recording is then shown to the court in evidence at the subsequent trial. That means that currently a vulnerable witness can pre-record their evidence in advance of the criminal trial.

37. However, research for the SCTS's Evidence and Procedure Review indicated that pre-recorded evidence is used only rarely relative to other types of special measures. According to the statistics available to the Review, the standard measures of screen, supporter or video link accounted for 99% of the 23,000 applications for special measures over the period July 2011 to June 2014.¹⁵ There appears to have been very little use made of giving evidence-in-chief in the form of a prior statement or evidence by a commissioner.

38. In order to encourage the greater use of evidence by a commissioner, the Lord Justice Clerk, Lady Dorrian, introduced a revised High Court Practice Note in effect from 8 May 2017.¹⁶ The revised Practice Note provides extensive new guidelines for the taking of evidence by a commissioner as to:

- when practitioners should consider whether a commission is required;
- what practitioners must do in preparation for seeking authorisation to take evidence of a vulnerable witness by a commissioner; and
- what issues the court will expect practitioners to address in an application in relation to taking of evidence by a commissioner.

39. Research by SCTS and COPFS indicates the positive impact of the Practice Note to date. In the first quarter of the 2018 calendar year there were 29 applications for evidence by commissioner in the High Court for child witnesses. This can be compared to 30 applications

¹⁵ Scottish Court Service, Evidence and Procedure Review Report (March 2015), para 2.14.

¹⁶ High Court of Justiciary Practice Note No.1 of 2017: Taking of Evidence of a Vulnerable Witness by a Commissioner, available at <https://www.scotcourts.gov.uk/rules-and-practice/practice-notes/criminal-courts-practice-notes-and-directions>.

made in the full 2017 calendar year, covering the pre-implementation and initial stages of the Practice Note. This is an encouraging development and the Scottish Government considers that this Bill could now create a major impetus towards pre-recording evidence.

Victims and Witnesses legislation

40. Improvements implemented through the Victims and Witnesses (Scotland) Act 2014 (“the 2014 Act”) and the Victims’ Code for Scotland ensure that victims have better access to information and wider access to special measures when giving evidence in court (e.g. giving evidence by video link, use of screens, and having a supporter present).

41. The 2014 Act also requires criminal justice organisations (Police Scotland, SCTS, COPFS, Scottish Prison Service and Parole Board for Scotland) to publish Standards of Service for Victims and Witnesses and to report annually against these. The Standards are based around the main principles set out in the 2014 Act: ability to obtain information; safety; accessing appropriate support; and effective participation. The agencies have signed up to a set of common standards which deal with fair and equal access to services; partnership working; and dealing with complaints. Each agency also sets out and reports against particular standards for their own service – these are reviewed each year alongside reporting on action taken during the year to meet the standards and planned action for the coming year.¹⁷

A victim-centred model for information and support

42. A number of reports considering victims’ experiences of the Scottish criminal justice system have highlighted that there is a need to improve and join up support for victims, for example by providing a one stop shop or single point of contact model. Following a multi-agency workshop held in September 2017, the Scottish Government is now funding Victim Support Scotland to develop a national model to build on existing good practice already taking place within the criminal justice agencies, other public authorities and third sector providers. This will be a key output from their £13.8 million grant award covering the period 2018/19 – 2020/21. Victim Support Scotland will seek to act in partnership with the range of other bodies already providing valuable support and information to victims of crime in developing an alternative model.

Scottish Homicide Service

43. Victim Support Scotland is also being funded by Scottish Government to lead the development of a new homicide service in Scotland, delivered in partnership with other organisations, to ensure that families bereaved by murder have access to a dedicated case worker and continuous support and are referred on to specialist services where appropriate.

¹⁷*Standards of Service for Victims and Witnesses 2018-19* (April 2018), available at <http://www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/standards-of-service-for-victims-and-witnesses-2018-19.pdf?sfvrsn=2>.

Experience of Sexual Offence Victims in the Justice System

44. Improving the experience of victims in the criminal justice system was a key theme of discussions with members to the Justice Expert Group when developing the Equally Safe Strategy's Delivery Plan. This included a membership of SCTS, Police Scotland, COPFS representatives and Rape Crisis Scotland. As such there are several actions within the Plan which specifically relate to activities which could be done now to improve parts of the justice process. SCTS undertook an action to improve the experience of witnesses who require to give evidence including requiring that the location of rape trials in the High Court is fixed so they will not be moved, to minimise trauma.

45. In addition, 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.

46. Changes to the law made in April 2017 require judges to direct juries in certain sexual offence cases on how to consider evidence – specifically explaining why a victim may not physically resist their attacker, nor report an offence immediately.¹⁸

47. The Scottish Government supported the related, high-profile "I Just Froze" campaign,¹⁹ led by Rape Crisis Scotland challenging wider public attitudes to the issue.

48. In March 2017, the Scottish Government established a taskforce for the improvement of services for children and adults who have experienced rape and sexual assault. A key priority for the taskforce is to improve the provision of appropriate services for victims of sexual crime who require a forensic medical examination. The Scottish Government has provided £76,000 funding for NHS Education Scotland to train at least 50 forensic physicians by the end of 2018/19 – a significant proportion of these are women which will increase the likelihood of meeting the victim's preference for the gender of their examiner.

Funding to tackle Violence Against Women and Girls

49. On 28 March 2015, the First Minister announced an additional £20 million over three years to be put towards a range of measures to tackle all forms of violence against women and girls. This three year budget allocation has had a direct and positive impact for victims at the front line of delivery, in line with its intended purpose to put in place better support for victims of gender based violence.

50. To reduce the stress caused to victims of domestic abuse, associated with long waiting times for trials, additional funding of £2.4 million was made available to COPFS and SCTS. This funding has now been mainstreamed, as announced within the Scottish Government's 2018-19 Budget, to keep waiting times down. Funding will also continue to be made available to

¹⁸ Further information available at <https://beta.gov.scot/news/tackling-abusive-behaviour-and-sexual-harm/>.

¹⁹ Further information available at <https://www.rapecrisisscotland.org.uk/i-just-froze/>.

support on-going work with justice agencies and third sector organisations to improve the experience of victims of sexual offences through the justice system, and to encourage activity in other sectors such as health and education to develop a consistent response to violence against women across Scotland.

Advocacy Services

51. The Scottish Government has taken action to strengthen advocacy and support available to victims of sexual crime. This included an additional £1.85 million in funding (2015-18) to Rape Crisis Scotland, which has enabled additional advocacy support workers to be allocated to every rape crisis centre in Scotland, and to establish new services in Orkney and Shetland.

52. Following an independent evaluation of the advocacy service,²⁰ Scottish Government funding was announced on 1 March 2018 of £1.7 million over two years (2018-20) to Rape Crisis Scotland to allow a continuation of the service and the appointment of additional advocacy workers where they are needed most.

53. A National Scoping report on advocacy services for victims of violence against women and girls was published in August 2017.²¹ This identified gaps in advocacy support for victims, including criminal justice advocacy services for child victims of sexual crime. A working group has been set up to develop recommendations on how criminal justice advocacy services for victims of violence against women and children can be improved.

Appropriate Adults

54. The Scottish Government published a consultation in April 2018 on the statutory provision of appropriate adults to support victims and witnesses with communication difficulties in police interview situations.²² The consultation addresses training of appropriate adults and inspection and oversight of the statutory service. The consultation is open until 26 June 2018.

Victim Impact Statements

55. As set out in the Equally Safe delivery plan,²³ the Scottish Government and COPFS are currently considering an extension of the list of prescribed offences in relation to victim impact statements.

56. The reforms proposed in this Bill should therefore be seen in the context of all other wider related and supportive work that is being undertaken to improve the criminal justice system for victims and witnesses.

²⁰ The Scottish Centre for Crime and Justice Research, *Evaluation of the Rape Crisis Scotland National Advocacy Project: Final Report* (2018) available at http://www.sccjr.ac.uk/wp-content/uploads/2018/02/RCSNAP-Evaluation-Final-Report_2018.pdf.

²¹ Available at <http://www.gov.scot/Publications/2017/08/9838>.

²² Available at <https://consult.gov.scot/criminal-justice/appropriate-adult-service/>.

²³ *Equally Safe: A Delivery Plan for Scotland's strategy to prevent and eradicate violence against women and girls 2017-21* (November 2017) available at <http://www.gov.scot/Publications/2017/11/5647>.

The Inspectorate of Prosecution Thematic Review of the Investigation and Prosecution of Sexual Offences

57. In November 2017 the Inspectorate of Prosecution in Scotland published its thematic review of the investigation and prosecution of sexual offences.²⁴ The review included 12 recommendations, all of which have been accepted by the Lord Advocate. COPFS has already made changes to give effect to a number of the recommendations, such as the development of a policy of exception reporting to the National Sexual Crimes Unit. COPFS has also taken action to reduce the number of cases in pre-petition investigation (which can extend the journey time to trial). It has brought its pre-petition caseload down from around 700 cases in October 2016 to 220 cases in May 2018. Work is ongoing to fulfil the other recommendations, including a review of all correspondence sent by COPFS Victim Information and Advice (VIA) service.

Memorandum of understanding between COPFS and Rape Crisis Scotland

58. In December 2017, the Lord Advocate and the Chief Executive of Rape Crisis Scotland signed a Memorandum of Understanding on the provision of anonymous feedback about victims' experiences of the criminal justice system and their views on the service provided by COPFS. The feedback, provided only with the victim's consent, will be used to identify ways COPFS can improve the service provided to victims of sexual crime, for example in relation to how the court process is explained, how information is shared and, where applicable, the person's experience in court. Through this feedback COPFS will seek to improve the service provided to victims of sexual crime.

CONSULTATION

Public consultation

59. Between 29 June 2017 and 29 September 2017, the Scottish Government consulted on pre-recording evidence of child and other vulnerable witnesses.²⁵ The focus of the consultation was on addressing identified legislative and practical gaps within the current arrangements for enabling child and other vulnerable witnesses to have their evidence pre-recorded in advance of trial, with a particular focus on strengthening and improving the current arrangements for evidence being taken by a commissioner. The consultation received 47 responses.²⁶

60. An overwhelming majority of respondents supported the longer term aim of a rule that, in most cases, child and vulnerable adult witnesses have all their evidence taken in advance of the criminal trial. There was general support for the initial focus being on child witnesses and complainers and also for focusing on the most serious crimes in the High Court. A majority also supported child accused being able to give pre-recorded evidence although most did not address some of the complications and difficulties in doing so. The new rule in the Bill on pre-recording will not be extended to children accused of crime as there are complex issues that require to be further explored in particular that requiring pre-recording could prejudice the child's right to

²⁴ Inspectorate of Prosecution in Scotland, *Thematic Review of the Investigation and Prosecution of Sexual Crimes* (November 2017).

²⁵ Scottish Government, *Pre-Recording Evidence of Child and Other Vulnerable Witnesses: Consultation* (June 2017), available at <http://www.gov.scot/Publications/2017/06/2392>.

²⁶ Available at <https://consult.gov.scot/criminal-justice/pre-recorded-evidence-for-criminal-trials/>.

remain silent and to not give evidence. Lady Dorrian’s working group recommended that further work be undertaken but focussing on other means of support rather than pre-recording.²⁷

61. There were limited detailed views provided on the wide number of technical changes to the pre-recorded evidence process proposed, but these did indicate general support for the type of changes outlined in the Scottish Government’s consultation.²⁸

NEW RULE REQUIRING PRE-RECORDING

Policy Objectives

62. One of the main reforms in the Bill is to create a new rule that where a witness (including complainers but not accused) is under the age of 18 and they are due to give evidence in the most serious cases, they will have their evidence pre-recorded usually by the special measure “evidence by commissioner” (unless an exception applies). In terms of defining the most serious cases, the new rule will apply in solemn proceedings and will cover the following list of the most serious or violent offences or those that are the most sensitive cases:

- Murder;
- Culpable homicide;
- Assault to the danger of life;
- Abduction;
- Plagium;
- A sexual offence to which section 288C of the Criminal Procedure (Scotland) Act 1995 applies (rape and other sexual offences);
- An offence of human trafficking (see section 1 of the Human Trafficking and Exploitation (Scotland) Act 2015);
- An offence under section 4 of the Human Trafficking and Exploitation (Scotland) Act 2015 (slavery, servitude and forced or compulsory labour);
- An offence under section 1 of the Prohibition of Female Genital Mutilation (Scotland) Act 2005 (offence of female genital mutilation);
- An offence under section 3 of that Act (aiding and abetting female genital mutilation);
- An attempt to commit an offence listed above.

63. However, the Bill also includes a power for the proposed statutory rule to be extended to adult “deemed vulnerable witnesses” in solemn cases. This could potentially include complainers in sexual offences, human trafficking, stalking and domestic abuse cases. The Scottish Government considers these categories of witnesses would also greatly benefit from the greater

²⁷ Scottish Courts and Tribunals Service, *Evidence and Procedure Review Child and Vulnerable Witnesses Project – Pre-Recorded Further Evidence Work-Stream: Project Report* (September 2017), para 98.

²⁸ Scottish Government, *Pre-recording Evidence of Child and other Vulnerable Witnesses: Consultation Analysis* (December 2017), available at <http://www.gov.scot/Resource/0052/00529192.pdf>.

use of pre-recording and this power therefore ensures that this Bill's most significant reform can be extended beyond child witnesses in due course.

64. As stated at paragraph 4, the Bill's main policy objective is in the first instance to improve how children, in the most serious cases, participate in our criminal justice system by enabling the much greater use of pre-recorded evidence. It was therefore considered appropriate that the rule applying to children giving evidence should be on the face of the Bill. This emphasises that the initial focus of the reform is intended to benefit children. However, the Scottish Government considers that other categories of witness could also greatly benefit from the greater use of pre-recording in the future and the regulation making power provides a means by which the Bill's most significant reform can be extended beyond child witnesses at a later date.

Key Information

65. As referred to above, given that the new rule imposes significant demands on the criminal justice system it is proposed that it should initially apply to child witnesses in the most serious cases. Given the relatively low numbers of witnesses who currently have their evidence pre-recorded each year the extent of this reform will require a substantial shift in current practice. Although the Bill's provisions as currently proposed link the new rule to specific offences, a power is proposed in the Bill to add to or to remove that list of offences. This means that ultimately it could be possible for the rule to apply to all child witnesses in solemn cases. In consequence of such a considerable change, it will be important that this is phased in to ensure its smooth implementation in practice and the Bill proposes a number of secondary legislation powers to be able to do so:

- a power which will allow for a phased commencement by age (under 12, 16, 18); and
- a power which will allow for a phased commencement by court forum - High Court, Sheriff Court Solemn, and specific Sheriff Courts (in solemn cases only).

66. In addition, extension of the new statutory rule to adult "deemed vulnerable witnesses" (as outlined in paragraph 63) is likely to have to be commenced on a phased basis, e.g. complainers in sexual offence cases in the High Court.

67. Many responses to the consultation also commented that if a rule on pre-recording is to apply, it is still important that a child's wishes are taken into account (i.e. if they wish to give evidence during the actual trial). The Bill provides that where a witness aged 12 or over expresses a wish to give evidence by other means and the court is satisfied that this would be in the child's best interests, then the court will order that the child's evidence be taken by non-pre-recorded means. It is not proposed that the rule be displaced in any other circumstances other than if pre-recording the child's evidence could give rise to significant 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 if the child were to give evidence at the hearing. Furthermore, where such an order is made it is to provide for the child's evidence to be taken by an alternative method which does not require them to be present in the court room during the trial, unless once more specific criteria for the displacement of this new rule are met. Essentially, subject to the future addition of any new special measures to the choices available, this will mean that the evidence will probably be taken by live television link instead.

68. 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.

Consultation

69. An overwhelming majority of respondents to the consultation supported the longer term aim of a rule requiring that child and vulnerable adult witnesses have all their evidence taken in advance of the criminal trial. The consultation emphasised that the initial focus was likely to be on child witnesses and this was an approach that was generally supported. The consultation analysis sets out some of the views of respondents to the question of how best the greater use of pre-recording could be phased in including whether it should begin with younger children and also whether it should apply first to specific court venues, e.g. the High Court, or to types of offences.²⁹

Alternative Approaches

70. An alternative approach would have been to have a rule requiring pre-recording of the evidence of all vulnerable witnesses which could then be phased in by stages or to add specific other categories of adult vulnerable witness to which the rule could apply in the future. However, the Scottish Government considers that this is already an ambitious programme of reform which will present implementation challenges for the criminal justice system. It will be important to ensure that extension of the new rule can be managed effectively and to the benefit of deemed vulnerable witnesses.

71. 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. As discussed at paragraph 60, it is of note that the vision of Lady Dorrian's working group did not extend to vulnerable accused under 18 but they considered further work should be undertaken. Significant progress has been made in keeping children accused of crime out of court through a preventative, whole system approach to offending involving children and young people. The number of young people (12-17) proceeded against in Scotland's courts has fallen by 79% from 9,813 in 2006-07 to 2,065 in 2016-17. A focus on early and effective intervention and diversion helps keep children out of court and formal systems, which is backed by evidence on the impact of system contact on children, many of whom have experienced trauma and adverse childhood experiences. A collaborative approach to implementation of the youth justice strategy, Preventing Offending: Getting It Right For

²⁹ Page 10 of the consultation analysis available at <http://www.gov.scot/Resource/0052/00529192.pdf>.

Children and Young People, includes work with partners to maximise diversion and enable more cases to be remitted from court to Children’s Hearings. As part of the work to develop statutory guidance for JIIs, as discussed at paragraph 32, specifically in relation to evidence and procedure issues relating to the interviewing of young children suspected of serious harmful behaviour, consideration will be given to the work being progressed associated with the Age of Criminal Responsibility (Scotland) Bill to extend any best practice interview principles for older children suspected of committing criminal acts.

72. For these reasons, the Scottish Government considered that there could be many unintended consequences if the new rule for pre-recording evidence was to apply to the accused before these issues had benefitted from further consideration.

TIMING OF COMMISSION

Policy Objectives

73. One of the policy objectives is to remove any current legislative barriers that may have a detrimental effect on the greater use of pre-recorded evidence.

74. In the “Evidence and Procedure Review – Pre-recorded further evidence workstream” it was noted that “commissions can only take place after an indictment has been served”.³⁰ In *MacLennan v HMA* this was recognised as creating the potential for a long period of time to elapse between when a child’s account of alleged events is taken at a JII and any subsequent commission hearing.³¹ This has frequently been cited, including in the Evidence and Procedure Review, as a reason why commissions are not used more often.

75. The Court in *MacLennan v HMA* noted, “this problem could be solved, however, by introducing a relatively simple provision permitting the evidence of young children to be taken on commission at any time after the appearance on petition. That may be a matter which the Government might consider in the relatively short term.”³²

Key Information

76. There should be no legislative barriers to preclude a commission from taking place prior to service of the indictment, if it is appropriate to do so (i.e. the case is sufficiently prepared to allow a commission to take place). The Bill therefore makes provision to amend the current legislative provisions which could act as a statutory barrier to commissions taking place in advance of an indictment being served. However, in the short to medium term it is considered that applications for evidence by commissioner in advance of the indictment are likely to be rare as it is only at the point at which an indictment is served that it will become clear what requires to be proven in a specific case. It is unlikely to be in the best interests of the witness to have their evidence recorded at too early a stage. The defence may not be certain of the exact charges the accused is facing and this could result in a further evidence taking session with the witness being

³⁰ Scottish Courts and Tribunals Service, *Evidence and Procedure Review Child and Vulnerable Witnesses Project – Pre-Recorded Further Evidence Work-Stream: Project Report* (September 2017) at paras 45-46.

³¹ *MacLennan v HMA*, 2016 JC 117, para 28.

³² *MacLennan v HMA*, 2016 JC 117, para 29.

required, particularly if further avenues of cross-examination are identified once the exact charges the accused is facing are certain. Removing the pre-indictment barrier does however give flexibility and future proofs the legislation so that at least a commission could be held pre-indictment if that was considered appropriate in a specific case.

Consultation

77. There was overwhelming support in the responses to the consultation for the legislative barrier to be removed to allow a commission, where appropriate, to take place prior to the service of indictment.

Alternative Approaches

78. One alternative approach would be to maintain the status quo, however this would not have addressed the legislative barrier which exists at present. Given the policy objective is to allow evidence to be taken as soon as possible, this approach was discounted.

79. Another alternative approach would be to *require* pre-recording to happen pre-indictment rather than leave it to the party citing the witness to apply at the time they consider appropriate. However, in the vast majority of cases it would not be practical for commissions to be held in advance of an indictment given the requirement to know what is being prosecuted. The nature of the charge would have to be clear cut and relatively straightforward for any commission to be held in advance of the indictment being served.

GROUND RULES HEARING

Policy Objectives

80. The policy objective is to ensure that prior to any commission taking place, not just those where the new rule applies, all parties are prepared and the issues as set out by the current Practice Note are considered. The Bill provides flexibility for the court to conduct a separate grounds rules hearing if appropriate, where the issues have not been dealt with as part of the preliminary or other relevant hearing. This reform should therefore benefit all vulnerable witnesses where an application has been made to pre-record their evidence.

Key Information

81. At present there is already a mechanism for dealing with the issues to be considered as set out by the current Practice Note³³ where there is to be a commission - these are currently dealt with at the preliminary hearing in High Court cases. Whilst numbers of commissions are low at the moment, early indications seem to be that dealing with these matters at the preliminary hearing are working well. Therefore, the expectation is that this will continue. However, flexibility will be provided for the court or the commissioner to conduct a separate ground rules

³³ High Court of Justiciary Practice Note No.1 of 2017: Taking of Evidence of a Vulnerable Witness by a Commissioner, available at <https://www.scotcourts.gov.uk/rules-and-practice/practice-notes/criminal-courts-practice-notes-and-directions>.

hearing if appropriate, where the issues have not been dealt with as part of the preliminary or other relevant hearing.

82. 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.

Consultation

83. There was overwhelming support in the responses to the consultation to make provision for a ground rules hearing.

Alternative Approaches

84. One alternative approach would be to maintain the status quo, and continue dealing with the issues to be considered where there is to be a commission as set out in the Practice Note at the preliminary hearing or first diet. However, depending on the timing of the commission hearing, there may be instances where this would not be compatible with the timing of the preliminary hearing/first diet. Also, given the support for the introduction of a ground rules hearing in the consultation and by the senior judiciary, it was considered appropriate to allow for the flexibility to hold a separate hearing where it is thought necessary to ensure proper consideration of the issues is given by all parties concerned.

85. Another alternative approach would be to require a separate ground rules hearing where any complainer or witness is to give evidence by way of commissioner. However, there may be many instances where a separate ground rules hearing may not be necessary and matters can continue to be dealt with as part of the preliminary hearing. It is therefore more appropriate to allow the court the flexibility to decide when a separate ground rules hearing is appropriate in the specific circumstances of the case before it.

COMMISSIONER

Policy Objectives

86. The policy objective is to ensure that the commissioner has the same powers as a judge to review the arrangements for a vulnerable witness giving evidence and encourage that the same judge undertake the ground rules hearing and the commission but only where it is reasonably practicable to do so. The commissioner is a judge or sheriff, appointed by the court to hear the evidence of the vulnerable witness at the commission hearing.

Key Information

87. Section 271I of the 1995 Act allows evidence by a commissioner to be used as a special measure for vulnerable witnesses. The court may appoint a commissioner for these purposes. Where the trial is to be in the High Court, the commissioner must be a judge of the High Court,

or in any other case, a sheriff. At present it is often the case that the commissioner is not the same judge who will go on to preside at the trial. The Bill provides that the same judge should undertake the ground rules hearing and the commission where it is reasonably practicable to do so and also that they have the same powers as a judge to review the special measures to be provided for that witness.

Consultation

88. The consultation asked if the same individual (i.e. the judge or sheriff) who acts as the commissioner should also preside at the trial. There was a mixed response to this question and further engagement with COPFS and SCTS suggested that to set out such a requirement in primary legislation would create inflexibility and may be operationally impractical, for example in terms of scheduling court business.

Alternative Approaches

89. One alternative approach would have been to make no further requirements of the individual acting as commissioner. However, given that respondents to the consultation frequently cited the benefits of familiarity and consistency for the witness, this approach was discounted.

90. Another alternative approach would be to require that the same judge undertake the ground rules hearing and the commission. However, this would likely cause operational issues and would limit the flexibility of combining the ground rules hearing with the preliminary hearing or first diet. It is therefore considered more appropriate to allow this to happen where it is reasonably practicable to do so. It is not considered practicable either for the judge who presides over the actual criminal trial to have to be the same as the commissioner who took the pre-recorded evidence. However, given that all commissioners are either judges or sheriffs this is not considered to be a specific issue and it is more important that these reforms do not restrict the court too much in how it organises its business.

VULNERABLE WITNESS NOTIFICATION PROCESS FOR STANDARD SPECIAL MEASURES

Policy Objectives

91. The policy objective is to streamline the current vulnerable witness notification process for standard special measures by making it an administrative rather than judicial process.

Key Information

92. Section 271A(2) of the 1995 Act requires the party citing a child witness or deemed vulnerable witness to lodge with the court a vulnerable witness notice specifying the special measures sought for that witness. Such a notice must be lodged with the court even if the witness only requires the use of standard special measures and must be in writing.

93. The effect of section 271A(4A) and section 271A(5)(a)(i) is that when a notice in terms of section 271A(2) seeking only “standard special measures” is lodged, the court is obliged (after

satisfying itself that the witness is genuinely a child/deemed vulnerable, if it thinks that necessary) to make an order authorising the use of any standard special measure which has been sought. If a notice seeks any special measure which is not a standard special measure, the court may make an order authorising the use of those special measures if the court is satisfied that it is appropriate to do so. Otherwise, there is provision for hearings where needed before a decision on special measures is made. The defence cannot object to the granting of standard special measures because of the entitlement or right of the qualifying witness to them.

94. In practice this means that the vast majority of notices currently being lodged require to be placed before a judge who, in terms of the provisions, has little discretion other than to make the order sought, nor can the other parties object. 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.

95. The reason for these provisions is to alert the court to the witness vulnerability and to ensure that the requisite special measures are available for the witness. However, as noted by the Inspectorate of Prosecution in Scotland, the removal of the current requirement to lodge notices may provide child and deemed vulnerable witnesses with more certainty that the special measures of their choice were guaranteed and the “abolition of the industry of drafting notices would also free up valuable VIA [COPFS Victim Information and Advice service] time that could be devoted to their core functions.”³⁴

96. The new vulnerable witness notification process will not be used where the new rule on pre-recording of evidence applies. The new rule is a major development for the Scottish criminal justice system, and taking evidence by commissioner requires early judicial input before the evidence is actually taken (for example, a court order is required to appoint a judge or sheriff to act as commissioner). In these circumstances, having a judicial rather than administrative process would be more appropriate. The frequency with which this new streamlined process is used will of course also depend on whether and how quickly the new statutory rule is extended to other categories of adult deemed vulnerable witness.

Consultation

97. The introduction of a simplified notification process where standard special measures are sought was not part of the formal public consultation. However, the Scottish Government has consulted with the COPFS, SCTS and representatives from the Public Defence Solicitors’ Office, the Faculty of Advocates and the Law Society of Scotland on these provisions. In principle, they could see the merits of such a change and had no specific objections to such a reform being taken forward. If this reform is passed by the Scottish Parliament, the means by which the intimation is given will be important and this could be dealt with by Act of Adjournal. The Scottish Government accepts that any mechanism should be secure and available to all parties including all defence solicitors.

³⁴ Inspectorate of Prosecution in Scotland, *Thematic Review of the Investigation and Prosecution of Sexual Crimes* (November 2017), para 256-257.

Alternative Approaches

98. The alternative approach would be to maintain the status quo, however this would not have addressed the inefficiencies in the current process. Given the policy objective is to streamline the current vulnerable witness notification process for standard special measures, this approach was discounted.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

99. An Equality Impact Assessment has been published alongside the Bill. It is considered that none of the provisions will give rise to the possibility of those affected being treated less favourably due to their protected characteristics. Indeed, some of the reforms relating to child witnesses under 18 are intended to ensure that their rights and experiences are improved due to their protected characteristic of age.

Human rights

100. The Scottish Government is satisfied that the provisions of the Bill are compatible with the European Convention on Human Rights (ECHR), and are within the Parliament's legislative competence. The existing provisions of the 1995 Act making special measures available and entitling certain categories of vulnerable witness to particular types of special measure are widely accepted as being compatible with the accused's right to a fair trial and with ECHR requirements more generally. There is an exception to the new rule requiring pre-recording in any case where this is considered by the court to be necessary in the interests of justice. The Bill is also considered to be fully compatible with other international human rights instruments such as Articles 10 and 11 of the Universal Declaration of Human Rights and Article 14 of the International Covenant on Civil and Political Rights.

Island communities

101. The Bill has no differential impact upon island communities. The provisions of the Bill apply equally to all communities in Scotland.

Local government

102. The Scottish Government is satisfied that the Bill has minimal direct impact on local authorities. Any impact on the business of local authorities has been captured in the Financial Memorandum.

Sustainable development

103. The Bill will have no negative impact on sustainable development. The provisions in the Bill form part of wider work being taken forward by the Scottish Government and justice agencies to improve the operation and efficiency of the justice system, including through greater use of technology. A key aim is to reduce delays and the inconvenience for victims, witnesses

and others. This has potential to deliver wider benefits beyond the justice system, for example in reduced trauma for victims and reduced loss of working hours for witnesses.

104. The potential environmental impact of the Bill has been considered. A pre-screening report confirmed that the Bill has minimal or no impact on the environment and consequently that a full Strategic Environmental Assessment does not need to be undertaken. It is therefore exempt for the purposes of section 7 of the Environmental Assessment (Scotland) Act 2005.

This document relates to the Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill (SP Bill 34) as introduced in the Scottish Parliament on 12 June 2018

VULNERABLE WITNESSES (CRIMINAL EVIDENCE) (SCOTLAND) BILL

POLICY MEMORANDUM

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