JUSTICE 2 COMMITTEE

AGENDA

4th Meeting, 2003 (Session 2)
Tuesday 2 September 2003

The Committee will meet at 2.30 pm in the Chamber, Assembly Hall, The Mound, Edinburgh.

1. **Vulnerable Witnesses (Scotland) Bill**: The Committee will take oral evidence on the general principles of the Bill at Stage 1 from—

   Shona Barrie, Head of Victims, Witnesses and Vulnerable Accused Team, Crown Office and Procurator Fiscal Service

   David McKenna, Chief Executive and Barry Jackson, Policy Officer, Victim Support Scotland

   Peter Beaton, Head of Civil Justice & International Division, Barbara Brown, Head of Civil Justice & Evidence Policy Branch, Lesley Napier, Vulnerable Witnesses Bill Team Leader and Merlin Kemp, Vulnerable Witnesses Bill Team Member, Scottish Executive.

2. **Vulnerable Witnesses (Scotland) Bill**: The Committee will consider written evidence received at Stage 1.

Gillian Baxendine / Lynn Tullis
Clerks to the Committee, Tel 85054
The following papers are enclosed for this meeting:

**Item 1 – Vulnerable Witnesses (Scotland) Bill**

Note by the Clerks – Summary of evidence received J2/S2/03/4/1
Submission from Victim Support Scotland J2/S2/03/4/2

Papers for information
Vulnerable Witnesses Bill - written evidence received

Judicial Appointments Board for Scotland
– Annual Report 2002-2003

**Forthcoming Meetings:**
Monday 8 September – Joint Committee awayday (all day)
Tuesday 16 September – Committee meeting (afternoon)
Wednesday 17 September – Joint Committee with Justice 1 Committee (morning)
Tuesday 23 September – Committee meeting (afternoon)
Tuesday 30 September – Committee meeting (afternoon)
Wednesday 1 October – Joint meeting with Justice 1 Committee (morning)
Tuesday 7 October – Committee meeting (afternoon)
Introduction

1. Members will recall that the Vulnerable Witnesses (Scotland) Bill was introduced in the Parliament on 23 June 2003 and that the Justice 2 Committee has been designated lead Committee for consideration of the Bill.

2. The Committee agreed at its meeting on 24 June to issue a call for written evidence. This note summarises the responses received to enable Members to decide which individuals or organisations to invite to give oral evidence as part of its Stage 1 consideration of the Bill.

Background

3. The purpose of the Bill is to improve the way in which all witnesses are treated by the justice system. It proposes to introduce a number of changes to existing procedures and practices to enable better assistance and protection to be given to vulnerable witnesses, especially children. Its aims include—

- early identification of vulnerable witnesses;
- training for police officers and other conducting investigation interviews to ensure greater use can be made of recordings of vulnerable witnesses’ statements in court;
- consistency in the way that special measures are used;
- more extensive use of existing special measures, for example evidence on commission;
- increase in resources to meet the greater demand for special measures;
- greater awareness on the part of judges, lawyers and other officials about the appropriate treatment of vulnerable witnesses.

Responses received

4. The Committee’s call for evidence invited comments on the general principles of the Bill and particularly on any omissions from the Bill; the consultation process; the practical implications of putting the measures into place; and any other steps required to support the Bill’s implementation.

5. Fifteen submissions have been received so far from the following organisations and a summary is attached as an annex to this report. The full submissions are included with the Committee papers:
Victim Support Scotland
Disability Rights Commission
Association of Chief Police Officers in Scotland (ACPOS)
Scottish Legal Aid Board
Scottish Association for Mental Health (SAMH)
Scottish Women’s Aid
Donald MacKinnon
ChildLine Scotland
Scottish Children’s Reporter Administration
Justice for Children Child Witness Reform Group
Joint submission from various children and women support organisations
Eighteen and Under
Moira Anderson Foundation
Scottish Child Law Centre
Scottish Human Rights Centre

**Oral Evidence**

6. The Committee will take evidence at this meeting from the Executive Bill Team, the Crown Office and Victim Support Scotland. In addition it is due to take further oral evidence on 16, 23 and 30 September. The Minister is due to give evidence on 30 September and so there is currently time available for the Committee to hear from a further five individuals or organisations during its Stage 1 consideration. The Committee can also schedule additional meetings in order to take further evidence if required.

7. In order to acquire a broad range of views it is suggested that the Committee consider inviting the following organisations to give oral evidence—

Scottish Women’s Aid
Scottish Child Law Centre
Justice for Children
Faculty of Advocates
Scottish Human Rights Centre

8. Any specific points arising from the evidence could also be followed up in writing.

9. The Bureau has agreed that Stage 1 should be completed by 21 November and so it is planned that all evidence will be gathered by the October recess with a view to a report being agreed by the beginning of November.

**Additional evidence**

10. Members will recall that at the meeting on 24 June it was agreed to investigate ways to seek the views of individual vulnerable witnesses. A questionnaire has been circulated widely and has been available on the Parliament’s website throughout recess. A deadline of 15 September has been set and some responses have already been received.
11. The possibility of organising confidential interviews is also being explored and it is hoped that some witnesses will be willing to give their views by this means. The Committee will be kept informed of progress being made.

Recommendations

12. The Committee is invited to note the summary of evidence and agree which organisations or individuals it wishes to call to give oral evidence.

Clerk to the Committee
ANNEX

Summary of Evidence

1. Overall, submissions to the inquiry were supportive of the general principles of the Bill and its aim to improve the treatment of witnesses in the justice system.

2. Some more specific concerns were raised by individual organisations which are detailed below.

**Victim Support Scotland**

3. Victim Support Scotland supports the range of measures which the Bill proposed to put in place for child witnesses. It also supports the wide-ranging set of factors to be taken into account by the court when considering discretionary entitlement. However it calls for training for agencies within the justice system to recognise vulnerable witnesses and improve victim awareness.

4. It also recommends that all special measures be available in all courts and that training and guidance is provided for agencies in the correct application of these special measures. It notes that delays in cases are a major cause of distress and that to avoid these, calls for assessment of vulnerability to be made early in the process and to integrate special measures into existing trial diets. It suggests that strong judicial guidance is necessary to support this.

5. Finally, the organisation calls for further guidance and monitoring to ensure that the intention of the Bill is not diminished by provision for the application for special measures to be denied by the court where there is significant risk to the fairness of the trial.

**Disability Rights Commission**

6. The Disability Rights Commission considers that the definition of disability from the Disability Discrimination Act 1995 should be used in the Bill as this would assist the court in determining whether the person’s disability should be taken into account when deciding whether application for special measures should be granted.

**ACPOS**

7. ACPOS suggest a number of amendments to the Bill which include amendments to the definitions of vulnerable witnesses and increased protection for child witnesses.

8. It makes further recommendations in relation to special measures for witnesses and calls for the inclusion of Appropriate Adult Schemes as a special measure. It highlights concern at the provision within the Bill for the accused to be present when a witness is giving evidence on commission. It also proposes a more flexible approach to the use of supporters to allow the supporter to be someone who is also a witness in the trial, where circumstances dictate.
Scottish Legal Aid Board
9. The Scottish Legal Aid Board highlights its concerns at the financial and administrative implications of the Bill. It expresses concern that the measures in the Bill will lead to a resource implication for the Scottish Legal Aid Fund and highlights areas where it has particular concerns. In particular it has some concerns about the predicted number of cases which may involve vulnerable defence witnesses and consequently the accuracy of costings made in the Financial Memorandum.

Scottish Association for Mental Health
10. The Scottish Association for Mental Health concerns relate to the definition of vulnerable witness with regard to people with mental disorders. It believes that the court should not have to assess the need for special measures for such witnesses against the list of factors to be taken into account. It is concerned that it is unclear what evidence would be required by the court to be satisfied that a witness had a mental disorder and also whether this information would be made public.

Scottish Women’s Aid
11. Scottish Women’s Aid welcomes the provisions of the Bill but makes a number of specific comments. These include comments on the definition of a vulnerable witness; the need for training for justice agency staff concerned in order to ensure appropriate and effective use of the special measures available; the automatic entitlement for child witnesses, and in particular the power the court has to revoke this automatic right under particular circumstances; and the power for the court to review the use of special measures which could disadvantage witnesses who had previously been granted special measures which were subsequently revoked, particularly for child witnesses.

12. It also suggests an expansion of the provision to allow expert evidence; calls for the extension of some provisions available in criminal cases to be available in civil cases; and calls for the procedures relating to the admission of restricted evidence to be put in writing as provided for in the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 to be extended to children’s hearings.

13. It highlights the need to publicise the provisions of the Bill to ensure witnesses and all agencies involved are aware that these are available. It recommends that steps are taken to ensure adequate resources are available and that delays be reduced. It also recommends that special measures should be applied consistently and that adequate facilities should be made available within court premises.

Donald MacKinnon
14. Donald MacKinnon calls for the removal of the threat of defamation action on an individual who reports a concern to an appropriate authority if the authority takes no action against the person whose conduct the complaint is made. He also requests that vulnerable people should be able to report abuse in private. Mr MacKinnon has lodged petition PE578 on this issue which will be considered by one of the Justice Committees.
ChildLine Scotland
15. ChildLine Scotland highlights concerns that the Bill does not take account of the trauma caused by the whole judicial process and that support for vulnerable witnesses should be available at every stage in the process. It is concerned that the provision for evidence on commission does not protect children as there are provisions for the accused being present in the room while evidence is being taken. Likewise, it is concerned that the use of screens is also inadequate to protect children as they will be in the same room as the accused. It supports Donald MacKinnon’s call for removal of threat of defamation for children which it feels will encourage more children to come forward.

Scottish Children’s Reporter Administration
16. The Scottish Children’s Reporter Administration supports the measures in the Bill as a step towards improving support available for vulnerable witnesses. It calls for the Bill to allow for the supporter of a vulnerable witness also to be a witness in the proceedings.

Justice for Children
17. The Justice for Children Child Witness Reform Group comprises Children 1st, NCH Scotland and ChildLine Scotland. It highlights two omissions from the Bill, namely the establishment of a Child Witness Support Service to meet the support arrangements for the child prior to and post court appearance and the establishment of a Children’s Justice Section within the Justice Department to protect the rights, interests and welfare of children.

18. It also sets out specific concerns on the provisions within the Bill. It does not believe that the Bill as drafted gives children the automatic entitlement to special measures as it intends to do. It seeks a culture change within the justice system to enable full participation of children and other vulnerable witnesses and urges the committee to seek further information on what other measures will be introduced to achieve this culture change.

19. The group calls for a better system of identifying child witness cases than exists at present. It also makes specific comments on the provision of special measures and highlights the need for sufficient investment in the staff and technology required to deliver these and to ensure that they are available in every sheriff court. It makes further comment on support available for children provided by a supporter in the court; the need for action to be taken to address the problem of delays in cases; the need for adequate training for those involved in child witness cases; the need to ensure that children are protected on the occasions when they elect to give evidence in court; and the need further explore the law in relation to defamation.

Joint submission from various children and women support organisations - Children in Scotland; Aberlour Child Care Trust; Scottish Women’s Aid; Eighteen and Under; Save the Children; Children 1st; NCH Scotland; ChildLine Scotland
20. These organisations raise specific concerns about the effect delays have on vulnerable witnesses and how these undermine the intention of the Bill and have a particular impact on child witnesses. They have further concerns that the delays
currently experienced may be increased by the measures in the Bill, for example
the holding of a pre-trial diet under s271A(10) of the Bill. These issues could be
overcome by allowing children to give evidence by videotape or on commission in
advance of the proceedings.

_Eighteen and Under_
21. Eighteen and Under expresses concerns on the issue of delays and highlights
the need for a culture of urgency in cases involving child witnesses.

_The Moira Anderson Foundation_
22. The Moira Anderson Foundation expresses concern that the requirement for
corroboration is not addressed by the Bill. In particular raises concerns at the
Moorov Doctrine which allows for corroboration by separate witnesses in
separate circumstances if the crimes are related in character, circumstances and
time, but only for crimes which are no more than three years apart. The
Foundation believes that this undermines the effectiveness of the Bill.

_Scottish Child Law Centre_
23. The Scottish Child Law Centre highlights a number of issues within the Bill.
These include the need to address the adversarial nature of criminal justice which
requires the cross-examiner to discredit witnesses. This can be distressing for
child witnesses and in this context it calls on the recommendations of the Lord
Advocate’s working group on child witnesses to be implemented. It recommends
the establishment of a Child Witness Support Service within the Justice
Department to provide support for child witnesses. It recommends that children’s
evidence in criminal cases should be given by video and that it would only be in
exceptional cases that evidence would be given live in court. Where a child is
giving evidence live then an intermediary should be used.

24. The Centre also highlights the need to establish support for children; and to
balance the rights of children and against the power of the court to determine or
remove. The Centre also calls for more scope for children to give evidence
completely by video and to use an intermediary.

_Scottish Human Rights Centre_
25. The Scottish Human Rights Centre suggests that the definition within the Bill of a
child as someone under 16 should be brought into line with the international legal
definition as someone under 18 years. It also proposes that the protection
afforded children under 12 should be extended to all children under 18.

26. It calls for people with learning difficulties or communication difficulties to be
mentioned specifically in the Bill. It calls for the inclusion of the accused as a
vulnerable witness to be extended beyond the category of child witness to include
anyone who would fall within the category of vulnerable witness.

27. It has serious concerns at the proposal to remove the rights of the accused to
conduct their own defence in cases which are not of a sexual nature. It also
makes more specific proposals to improve the experience of giving evidence for
all witnesses.
The Vulnerable Witnesses (Scotland) Bill represents a significant step in recognising the need to improve the treatment of witnesses within the justice system in Scotland. It is unfortunately commonplace for witnesses to suffer distress or trauma during criminal proceedings and especially when giving evidence. This impacts not only on the witness at the time of the proceedings, but also on their life and work, their family and friends. The distress of presenting evidence may also negatively impact on the quality of the evidence itself.

Victim Support Scotland strongly welcomes this Bill. In conjunction with the necessary culture change that is required to understand and account for the needs of victims and witnesses within the justice system, this Bill should substantially improve the position of witnesses. As an organisation which supports victims and witnesses, we favourably endorse measures which should serve to reduces the distress or trauma that is so often experienced. With this we anticipate improved delivery of evidence resulting in better access to justice.

Background

The UN Declaration of the Basic Principles of Justice for the Victims of Crime and Abuse of Power states that “victims should be treated with compassion and respect for their dignity”. Section 6 states that:

“The responsiveness of judicial and administrative processes should be facilitated by:

- “Providing proper assistance to victims throughout the legal process;
- “Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation”

The European Convention on Human Rights gives everyone the right to a fair trial:
“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

Rights of victims are codified within the European Council Framework Decision of March 2001 which states that each Member State shall:

- “continue to make every effort to ensure that victims are treated with due respect for the dignity of the individual during proceedings”
- “ensure that victims who are particularly vulnerable can benefit from specific treatment best suited to their circumstances”

**Comments on the Bill**

**Children under 16**

**Victim Support Scotland supports the provision of automatic entitlement to special measures for those under 16 at the start of the trial.** It is widely recognised that children require specialist support and may be particularly exposed to fear or distress in judicial proceedings. The justice system in Scotland – and in particular court proceedings – is of an adversarial nature. The court environment is formal and intimidating. Often sight of the accused or the conduct of a defence agent may be particularly distressing. As such it is not an environment that is naturally conducive to gaining the best evidence from children.

Many aspects of giving evidence can cause children to become fearful or distressed. It is not just participation within a trial – anticipation of proceedings may also give rise to anxiety. The child’s home life can be adversely affected, and withdrawal at school, or from family and friends is also often apparent.

Although previously under 16s may have been generally eligible for special measures, there are many cases where access was not available. Instances occurred where children were still subjected to the pressures of appearing at a court trial without any special measures available. This is a situation that should not be repeated. Accordingly the automatic entitlement is a vital step in improving the experience of children in the justice system.

**Children under 12**

When giving evidence, younger children may be particularly vulnerable to intimidation, fear or distress. It is certainly the case that greater support and assistance will be required. Children under 12 often are often less able to understand the proceedings facing them. **Accordingly, Victim Support Scotland strongly supports the Executive’s view that no child under 12 in cases involving sexual or violent matters should have to personally give evidence in court.**
Continuing entitlements

The removal of a special entitlement because a birthday has passed may cause distress and adversely affect the quality of the evidence that the young person is able to present. It is reasonable that special measures adopted at the start of proceedings are continued throughout. **Victim Support Scotland supports the provision that the child witness’s age at the commencement of proceedings should indicate automatic entitlement to special measures.**

Discretionary Entitlements

Many witnesses suffer fear or distress when faced with a court appearance. This often compounded by meeting the accused in the public areas of the court. The adversarial nature of the system makes some witnesses feel as if they are on trial.

Beyond the court setting itself, some witnesses may have experienced intimidation. This can lead to the witness suffering additional fear and distress and can diminish the quality of evidence.

There is a variety of situations where the witness may require special measures in order to be able to present best evidence while at the same time having access to appropriate support. **Victim Support Scotland strongly supports the wide ranging set of factors which a court may take into account when assessing eligibility for special measures.**

We recognise that any discretionary entitlement is subject to the parties identifying witness’s vulnerability and ultimately to the court considering that indeed the witness is vulnerable. The Bill provides useful guidance as to who may suffer fear or distress. Importantly it is essential that agencies within the justice system at present are sufficiently trained to recognise vulnerability. It is our experience that statutory criminal justice agencies could benefit from improved victim awareness. Further training and policy guidance will be necessary to ensure that the Bill is applied effectively.

**Victim Support Scotland calls for training for criminal justice professionals in identifying and working with vulnerable witnesses. Guidance and policy should be developed throughout criminal justice agencies to ensure that the provisions of this Bill are appropriately met.**

Special Measures

Special measures are vital tools in enabling vulnerable witnesses to present best evidence. **Victim Support Scotland supports the measures provided by Bill. We recommend that training and guidance in the correct application of special measures is required.**

In addition, we would like to ensure that all special measures are available in all cases where witnesses require them. Travelling to another court area causes both difficulty and distress for witnesses and their families who accompany them. **Victim**
Support Scotland calls for the provision of special measures in all court areas.

Delays

In our experience, delays are major causes of distress to victims and witnesses. It is often the case that the witness has prepared themselves to attend court and give evidence. Delays and adjournments often cause additional distress and upset.

Victim Support Scotland recommends that hearings for special measures are properly integrated into existing trial diets. It is important for the assessment to take place as early on as possible (as has been provided for in the Bill).

Uncertainty over whether a witness will be entitled to special measures in itself may lead to distress and concern. An understanding of the practical arrangements of giving evidence may be extremely important to the witness – especially where the witness is vulnerable or suffering concern and distress.

We are interested to ensure that early assessment of the witness’s vulnerability takes place to ensure special measures hearings are integrated the first trial diets. Victim Support Scotland recognises that strong judicial guidance is necessary to ensure that applications for special measures are lodged in good time.

Significant risk

The Bill provides that some witnesses who may have special measures applications lodged on their behalf may be denied these in cases where there is “significant risk to the fairness of the trial” that outweighs “risk of prejudice to the interests of the witness”. Victim Support Scotland recommends that further guidance and monitoring is established to ensure that the intention of this Bill is not diminished by the effects of this provision.

Conclusion

It is our view that this Bill will materially improve the experience of witnesses within the Scottish justice system. For many years Victim Support Scotland has been greatly concerned by the impact of the giving evidence on victims and witnesses. We are pleased to lend our support to this valuable step forward.

Yours sincerely

Barry Jackson
Policy and Information Officer
Victim Support Scotland