Pre-Recording Evidence of Child and Other Vulnerable Witnesses

Consultation

June 2017

Scottish Government
Riaghaltas na h-Alba
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FOREWORD BY THE CABINET SECRETARY FOR JUSTICE

I am proud of the positive record that the Scottish Government has in strengthening and enhancing the rights of victims and witnesses. The Victims and Witnesses (Scotland) Act 2014 introduced a variety of measures including new rights to access information; new duties to publish standards of service; and the extension of automatic access to special measures to a broader range of vulnerable witnesses. In 2015, we published the Victims' Code for Scotland setting out, clearly and in one place, the rights and support available.

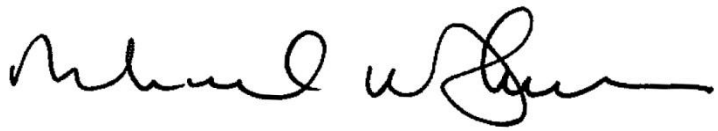
The overall programme of work that we are undertaking also includes continuing consideration of any changes we need to make to enable all, but particularly vulnerable witnesses to give their best evidence.

Giving evidence can be a stressful time and for some witnesses it can be an extremely traumatic experience. I want to ensure that we continue to make further improvements that are considered necessary whilst always ensuring that any proposed reforms are balanced and proportionate.

It is in this context that enabling the greater use of pre-recording evidence for child witnesses is one of my key priorities. My ultimate future vision is that all child witnesses in Scotland will have their evidence recorded as early as possible in the process. Ideally, this will mean that their evidence is taken well in advance of the actual trial. I realise this is an ambitious aim and it is likely to take time to fully achieve. But I believe it is vital and necessary that we make this important progressive change whilst also ensuring that the rights of a person accused of a crime are maintained.

I am keen to hear your views on my vision and also how a model for pre-recording evidence could work best for Scotland. In particular, whether there should be a presumption in law in favour of certain categories of witnesses giving pre-recorded evidence. Although my initial focus is on child witnesses, I want to ensure that any new model is also flexible enough to accommodate vulnerable adult witnesses too. That is why this consultation also seeks views on how any presumption in favour of giving pre-recorded evidence could be rolled out in the future.

I hope you have time to consider and respond to the questions posed in this consultation and I look forward to hearing your views.



Michael Matheson MSP
Cabinet Secretary for Justice
June 2017

CONSULTATION - PRE-RECORDING EVIDENCE OF CHILD AND OTHER VULNERABLE WITNESSES

Background

One of the most important functions of the justice system is to protect the interests of the witnesses to crime. However, there is the risk that witnesses – especially child and other vulnerable witnesses of the most serious and traumatic crimes – can be re-traumatised through their participation in the criminal justice process. This does not benefit 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.

In recent years, arrangements have been strengthened within the justice system 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 criminal 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.

Support for Vulnerable Witnesses - Special Measures – current position

The Scottish Government recognise that some witnesses may find it difficult to give evidence. They may be particularly vulnerable because of their circumstances or the nature of their evidence.

The court can take extra steps (called 'special measures') 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
- they are an alleged victim of a sexual offence, human trafficking, domestic abuse or stalking

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 evidence

Other special measures (such as taking evidence by a commissioner in advance of the 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 special measures 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
•they are at risk of harm because they are giving evidence or are to give evidence

Types of Special Measures

Using a screen

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 link

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 supporter

A supporter is someone who stays with the witness when they give their evidence. They can be:
•someone the witness knows
•a person from a support organisation
•a person from the social work department

A supporter can't help the witness give evidence, or interfere or influence the evidence in any way.

Using a prior statement

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

- a video or audio taped interview between the witness and the police
- a visually recorded interview between the witness, police and social worker (referred to as a Joint Investigative Interview)
- a written statement that's read out.

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

Taking evidence by a commissioner

Sometimes it's possible for a witness to give evidence at a different time than the actual court case. The court will nominate someone to act as the commissioner (the person who will hear their evidence) 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 commissioner will record the evidence, which will be played during the trial or court hearing. Both evidence-in-chief and cross-examination can be done in advance using this method.

Closed court

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 of the court, parties to the case before the court, counsel or solicitors are allowed to remain.

Scottish Courts and Tribunals Service Evidence and Procedure Review

In March 2015, the Scottish Courts and Tribunals Service's (SCTS's) Evidence and Procedure Review Report called 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. It outlined how some other jurisdictions have adopted or are piloting different approaches.

Since that time, the SCTS have published a "next steps" report and established a number of working groups to consider in more detail the proposals in their Evidence and Procedure review including those on the pre-recording of evidence. One of these working groups led by the Rt Hon Lady Dorrian, Lord Justice Clerk examined how existing processes could be improved and potentially used more often than at present.

Scottish Government Vision

In October 2016, the Cabinet Secretary for Justice outlined his vision for the greater use of pre-recorded evidence, with specific reference to child witnesses:

- Recording the initial interview with the child as soon as possible after an alleged offence.
- Ensuring that any interview is conducted by highly trained professionals, who understand the needs and vulnerabilities of the witness. Ensuring that the interview is conducted in a safe and secure environment.
- Allowing that interview to be used as examination in chief in any criminal proceedings.
- Recording the testing of the witness's evidence as early as possible in proceedings and for it to be able to be used at the future trial.
- Ensuring that this questioning is carried out in a sensitive manner, which is appropriate to the needs and vulnerabilities of the witness.

The Cabinet Secretary acknowledged that this vision would require significant reform to the existing arrangements for witnesses to give evidence. He committed to taking forward necessary work, both to strengthen the current statutory and operational arrangements for enabling child and other vulnerable witnesses to give pre-recorded evidence taken by a commissioner. He also committed to take forward necessary action to deliver the wider vision for pre-recorded evidence thus avoiding the need for child and other vulnerable witnesses to attend court, especially in the most traumatic cases. This consultation document focuses on the first element of that commitment, to strengthen the current arrangements and legislation for taking pre-recorded evidence.

Taking Evidence by Commissioner

Currently, it is possible for a child complainer or witness involved in a criminal case in Scotland to give pre-recorded evidence. This may occur by means of an initial joint investigative interview (if there are child protection concerns) followed by a special measure procedure called "taking of evidence by a commissioner". Alternatively, the whole of a child's evidence including the cross examination may be taken using procedures for taking of evidence by a commissioner. This special measure was introduced by section 271I of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act").

Taking of evidence by a commissioner involves proceedings before a commissioner appointed by the court. It 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 (in criminal proceedings this would involve examination, cross examination and re-examination). These proceedings can be visually recorded and that recording shown to the court in evidence at the subsequent trial. This should enable the child to give evidence in advance of the trial and therefore not to have to attend court during the trial itself.

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 special measures of screen, supporter or video link account for 99% of the 23,000 applications for special measures

over the period July 2011 to June 2014.[1] There appears to have been very little use made of giving evidence in chief in the form of a prior statement (271M of the 1995 Act) or evidence by a commissioner (271I of the 1995 Act.)

High Court Practice Note

On 29 March 2017, the Lord Justice Clerk, Lady Dorrian, introduced a new High Court guideline (Practice Note Number 1 of 2017) which provides extensive new guidelines for the process of taking evidence by a Commissioner. The new guidelines came into effect on 8th May. The Practice Note builds on learning from other jurisdictions, and requires that, before a Commission can take place, the parties must appear at a court hearing to discuss in detail all the measures that will ensure that a witness can give their evidence fully and with the minimum risk of further trauma. The Note sets out the practical arrangements that should be considered in advance of evidence being taken by a Commissioner, such as determining the best location and environment for the recordings to take place, the timing of the session, and what aids to communication may be required, all taking into account the specific needs of the witness. The Practice Note requires the parties to consider and discuss in advance the lines of inquiry to be pursued, the form of questions to be asked, and the extent to which it is necessary for the defence case to be put to the witness.

When the Practice Note was published, the Scottish Government committed to providing necessary financial and practical support to the SCTS and the Crown Office and Procurator Fiscal Service ("the Crown") to ensure that the new Practice Note is implemented consistently and effectively to benefit child and other vulnerable witnesses and the wider interests of justice. This includes support for any necessary investment in equipment to record and play visually recorded evidence and updated operational guidance for Court and Crown staff on obtaining and presenting evidence by a commissioner.

As well as offering practical and financial support to take forward the Practice Note, the Scottish Government also committed to considering whether further changes are necessary to the existing legislation to enable the greater use of pre–recorded evidence for child and vulnerable adult witnesses.

[1] Scottish Court Service – Evidence and Procedure Review (March 2015), page 13 paras 2.13 & 2.14.

Strengthen Legislation for Pre-Recorded Evidence by Vulnerable Witnesses

The Evidence and Procedure Review and subsequent work led by Lady Dorrian acknowledged that there are limitations to the effective use of pre-recorded evidence under the existing legislation. These limitations include:

- The use of visually pre-recorded evidence is not a 'standard special measure' for child and other vulnerable witnesses.

- There is no general presumption in favour of either all or certain child and other vulnerable witnesses being able to give pre-recorded evidence in advance of a criminal trial.

- There are issues with the timing within solemn and summary criminal proceedings when applications for the taking of evidence by a commissioner can be made and considered.

- Any pre-recorded evidence taken by way of evidence by a commissioner is not currently part of the formal proceedings in a criminal trial, so the commissioner does not have the same formal powers as the trial judge.

- There is no current requirement in Scotland for a "ground rules hearing" to be held for the Court to agree the manner and duration of questioning of vulnerable witnesses; questions that may or may not be asked; any communication aids; etc. This can assist in ensuring a clear understanding of the Court's expectations for how a child or other vulnerable witness should be questioned and protected.

Further sections of this consultation document ask specific questions about how these issues might be addressed and seek wider views about how current arrangements for child and other vulnerable witnesses providing pre-recorded evidence can be strengthened and improved.

Further reforms under consideration or being actioned now

The focus of this consultation is 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 initial focus of any changes is likely to be on child witnesses but this consultation does seek views on potential changes for vulnerable adult witnesses too. This consultation also needs to be seen within the context of the wider work being taken forward to progress the vision set out by the Cabinet Secretary for Justice in order to improve the experiences of child and other vulnerable witnesses more generally.

It is likely that there will need to be a staged approach to any changes and potential pilots to ensure a smooth transition to a new process where most children can give evidence in advance of the actual trial itself. Alongside this consultation the Scottish Government is also undertaking work to assess the current technology and facilities available so these can be updated if necessary to enable more child witnesses to give pre-recorded evidence in the short and medium term.

Joint Investigative Interviews

The Evidence and Procedure Review Next Steps Report emphasised the importance of ensuring that the initial interview of child witnesses is of a consistently high standard and follows a methodology that produces the best possible outcome in terms both of the witnesses experience and the quality of the evidence elicited. 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. There was concern to ensure that the timing of the initial interview was as effective as possible and to avoid the need for repeat interviews. The Report recommended that the current guidelines for interviewing children, which were issued in 2011, should be reviewed and updated. A subsequent working group established by the SCTS made further recommendations for how the current model for joint investigative interviews and the initial interview process could be strengthened. [2]

The Scottish Government has committed to working with key partners to review and update the guidance for joint investigative interviews and to also review the technology, support and other facilities available to support child witnesses to provide the best possible evidence.

[2] https://www.scotcourts.gov.uk/about-the-scottish-court-service/scs-news/2017/06/16/taking-child-and-vulnerable-witnesses-evidence-out-of-court

The Barnahus Concept

The Scottish Government is considering how elements of the Barnahus concept could be adapted for Scotland and work is underway in this regard. This concept was developed in Iceland, and is used where a child witness of particular types of crimes undergoes a forensic interview by a single interviewer in a purpose-built facility, sometimes under the guidance of a judge and with the mediated participation of the relevant legal representatives. Adaptions of this concept have been taken forward in Norway, Denmark, Sweden and other European countries. Some of these other European countries are either introducing a form of Barnahus or considering doing so. The concept was designed primarily for alleged child victims or witnesses of violence and sexual abuse aged 16 years or younger. The multi-disciplinary centres take principal evidence soon after a relevant incident is reported, thus freeing the child from the often traumatising court experience and quickly allowing any necessary medical and therapeutic support to begin. The role of the Barnahus staff is to coordinate and facilitate the interview with the child, to evaluate the need for psycho-social assistance, and to provide short term treatment to those in need.

We understand that in many jurisdictions Barnahus is a Health/Child protection led concept and we consider in the future, that multi-disciplinary services could be added to the overall model for children giving evidence. This could be important for children who have may have suffered a particularly traumatic event and therefore swift and effective support to that child in the one place (a Barnahus type venue) could have significant benefits to their future recovery and well-being. Although this consultation focuses on the justice part of any potential new model, and the most effective way to enable as many children as possible to give their evidence in advance of trial, this will sit alongside active consideration of the possibility of piloting a Barnahus type multi-disciplinary service in Scotland in the future.

The Scottish Government is also working along with other European countries to review the Barnahus concept for initial support and interviews for vulnerable child witnesses and are represented on a project group looking at the lessons from the various Barnahus models. We are committed to working with relevant justice, health, social work and child protection stakeholders to consider how the lessons from the various models can be adapted and applied within the Scottish context. This will include consideration of how the model could be used to pre-record the initial interview of child victims of traumatic crimes.

Developing proposals for child complainers and witnesses giving evidence in advance of the trial.

The SCTS Evidence and Procedure Review Next Steps Report (2016) recommends that:

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

The Report states that eligibility for such measures should follow the framework for defining vulnerable witnesses set out in section 271(1) of the 1995 Act (as amended by s10(a) of the Victims and Witnesses Scotland Act 2014). However, the Report states that it may not be appropriate immediately to make pre-recording automatically available to all those considered to be vulnerable:

> "There should be scope to introduce such a system in a phased way that allows for the appropriate piloting of this approach…It may therefore be appropriate to limit the first stage of this approach to children under a certain age, although some flexibility should be allowed to account for exceptional circumstances."

The Report further states that a presumption that the evidence in chief and cross-examination will be pre-recorded "subject to the right of the witness to choose to give evidence in person." The Report emphasised that the choice of the witnesses whether or not to give pre-recorded evidence or to appear in court would need to be fully informed.

Presumption in favour of child and other vulnerable witnesses giving pre-recorded evidence

Provisions in the Victims and Witnesses (Scotland) Act 2014 amended and extended the definition of vulnerable witnesses in criminal proceedings. Witnesses are identified as vulnerable if they are under the age of 18, or alleged victims of sexual offences, domestic abuse, human trafficking and stalking. Those witnesses have an automatic entitlement to use standard special measures, which include the use of a live TV link to provide evidence, a screen and supporter.

In addition, the party citing the witness can apply to the court to use other, non-standard, special measures, including giving evidence in chief in the form of a prior statement, taking evidence by a commissioner and having a closed court. Witnesses who do not fall within the description above can be considered as vulnerable witnesses where specific circumstances apply, for example if there is a significant risk that the quality of their evidence will be diminished by reason of a mental disorder or fear or distress, etc. The party citing the witness in these circumstances can apply to use special measures.

Under these arrangements, there is automatic entitlement for children and certain other vulnerable witnesses not to give evidence in person in court, through the use of a live television link. However, there is no automatic entitlement for child and adult vulnerable witnesses to give their evidence in chief or cross-examination through pre-recorded evidence. To encourage the greater use of pre-recorded evidence, some special measures such as a prior statement could become a standard special measure. However, this would not necessarily mean that for example most child witnesses would give pre-recorded evidence in advance of the trial. To remedy this there could potentially be a presumption in law so that the special measures used in these cases are ones that involve evidence being taken in advance of the trial (eg a prior statement, evidence taken by a commissioner).

Question 1 - Do you consider that the ultimate longer-term aim should be a presumption that child and other vulnerable witnesses should have all their evidence taken in advance of a criminal trial?

Yes/No

Any comments?

Section 271 of the 1995 Act covers special measures. In the earlier paragraphs of this consultation we set out the current position on the special measure of “taking evidence by commissioner”. Another special measure that can also involve taking evidence earlier in the process is ‘prior statements’. Specifically, section 271H(e) provides that “giving evidence in chief in the form of a prior statement in accordance with section 271M may be used as a ‘special’ measure. Section 271A(14) specifies what constitutes a ‘standard’ special measure; the use of a live television link (section 271A(14)(a); the use of a screen (section 271A(14)(b) and the use of a supporter (section 271A(14)(c)). So, at

present the use of a prior statement as evidence in chief is not defined as a 'standard' special measure. This means that the Court requires to be satisfied by the information in the vulnerable witness application that it is appropriate for the child's (or vulnerable witness's) evidence in chief to be given by way of a prior statement. This prior statement could be written or recorded on video. Potentially if a prior statement was to become a standard special measure this could lead to it being used more often as a way for a child or vulnerable witness not having to attend a criminal trial to give their evidence.

Question 2 – Should section 271A(14) of the 1995 Act be amended to include the use of (a) prior statements as evidence in chief and (b) evidence by a commissioner as standard special measures?

Yes/No

Any comments?

Transitional arrangements for moving to pre-recorded evidence for child witnesses

In line with the findings of the Evidence and Procedure Review Next Steps Report, we do not underestimate the challenges involved in moving to a system where most children and other vulnerable witnesses are not required to be present to give evidence during a criminal trial. Our current view is that in order to successfully implement such a policy so that it does not disrupt the administration of justice or very importantly cause further trauma to the witness, it will be necessary to devise a number of transitional arrangements in terms of how this new procedure should ultimately be rolled out. We want to consider how best any greater presumption in favour of the use of pre-recorded evidence should be phased in for certain categories of witnesses and types of criminal case. In particular, we note the recommendation of the Evidence and Procedure Review Next Steps Report that initial priority should be given to child witnesses under a certain age initially in solemn cases.

Question 3 - If a presumption to use pre-recorded evidence is placed on a statutory basis, how best should it be phased in to allow for appropriate piloting and expansion of necessary operational arrangements, eg:

- Should the initial focus of any presumption be on all child witnesses, or on child complainers or on those under a certain age?

- Should the initial focus be on all solemn cases, cases in the High Court or cases involving only certain types of offences, eg. sexual offences; serious violent offences; etc.

Any comments?

Right to choose to give evidence in Court

The Victims and Witnesses (Scotland) Act 2014 amended section 271B of the Criminal Procedure (Scotland) Act 1995 to place greater emphasis on the wishes of a child as to where they give evidence. Where a child under 12 wishes to be present in court to give evidence at a trial for a serious offence listed in that section, the court must make an order requiring the child to be present unless the court considers that would not be appropriate (section 271B(3) and (4)).

Question 4 - Do you consider any further change is necessary regarding how a child witness's wishes, on whether to give evidence during the trial, are taken into account ?

Yes/No

Any comments?

Question 5 - Should the right to choose to give evidence in court be maintained for all witnesses or limited to those above a certain age, eg. children aged 12 or above?

Any comments?

Child Accused in Criminal cases

Currently, children under the age of eight are deemed to lack the legal capacity to commit an offence, and therefore cannot be prosecuted in the criminal courts and can only be referred to the children's hearings system on non-offence grounds. Children aged between eight and 12 cannot be prosecuted in the criminal courts but can be referred to the children's hearings system on both offence and non-offence grounds.

Children aged 12 or more can be prosecuted in the criminal courts (subject to the guidance of the Lord Advocate) or referred to the children's hearings system on both offence and non-offence grounds.

A person accused of a crime, if classed as vulnerable, is entitled to apply to use standard special measures with the exception of using a screen. Screens are only appropriate as a special measure for vulnerable witnesses other than an
accused, as they are used to shield witnesses from the accused.

A child accused is therefore not treated any differently to that of any other child witness with the exception that a child accused is not entitled to use screens as a special measure or apply for the special measure of a closed court. The potential however for child accused to give pre-recorded evidence in advance of the trial is likely to raise different issues and practical considerations than arise for other child witnesses There are also some important differences between an accused person and another vulnerable witness. For instance the accused can choose whether or not to give evidence and he or she also has a right to legal representation.

Question 6 - Should a child accused in a criminal case be able to give pre-recorded evidence in advance of trial?

Yes/No

Any comments?

Question 7 - Are there are any differences to be considered between how a child complainer or witness can give pre-recorded evidence and how a child accused can do so?

Yes/No

Any comments?

Timing of Taking of Evidence by a Commissioner

We understand that one of the issues that has been raised is the timing for making applications for the use of evidence by a commissioner. In practical terms the current legislative provisions require that in the High Court the vulnerable witness notice requires to be lodged no later than 14 clear days prior to the preliminary hearing; and for "proceedings on

indictment in the sheriff court" no later than seven clear days before the first diet. (See Section 271A(13A) and section 271C(12) of the 1995 Act). In solemn cases, evidence by a commissioner is only applied for after the indictment is served.[3] This is because there is no specific statutory procedure for taking evidence by commissioner before service of the indictment. This has previously been raised as one of the reasons why it is not used more often. It also tends to be the case that until the indictment has been served it may not be sufficiently clear what requires to be proven in a specific case.

Question 8 - Do you consider legislation should provide for the taking of evidence by commissioner before service of the indictment?

Yes/No

Any comments?

Question 9 – What other barriers, if any, may exist in relation to taking evidence by commissioner before service of the indictment? And how these could be addressed?

Any comments?

Question 10 - Do you have any comments on any other changes that may be required to this process to make evidence by a commissioner a more effective and proportionate mechanism for taking evidence in advance of a trial?

Any comments?

Ground Rules Hearings

One of the key elements to be considered for any model for pre-recording evidence is how the child is questioned. In England and Wales, in advance of any cross examination, a ground rules hearing is held. The Advocates Gateway Toolkit sets out the principles for the hearing. [4]. These include:-

[3] S271A(13A) of the Criminal Procedure (Scotland) Act 1995

[4] The Advocates Gateway – Ground rules hearing and the fair treatment of vulnerable people in court – Toolkit 1 – 1 December 2016, http://www.theadvocatesgateway.org/images/toolkits/1-ground-rules-hearings-and-the-fair-treatment-of-vulnerable-people-in-court-2016.pdf

- That these hearings are used by judges to make directions for the fair treatment and participation of vulnerable defendants and vulnerable witnesses.
- The Court must take every reasonable step to ensure the participation of vulnerable witnesses and defendants.
- It is reasonable for judges to ask advocates to write out their proposed questions for the vulnerable witness and share them with the judge and the intermediary (when there is one).

The Toolkit also sets out rules on the manner of questioning, the duration of questioning, questions that may or may not be asked and communication aids.
This has meant that for the section 28 pilots [5]the police, Crown Prosecution Service and defence are required to complete their case preparation in advance and the defence need to formulate their cross-examination questions at a much earlier stage. The judge in the case then conducts a ground rules hearing where matters such as the length of the cross-examination, the questions to be asked and any other practical matters are agreed. Although some of these matters could be addressed as part of the preliminary hearing, a specific ground rules hearing could become a requirement when evidence is to be pre-recorded.

Grounds rules hearings often involve an intermediary. An intermediary, as used in other jurisdictions, provides specialist assistance to victims and witnesses with communication needs to give their best evidence in criminal investigations and at trial, by ensuring they can understand questions put to them and can communicate their answers effectively. Intermediaries are not currently used in Scottish courts but the Scottish Government is currently assessing the potential benefits and operational requirements of introducing intermediaries.

Question 11 - Do you agree that a grounds rules hearing should be a requirement for all cases where a cross examination of a child witness is to be pre-recorded?

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[5] Section 28 of the Youth Justice and Criminal Evidence Act allows vulnerable and intimidated witnesses to video record their cross examination before the trial. The Ministry of Justice have published findings from a process evaluation of their initial pilots of s28, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/553335/process-evaluation-doc.pdf

Yes/No

Any comments?

Question 12 - Do you have any comments on the proposed timing for the ground rules hearing?

Any comments?

Role of the Commissioner

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 proceedings before the commissioner are in the High Court, the commissioner must be a judge of the High Court, or in any other case, a sheriff. There is a potential issue of whether the same judge who is to hear the actual trial should also conduct the commission hearing. Section 271D of the 1995 Act enables the court at any time, up to and including when a vulnerable witness is giving evidence in a trial, to review the arrangements for the taking of their evidence. We understand that it can cause practical difficulties that a High Court Judge when acting as a commissioner has no authority to review the arrangements for taking a vulnerable witnesses evidence. This means that a Commissioner can't consider a late application for an additional special measure such as using a prior statement as the child's evidence in chief.

This difficulty could potentially be resolved by amending the 1995 Act to enable the Commissioner to review the arrangements for a vulnerable witness to give evidence.

Question 13 - Should the same individual (i.e. Judge/ Sheriff) who will act as the Commissioner also preside at the trial?

Yes/No

Any comments?

Question 14 – Do you consider that the Commissioner should be able to review the arrangements for a vulnerable witness giving evidence?

Yes/No

Any comments?

Question 15 - Should the Commissioner be the ultimate decision maker on which questions are appropriate to be asked during a pre-recorded cross examination?

Yes/No

Any comments?

Other comments

Question 16 - Do you have any other comments relevant to this consultation?

Any comments?

Responding to this Consultation

We are inviting responses to this consultation by 29 September 2017

Please respond to this consultation using the Scottish Government's consultation platform, Citizen Space. You view and respond to this consultation online at https://consult.scotland.gov.uk/criminal-justice/pre-recorded-evidence-for-criminal-trials. You can save and return to your responses while the consultation is still open. Please ensure that consultation responses are submitted before the closing date of 29 September 2017

If you are unable to respond online, please complete the Respondent Information Form (see "Handling your Response" below) to:

prerecordedevidence@gov.scot

Handling your response

If you respond using Citizen Space (http://consult.scotland.gov.uk/), you will be directed to the Respondent Information Form. Please indicate how you wish your response to be handled and, in particular, whether you are happy for your response to published.

If you are unable to respond via Citizen Space, please complete and return the Respondent Information Form attached included in this document. If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

Next steps in the process

Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material, responses will be made available to the public at http://consult.scotland.gov.uk. If you use Citizen Space to respond, you will receive a copy of your response via email.

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us. Responses will be published where we have been given permission to do so.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to prerecordedevidence@gov.scot

Scottish Government consultation process

Consultation is an essential part of the policy-making process. It gives us the opportunity to consider your opinion and expertise on a proposed area of work.

You can find all our consultations online: http://consult.scotland.gov.uk. Each consultation details the issues under consideration, as well as a way for you to give us your views, either online, by email or by post.

Consultations may involve seeking views in a number of different ways, such as public meetings, focus groups, or other online methods such as Dialogue (https://www.ideas.gov.scot)

Responses will be analysed and used as part of the decision making process, along with a range of other available information and evidence. We will publish a report of this analysis for every consultation. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

This publication is available at **www.gov.scot**

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