Scottish Court Service

Evidence and Procedure Review Report

March 2015

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CHAPTER 1: Introduction

1.1 This Review is concerned with a fundamental element of the criminal justice system. Although there are some who might argue otherwise, most (and especially those not engaged in the niceties of legal philosophy) would agree that the trial process is about the ascertainment of the truth[1]. The Review's purpose is to explore and identify the best possible methods for ascertaining the truth in the context of the trial in the modern environment. It aims to generate proposals for changes to the law, procedures and practice that will contribute to the modernisation of the criminal justice system so that it meets the highest standards of justice now and in the foreseeable future.

1.2 In May 2013, the Lord Justice Clerk, Lord Carloway, delivered a speech to a Criminal Law Conference at Murrayfield[2], in which he called for "clear-sky thinking" to help bring trial procedures rooted in the Victorian era into the modern, technologically-enhanced society today and in years to come. His view was that certain rules of criminal law and practice were becoming increasingly divorced from the realities of the modern world and current concepts of justice. In particular, he called for an examination into how digital technology could be used to capture and present the testimony of witnesses in advance of the trial. The reasons for this were that it should improve the quality of the evidence being presented; make the administration of justice much more convenient for witnesses and the courts; and tackle some of the inefficiencies that are endemic in the criminal justice system.

1.3 At the same time the Scottish Court Service, Scottish Government and others participating in the criminal justice system were becoming increasingly concerned that, despite a series of reforms since devolution, the criminal justice system, particularly in summary cases, was not becoming significantly quicker or more efficient[3]. This inefficiency was, in itself, contributing to the obstruction of justice and the frustration of the search for the truth.

1.4 The Scottish Court Service therefore considered it appropriate to establish a judicially-led review to explore these issues in greater depth, on the grounds that modernisation of the rules of evidence and procedure could make a substantial contribution to improving the fairness, efficiency and effectiveness of trials, and would contribute to the core aim of enhancing the trial's role in discovering the truth. The Lord Justice Clerk convened a small Steering Group[4], supported by a full-time project Director, to oversee the Review.

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[1] For a discussion of the role of truth-finding in criminal trials, see T. Weigend, *Should We Search for the Truth, and Who Should Do it?* N.C. J. INT'L L. & COM. REG. [Vol. XXXVI 2010], 389-414. See also the exploration of the issue in M. Damaska's, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study* (1 Jan 1973) http://digitalcommons.law.yale.edu/fss_papers/1591

[2] Lord Carloway, *Scots Criminal Evidence and Procedure – Meeting the Challenges and Expectations of Modern Society and Legal Thinking*, Criminal Law Conference, Murrayfield 9 May 2013 available at http://www.scotland-judiciary.org.uk/26/1045/Lord-Justice-Clerks-speech-at-the-Criminal-Law-Conference

[3] See 1.14-1.19 *infra*

[4] In addition to the Lord Justice Clerk, the members of the Steering Group were Lady Dorrian, Sheriff Principal Craig Scott and Eric McQueen, Chief Executive of the Scottish Court Service.

1.5 At the first meeting of the Group, it was agreed that the Remit of the Review should be that it:

1) conducts an initial phase of research into the current and potential conduct of criminal proceedings, with particular reference to the rules of evidence and procedure, to cover:

- the current law and jurisprudence relating to the admissibility of evidence, and the implications for trial procedures;
- the technologies available for the recording of statements and for the provision of evidence;
- the treatment and handling of witnesses, including children, other vulnerable witnesses, police officers and experts ;
- other related aspects in the conduct of trials in Scotland, such as judicial case management, disclosure and court administration; and
- how these issues are addressed in other jurisdictions;

2) considers, in the light of this research: how to improve the Courts' access to relevant and reliable evidence at the appropriate time; how to exploit the opportunities this would bring to increase the efficiency of the trial process, leading to an enhanced means of delivering justice and improving the experience of all those involved, including witnesses and jurors; and

3) prepares recommendations, to be submitted to the Scottish Government and other relevant bodies, for changes to the relevant law and procedures.

1.6 In considering the Remit of the Review and its conduct, the Group identified some of the main principles which should inform any proposals to improve the criminal justice system, and explored the principal issues that needed to be explored or taken into account.

Principles for reform

1.7 The Group considered the principles that should apply in preparing proposals for reform to the criminal justice system. It considered that the Review should have in mind the kind of criminal justice system to which Scotland should aspire. In a modern, democratic society, that is a system:

- in which the trial process is and is seen to be fair to all the parties involved;
- which deals with cases efficiently and timeously, reaching a conclusion within a reasonable time;
- which provides access to justice for all;
- which provides protection for all parts of society against the damage that crime can cause;
- in which the experience of the participants, including victims, witnesses and jurors, is a positive one;
- which is reasonably simple to operate, with clear, readily understandable rules; and
- which is relevant to the everyday lives of the people and society it serves, and retains their trust and confidence.

1.8 Some of these principles are of course incorporated into the European Convention of Human Rights, principally under the Article 6 right to a fair trial. There is no question that safeguarding compliance with the ECHR must be an essential component of developing any future model. But these are principles expressed at a high level of abstraction. The European jurisprudence, which has developed from them, must be applied in any case. Scots law should aim to reach standards of practical fairness well above those expressed in the Convention. Bare compliance is an unacceptable minimum.

1.9 Particular importance was attached to the principle that Scotland should be moving towards a criminal justice system which is simple to operate, with clear and readily understandable rules. In this respect, the Review Group were keen to identify opportunities to simplify the increasingly detailed and confused landscape created by some relatively new, but mostly by old, rules of evidence, bearing in mind the approach recommended by the Scottish Law Commission that there are two "guiding principles" which it considered ought to be followed in relation to the reform of the law of evidence[5]:

> "(1) The law should be simplified to the greatest degree consistent with the proper functioning of a law of evidence;
>
> (2) As a general rule all evidence should be admissible unless there is good reason for it to be treated as inadmissible".

1.10 The underlying philosophy of this approach is that it is a hindrance, rather than an advantage, to have to apply rules which withhold from a judge or jury, in seeking to reach a just conclusion, evidence that is genuinely relevant and of probative value. It should therefore be the purpose of reform in this area to move towards a state in which the finders of fact are generally free to consider the quality of evidence and to attach such appropriate weight to that evidence as they think fit. This assumes a level of sophistication which, in the days of yore, the law was reluctant to assume, but which is fully justified in terms of the levels of understanding and education now pertaining to both judges and juries.

The imperatives for change

1.11 As stated earlier, the Review was initiated in the light of a number of considerations that, taken together, provided a compelling incentive to look for new ways of conducting business in the criminal justice system. These are outlined below.

1.12 **The opportunities that technology might bring.** It is clear that the pace of change in technology has become a driving force for the development of policy in all areas of life. During the course of the Review, the Scottish Government and other justice organisations produced the first Justice Digital Strategy[6], which sets out ambitions for the application of digital solutions to serve the justice system over the next five years. The Strategy is clear that it needs to be refreshed to take account of new approaches that may

[5] Scottish Law Commission 100th Report - *Evidence: Report on Corroboration, Hearsay and Related Matters in Civil Proceedings* para 1.3

[6] *The Digital Strategy for Justice in Scotland*, Scottish Government, Aug 2014 at http://www.scotland.gov.uk/Publications/2014/08/5429

become available in the future. At the launch of the Strategy, Lady Dorrian described the thinking that lay behind the judiciary's keenness to innovate in this area in the following way:

> "….. In any modern society, the administration of justice must retain the trust and confidence of the people it serves. And it will only do that if it keeps pace with the times, and remains relevant to the experience of the people and organisations it serves. We are now in an era, according to research published earlier this month, when Britons spend more time using technology devices than they do sleeping. If people and businesses communicate instantly by email, Skype or Facebook, they will expect public services to do likewise. They will increasingly fail to understand or have sympathy with any system that still relies on extensive documentation, sent by post, and by the requirement to appear in person for the handling of routine matters.……
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> "And the need to modernise also stems from the fact that technological innovation represents a huge opportunity – an opportunity to make justice more accessible to a wider number of people, to make evidence more reliable and more readily available, and to make processes and procedures more efficient. This is not just about fixing the problems of the current system, tinkering with what we have; it should be about taking advantage of new technologies to design a justice system that will meet the requirements of society in years to come."[7]

1.13 The Review group was conscious that a number of innovations were immediately available or on the horizon. Many courts throughout Scotland are now generally equipped for the presentation of evidence on screen and its provision in digital form, accessible by laptop or tablet. The Justice Digital Strategy refers, among other things, to:

- digital recording of evidence, reports, decisions and judgments, including submission of pleadings and the use of digital warrants;
- live video conferencing TV links throughout justice systems, supporting people and organisations;
- a secure digital platform to store all information relevant to a case or individual in one secure location.

1.14 All of these will have a part to play in changing the way in which evidence is captured, stored and presented in court. The Strategy also referred to the potential introduction of police body-worn cameras throughout Scotland. This was an issue of which the Group was already aware as something of potentially huge significance in terms of the nature and quality of evidence that may become available - real-time evidence, including the statements of witnesses at or near the scene and time of a crime. During the course of the Review's research, the Group also became aware of a major pilot being undertaken by the Metropolitan Police in London, trialling the use of 500 body-worn cameras[8], especially in the context of domestic violence.

1.15 **The current inefficiencies within the criminal justice system.** Current trial procedures are not able to cope as well as they might with the volume and nature of cases.

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[7] Lady Dorrian, *'Digital Justice Strategy: A view from the courts'* Edinburgh, 20 August 2014 available at http://www.scotland-judiciary.org.uk/26/1301/Speech-by-Lady-Dorrian-at-the-launch-of-The-Digital-Strategy-for-Justice-in-Scotland

[8] See *MPS launches Body Worn Video pilot,* Metropolitan Police News Release, 8 May 2014 available at http://content.met.police.uk/News/MPS-launches-Body-Worn-Video-pilot/1400023916227/1257246741786

A suite of reforms to summary procedures and practices was introduced in the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 following the Report of the Summary Justice Review Committee, chaired by SP MacInnes, of 2004. Although these reforms undoubtedly improved the operation of summary justice, and initially led to a trend of cases being processed more speedily, more recent indicators suggest that these gains are being reversed, and the system is slowing down. In 2011 Audit Scotland identified that in 2009-10, 37% of all summary cases were subject to "churn" – the repetition of court proceeding stages – at a cost at least £10m; that late decisions not to proceed cost a further £30m; and that "late" guilty pleas cost £47m[9].

1.16 More recent statistics suggest that these problems are continuing. At the start of the Review the Group considered statistics relating to the performance of summary justice in both the Sheriff and Justice of the Peace Courts nationally, over the twelve month period ending November 2013[10]. These showed that around a third of cases at each stage of the summary process were subject to "churn", usually in the form of continuation or adjournment. Less than 20% of the cases that reached the trial diet then took the form of a full and concluded trial within the allocated time without adjournment. In over 80% of cases, the trial was either adjourned to another diet, or reached a conclusion without all evidence being led (e.g. following a late guilty plea or desertion by the prosecution). The statistics for the period up to October 2014 suggest little has changed in the year during which the Review has taken place.

1.17 There are of course a number of factors that create churn in the system. One of these is the failure of witnesses to turn up on the appointed trial day. Research carried out in selected Sheriff courts in the Autumn of 2011 revealed that, out of 197 summary trials listed for the week in question, there was a failure to attend by a witness in 68 of them – a rate of 36%[11]. There was a particularly high rate of witness absence at the Domestic Abuse court. Witness attendance has continued to be an issue. In each of the last two years around 5900 summary trials have been subject to adjournment because of the failure of a witness to attend on the appointed day[12].

1.18 The non-attendance of witnesses is one element underlying court delays. There are of course unwelcome consequences of those delays and disruptions for those that do attend Court. Members of the public giving evidence have often taken valuable time off work, as are those called for jury service. In addition to this, many witnesses for the Crown are serving police officers. It has been recognised that there is a significant issue around the amount of time officers spend at Court waiting to give evidence, rather than carrying out front line police duties. This has been partially addressed by the introduction of new approaches to the need to schedule police witness time more efficiently; but there is still scope for improvement.

1.19 It is of course important to acknowledge that the Scottish Government has undertaken a suite of measures to tackle many of the issues facing the justice system in

[9] *An Overview of Scotland's Criminal Justice System*, Audit Scotland, 2011
[10] Drawn from Scottish Court Service data
[11] *A Study of Witness Non-Attendance at Courts in Scotland* Chief Inspector Fiona Armour, ACPOS, and Professor Kenneth Scott, UWS/SIPR, January 2013
[12] Source: Scottish Court Service

general. It has led the *Making Justice Work* initiative, in partnership with all of the agencies involved in the administration of the civil and criminal justice systems. *Making Justice Work* consisted of six programmes that each contained a number of projects to reform and improve the structure and performance of the justice system. Of particular relevance to the issues addressed in this Review was Programme 2: Improving procedures and case management, which included projects to improve the attendance rate of witnesses and defendants at court, and to promote the wider use of video-conferencing as a means of avoiding the need for parties – particularly those in custody - to be physically present in a courtroom.

1.20 **The quality of evidence and use of prior statements.** One of the consequences of the delays in the criminal justice system is that witnesses are frequently being asked to provide an account of events that took place months or sometimes years earlier. Given the reasonable assumption that memory alters and fades over time, there must be questions about whether the evidence of witnesses at trial is genuinely the best that could be available, now that there are means by which their testimony could be recorded much closer to the event.

1.21 This issue has been highlighted further by the increasing trend, noticeable over the last ten to fifteen years, of the use of prior statements as a means of leading evidence from the principal witnesses[13]. This method is very often adopted by the Crown, who seem to use the statements as their script for examination, as soon as the witness says something slightly different from the statement or omits to mention something which is recorded by the police. The statements are also used as a prop, again especially by the Crown but also the defence, when challenging the much later account of a witness in the stand. The Group was aware of a number of comments from judicial colleagues that this method of testing evidence was becoming so common that they felt that they were presiding over "trial by written statement". In the words of Lord Coulsfield:

> "The complaint has been made that too often the result is that the trial takes the form of a one-sided memory-test, where any discrepancy between the witness's words at court and the words in their statement may be the subject of meticulous cross-examination. Sometimes this may be valid and important, but in many cases it seems of dubious value for the pursuit of justice."[14]

1.22 **The current treatment of child and vulnerable witnesses.** The Group was aware of recent cases where, in spite of the significant progress that has been made in respect of legislation for child and vulnerable witnesses, there were clearly still instances where such witnesses were subject to processes in the Courts that were not best suited to their needs. Most recently the High Court had considered a case in which a five-year-old child had been examined in chief and then cross-examined for several hours over two days, in relation to an incident that occurred a year earlier[15]. There was clearly scope to investigate what more could be done to facilitate the taking of evidence from young and vulnerable witnesses in a more appropriate fashion.

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[13] See Chapter 3, infra

[14] *Review of the Law and Practice of Disclosure in Criminal Proceedings in Scotland* (2007) at para 5.42

[15] see the *Akram* case, reported in Edinburgh Evening News, 7 December 2013: http://www.edinburghnews.scotsman.com/news/crime/killer-freed-after-successful-child-abuse-appeal-1-3224243

The premise explored

1.23 The fundamental premise explored by the Review is that substantial improvements can be made to the administration of justice with the widespread use of pre-recorded statements in place of testimony in court and a more imaginative use of live-link technology. In particular, the Review has considered whether it would be advantageous for it to be routine that witnesses may record their testimony in advance, to be subsequently played at trial. Perhaps more important, what a witness has said in advance of trial, if digitally recorded, may be used as part of that person's testimony at trial.

1.24 Prima facie, the use of pre-recording should mean a better quality of evidence, with witnesses recounting events only minutes, hours or days after the event, rather than months or years. In many cases, use could be made of witness statements at the scene, recorded on police body-worn cameras. A properly conducted witness interview prior to trial may be far more conducive than a belated appearance at court to eliciting a comprehensive, credible and reliable story[16]. There should be better case management, as the principal evidence becomes available to all sides at an early stage in proceedings. Irrelevant or inadmissible material can be edited out and related issues resolved earlier. The potential to reduce the amount of churn in the system caused by witnesses failing to attend court on the appointed day must be considerable. Other problems relating to witness attendance and evidence (such as the retraction of statements or non-cooperation of witnesses) may also be addressed.

1.25 The pre-recording of evidence should benefit the practical administration of justice. It would mean that, for those witnesses who do engage in the process, there is the greater convenience of being able to provide their testimony at a time that suits them, rather than being required to attend court and wait to see if and when they will be called. This will reduce the disruption of their own working lives, with knock-on beneficial effects for the organisations they work for. This is particularly relevant in relation to police witnesses. Steps are currently being taken to reduce the amount of time police officers have to spend waiting at court to give evidence. The ability to pre-record such evidence should make a major contribution to this effort. A further contribution would come from the use of live-link technology between the police office and the court, allowing officers to provide evidence from their workplace, attending to their other duties immediately before and after. These considerations might also apply to expert witnesses, or those for whom travel to court would pose particular problems, such as those with mobility difficulties, or those in remote areas. The potential both for improving the experience of witnesses and in making the system more efficient and effective is considerable.

1.26 The Review considered the main area in which pre-recorded evidence is already used systematically in the other jurisdictions, that of children and vulnerable witnesses. **Chapter 2** considers the particular considerations that apply in relation to young and vulnerable witnesses, and draws conclusions from the experiences of these other jurisdictions both in respect of the special measures that need to be in place to provide the

[16] See Westera et al, *Losing two thirds of the story: a comparison of the video-recorded police interview and live evidence of rape complainants*, Crim. L.R. 2013, 4, 290-308

appropriate protections, and in respect of the lessons to be learnt in respect of the broader use of pre-recorded evidence – particularly, whether any of the benefits alluded to in para 1.25 have been realised.

1.27 The Review has considered what it would take to develop a system in which all witness statements could be audio-video recorded in advance, at a time convenient for them, in appropriate conditions that guaranteed the necessary security and solemnity. Such an approach would be consonant with the principle that the justice system should keep pace with changes in society more generally, making use of the near-ubiquitous familiarity with screens. It may well be that in the medium term all police officers will be equipped with body-worn cameras that would allow the taking of statements at or close to the scene of an alleged offence. The use of mobile phones to record accounts of events at or about the time of their occurrence should also be considered.

1.28 **Chapter 3** therefore looks at the issue of the general admissibility of witness statements recorded prior to trial. It reviews the law on hearsay, under which such statements are currently generally excluded, and considers the implications of a rule that would provide for their general admissibility. **Chapter 4** then considers how criminal procedures would have to change to accommodate and take full advantage of the availability of such evidence; this would need to be done within the context of a revised concept of a modern trial, and a reinvigorated approach to case management. It also covers how the infrastructure of the justice system, both in terms of the technology available and the nature of facilities in the courts, police offices and elsewhere will have to be rendered fit to undertake the tasks of recording, editing, storing and presentation of such testimony. **Chapter 5** provides some concluding remarks.

1.29 The Report that follows is the result of research into the extensive academic literature on the issues raised. Members of the Group also took part in study visits to other jurisdictions and held discussions with practitioners and academics with relevant expertise in these matters both in Scotland and elsewhere. The Group is extremely grateful to all those who gave so willingly of their time to help arrange, host and take part in those visits and discussions. Details of the written materials considered are given in Annex B.

CHAPTER 2: Children and Vulnerable Witnesses

Introduction

2.1 It is now widely accepted that taking the evidence of young and vulnerable witnesses requires special care, and that subjecting them to the traditional adversarial form of examination and cross-examination is no longer acceptable. This is for two main reasons. The first is that, as has been known for some time, the experience of going to court and recounting traumatic events is especially distressing for children, and can cause long-term damage[17], particularly where the necessary healing process for a victim of abuse is delayed for months, if not years:

> "The confrontation with the accused, the stress and embarrassment of speaking in public especially about sexual matters, the urgent demands of cross-examination and the sense of insecurity and uncertainty induced by delays make this a harmful, oppressive and often traumatic experience."[18]

2.2 It is, unfortunately, a fact that a large proportion of cases involving a child as a complainer or witness relate to domestic abuse or sexual offences. Regardless of age, the complainer in a domestic abuse or sexual offence case is likely to be vulnerable – if the allegations against the accused have any truth in them, she or he will be recounting events that were particularly traumatic, threatening or harmful; and the accused will often represent a figure of fear for the witness.

2.3 The second reason is that, particularly for young and vulnerable witnesses, traditional examination and cross-examination techniques in court are a poor way of eliciting comprehensive, reliable and accurate accounts of their experience:

> "Thirty-plus years of empirical research in the UK and other common law jurisdictions has shown again and again that conventional cross-examination is more likely to confuse and mislead the very vulnerable than to draw out accurate and reliable evidence."[19]

2.4 Most jurisdictions now recognise the need to have in place measures to protect child and vulnerable witnesses from the full impact of giving their testimony in open court. This has also been recognised in European legislation.[20] The extent to which protective measures are available and used does, however, vary. This chapter describes the protections currently available in Scotland, and explores what lessons might be learned from the experience of other jurisdictions.

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[17] In general, see *Children and Cross Examination: Time to change the rules?* Ed by John Spencer and Michael Lamb, which cites, among others, Quas JA, Goodman GS, et al *Childhood sexual assault victims: long-term outcomes after testifying in criminal court* Monographs of the Society for Research in Child Development 70, serial no. 280, vii – 245 (2005). See also Jacqueline Parker *The Rights of Child Witnesses: Is The Court A Protector Or Perpetrator?*, 17 New Eng. L. Rev. 643 (1981-1982)

[18] *Report of the Advisory Group on Video Evidence*, Home Office 1988 at 2.10

[19] Emily Henderson, *Reforming the cross-examination of children: the need for a new commission on the testimony of vulnerable witnesses* Arch. Rev. 2013, 10, 6-9

[20] EU Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, particularly Articles 23 and 24.

Children and vulnerable witnesses in Scotland

The legislative provisions

2.5 The regime governing the evidence of child and vulnerable witnesses in Scotland is contained in sections 271 – 271M of Part XII of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act"). These provisions were inserted into the Act as amendments contained in the following three subsequent Acts which introduced and then expanded the scope of protections:

- Vulnerable Witnesses (Scotland) Act 2004
- Criminal Justice and Licensing (Scotland) Act 2010
- Victims and Witnesses (Scotland) Act 2014

2.6 The special measures provisions in the 2014 Act have not yet been commenced, and are unlikely to be so until early 2015. Under the pre-2014 Act provisions currently in force, the Court may, on the application of the relevant party or of its own motion, authorise the use of special measures to aid the giving of evidence by a child under 16 or a witness vulnerable because of mental disorder or fear and distress in connection with giving evidence at the trial. The special measures available to the witness include:

- taking evidence by commissioner (section 271I)
- a live TV link from another room either within the court building, in another court building or from a remote location (section 271J)
- a screen (section 271K)
- a supporter (section 271L)
- giving evidence-in-chief in the form of a prior statement (without the need for the witness to "adopt" it) (section 271M)

2.7 Three of these measures - the live TV link from within the court building, a screen and a supporter – are termed Standard Special Measures, to which children under 16 currently have an automatic entitlement. An application must be made for the use of a video link from elsewhere or for any of the other measures.

2.8 Section 1 of The 2014 Act places a general duty on justice organisations, including the Lord Advocate, Scottish Ministers and the Scottish Court Service to have regard to a number of principles, as follows[21]:

- that a victim or witness should be able to obtain information about what is happening in the investigation or proceedings,
- that the safety of a victim or witness should be ensured during and after the investigation and proceedings,
- that a victim or witness should have access to appropriate support during and after the investigation and proceedings,
- that, in so far as it would be appropriate to do so, a victim or witness should be able to participate effectively in the investigation and proceedings.

[21] Section 1(3) of The Victims and Witnesses (Scotland) Act 2014

2.9 In pursuit of this, and in order to meet the requirements of the European Directive, the 2014 Act provides for a considerable expansion of the number of witnesses eligible to benefit from special measures. The term "vulnerable witness" will be automatically applied to any witness under 18 years old (up from 16 years old), and to the alleged victim in specified sexual, trafficking, domestic abuse or stalking offences. Under the proposed new section 271A of the 1995 Act, all deemed vulnerable witnesses will benefit from the automatic entitlement to the Standard Special Measures, which have been expanded to include entitlement to live link from any location. The Act also introduces a new special measure in the form of having a closed court (i.e. excluding the public during the taking of evidence from the vulnerable witness), and gives Ministers the power to introduce further special measures by secondary legislation.

2.10 The term vulnerable witness will also apply to witnesses for whom the court determines:

a) that there is a significant risk that the quality of their evidence will be diminished by reason of (i) mental disorder or (ii) fear or distress in connection with giving evidence at the hearing (section 271 (1)(b)) ; or
b) there is considered to be a significant risk of harm to the person by reason only of the fact that the person is giving or is to give evidence in the proceedings (section 271 (1)(d))

2.11 For these witnesses, the party citing them will be able to apply to use any of the standard or further special measures listed above, but will not have entitlement to them.

Current usage of special measures in Scotland

2.12 Take-up of the special measures available to children and vulnerable witnesses has significantly increased over the period since their introduction in 2004. As might be expected, the vast majority of applications for special measures have been for the standard special measures of a supporter, screen or remote TV link. In the vast majority of the cases where an application was made for a supporter – estimated at around 90% - this was in addition to an application for a screen or other special measure for the same witness.

2.13 According to Scottish Court Service data, in the second six months of 2011 (the first period with full data available) there were 2835 applications lodged on behalf of child witnesses and 711 for adult witnesses. The first six months of 2014 saw 3203 child witness applications and 1467 adult applications, and this increase is consistent with the trend over the period. Given that in many cases more than one application was made by an individual witness, it can be estimated that the figures for the first half of 2014 represent applications on behalf of around 1800 children and 800 adults. It should also be recognised that, although almost all of these applications were granted, in many cases the special measures were not required due to factors such as early pleas, abandonment of the case or the witness not being called.

2.14 According to the statistics available to the Scottish Court Service, the standard special measures of screen, supporter or video link account for 99% of the 23000 applications made for special measures over the period July 2011 to June 2014. This suggests that there has, until recently, been next to no use made of either the special measure provided under section 271M of the 1995 Act - Giving evidence-in-chief in the form of a prior statement - or the option to take evidence under commission (section 271I). This

is largely borne out by the anecdotal evidence from the judiciary and other court users, although it is possible that the use of these measures has also been under-recorded.

2.15 The Review has detected, however, that in recent months the Crown has shown increasing willingness to make applications under these two provisions. According to the feedback received from members of the judiciary, it appears that there was an initial increase in applications for evidence – including cross-examination - to be taken on commission. This new trend was then supplemented by applications to use the prior statement of a young witness as the evidence in chief, usually under section 271M. This has, however, brought to light one of the potential problems which this Review seeks to address. Unlike the approach taken in some other jurisdictions (detailed later in this chapter) these applications are not taking place within a systematic and commonly understood framework for their use, but on an ad hoc basis. Thus, for example, one recent case involved an application, which was granted, for the complainer's evidence-in-chief to be given in three ways: a) by prior statements in the form of two audio-visual recordings of joint investigative interviews ("JIIs"), b) by prior statements as recorded in police notebooks, to be read by the police officers concerned and c) on commission (to include cross-examination). This multiple approach made it very difficult for the jury to follow the evidence. In the absence of a clear framework, the presentation of the case may be fatally flawed. In another case involving a young complainer, the prosecution case was based on the notes of question and answer by the police officer who conducted the Joint Investigative Interview. An application under section 271M to have these notes read to the jury at trial as the complainer's evidence in chief was refused, as there was no audio-visual recording of the interview in question.

Future demand for special measures

2.16 With the expansion of the scope of the definition of vulnerable witness, it is expected that there will be a significant increase in the number of applications for special measures in court proceedings. The Scottish Government has estimated that the changes to the definition of a vulnerable witness will mean that the number of those eligible for special measures in each year will increase by around 18,500 – 6000 of that number being 16 and 17-year olds, and the rest complainers in the specified offences (the vast majority of which being domestic abuse cases). How that additional number of witnesses will translate in an increase in the use of special measures is hard to predict, but modelling work carried out by the Scottish Court Service suggests that the volume of case which will require the use of special measures could reach as high as 16,800 each year.

Child and vulnerable witnesses in other jurisdictions

2.17 In a number of other jurisdictions, the level of support and protection for the child witness is either at a similar level to or more advanced than Scotland. Most of the common law jurisdictions investigated, including Australia, Canada, England & Wales, Ireland, New Zealand and the USA, have as a minimum some form of provision allowing for screens in court, a support person and/or live video links to an out-of-court location. What is particularly of interest, however, is the extent to which some jurisdictions have supplemented these standard measures with the use of pre-recorded testimony.

2.18 Practice in this respect is more varied. In the USA for example, recent Supreme Court decisions[22] have determined that the use of pre-recorded testimony is incompatible with the right enshrined in the Sixth Amendment to the Constitution, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." This has meant that the initial interviews of children, conducted according to rigorous safeguards at Child Advocacy Centers, are now inadmissible. In Ireland, a pre-recorded statement by a complainer under 14 years old in sexual offences can be admitted, provided that the child then adopts the statement and is available for cross-examination at the trial[23].

2.19 In other jurisdictions, however, steps have been taken to remove the child or vulnerable witness from the trial hearing altogether by pre-recording their evidence, including cross-examination or its equivalent. This was the core recommendation of the landmark publication, *Report of the Advisory Group on Video Evidence*, issued by the Home Office as far back as 1989, and commonly referred to as "the Pigot Report" after its Chair, HHJ Thomas Pigot QC. Although not acted upon in England for a further 11 years, the Pigot Report has been highly influential in setting the terms of the debate, and laid the ground for reform not just in England, but also in other common law jurisdictions such as Australia and New Zealand.

2.20 Western Australia was the first jurisdiction to implement what has become known as the "Full Pigot" – pre-recording both the evidence-in-chief and the cross-examination of the complainer in certain cases, and this has now been introduced in all other Australian states. In England and Wales, the Youth Justice and Criminal Evidence Act 1999 made provision for pre-recording both elements of a child's evidence, but for many years the UK Government chose to implement a "Half Pigot" option – providing for the pre-recording of evidence-in-chief only, under section 27 of the 1999 Act. This year, however, the UK Government has been running a pilot for a "Full Pigot" scheme, implementing section 28 of the 1999 Act which allows for the pre-recording of cross-examination, in three selected Court Centres – Kingston-upon-Thames, Leeds and Liverpool.

2.21 By contrast, the New Zealand Government has stepped back from its original decision in 2011 to implement the "Full Pigot", in part due to a decision of its Court of Appeal in which it was held that at as a general rule, cross-examination should not take place pre-trial. The Court, in a joint decision in two cases[24], held that, although the Evidence Act expressly permits the pre-recording of cross-examination (under sections 103 and 104), its use will "be part of an answer in rare circumstances, but they will be rare". Even though the Court recognised the particular problems faced by child witnesses, "taking their cross-examination in advance is not in itself the answer to the problems"[25]. The New Zealand Cabinet has however agreed that a legislative presumption should be introduced so that all witnesses under the age of 18 use alternative ways to give their evidence-in-chief. This

[22] *Crawford v Washington* 541 U.S. 36 (2004); *Michigan v Bryant*, 131 S Ct 1143 (2011)
[23] Provided for under section 16 of the Irish Criminal Evidence Act 1992
[24] *R v M, R v E* [2011] NZCA 303.
[25] At 41

includes the use of pre-recorded evidence, audio-visual link, closed-circuit television and the use of witness screens in court[26].

2.22 The Review has considered in depth the implementation of the "Full Pigot" approach in Australia and England & Wales, both for what can be learnt about the particular circumstances of pre-recording child testimony, and for the general lessons about pre-recorded testimony within the common law tradition. It has also explored an alternative approach, in place in Norway, which goes further in providing a safe environment for the child to give evidence, and which is fundamentally different in the way the child witness is questioned. Each of these case studies is detailed below.

Case Study 1: The "Full Pigot" in action - Western Australia

2.23 In 1992 Western Australia became the first common law jurisdiction to introduce legislation allowing a child's evidence-in-chief and cross-examination to be recorded prior to the trial hearing.[27] All other Australian states and territories have now followed suit[28], with Tasmania being the last to do so in 2013[29]. The original Western Australian provisions have been amended on a number of occasions since then, to expand the scope of and strengthen the protections provided[30].

2.24 A Judge may order a pre-recording of the evidence and cross-examination [known as a special hearing] of a child against whom an alleged offence has been committed (an "affected child") within three broad categories of offences –

i. any sexual offence;
ii. various offences under the Prostitution Act mainly in the nature of procuring a child to act as a prostitute; and
iii. various offences involving violence against a child by a close relative or a person acting in loco parentis.

2.25 Under the Western Australian scheme, a child complainer will routinely be interviewed by specially trained police officers in a Visually Recorded Interview (VRI), which is a process similar to the "Achieving Best Evidence" interview used in England (and unlike a Joint Investigative Interview in Scotland, interviewing is not shared with a social worker). This interview is video-recorded and forms the child's evidence-in-chief.

2.26 An important feature of the Western Australian system is the Child Witness Service. This has been established as a part of the Attorney General's department, and is an independent service equally available to defence witnesses (although it is used by defence witnesses rarely). It is staffed by trained psychologists or counsellors, who are all full time

[26] See Amendments to the Evidence Act 2006, New Zealand Ministry of Justice 2013, found at *http://www.justice.govt.nz/publications/global-publications/a/amendments-to-the-evidence-act-2006/publication*

[27] Acts Amendment (Evidence of Children and Others) Act 1992 amending the Evidence Act 1906

[28] See *Bench Book for Children Giving Evidence in Australian Courts*, Australasian Institute of Judicial Administration 2012, found at http://www.aija.org.au/Child%20Witness%20Bch%20Bk/Child%20Witness%20BB%20Update%202012.pdf

[29] Evidence (Children and Special Witnesses) Amendment Act 2013 (Tas)

[30] For further details, see *Children's Evidence in Legal Proceedings – the Position in Western Australia*, Hal Jackson in *Children and Cross Examination: Time to change the rules?* ed John R Spencer and Michael E Lamb

employees. The function of the Service is to support child witnesses before, during and after they give evidence – preparing them for the experience, accompanying them throughout their testimony, and providing a debriefing and trauma counselling afterwards. The Service provides assistance to the child and the child's family in completing victim impact statements, which can be lodged with the Judge by the prosecutor at sentencing.

2.27 The process for a pre-recording is that the child comes into the Child Witness Service on the day they give their evidence. They have already viewed their VRI in the days prior to the special hearing. The hearing then takes place in a normal courtroom, which is equipped for the giving of evidence by CCTV. The child or special witness provides evidence to the court from the remote room. The procedure for recording the child's evidence given by CCTV at a pre-recording hearing is the same as that for the child's evidence given by CCTV at trial.

2.28 Present in court are the Judge, state prosecutor and defence counsel. According to the guidance, Judge and counsel should wear formal court dress "to provide consistency for the jury and the children"[31], although this requirement is not always observed. There is no jury to be empanelled and no legal argument or opening addresses. The child adopts the VRI and then is cross-examined by the defence counsel. They are then re-examined if necessary. This usually takes between 3 and 4 hours. The witness can take as many breaks as needed as these can be edited out. It is possible for the child to be accompanied by a support person and by a court-appointed "child communicator" whose function is, where requested by the court, to communicate and explain a) to the child, questions put to him/her, and b) to the court, the evidence given by the child.

2.29 Editing of the video is governed by section 106M of the Evidence Act 1906, which states that alterations may not occur without the approval of judge. However, in practice, editing is undertaken by the prosecution in consultation with the defence. The tape is stored by the court for use at the trial, and rather than being tendered as an exhibit, is treated as oral evidence. On the day of trial, the VRI, the pre-recorded cross-examination and re-examination is shown to the court as the child's complete evidence, with no need for the child to be present.

2.30 Practitioners in Australia have identified a number of benefits from this approach, both to the trial process and to the child witnesses themselves[32]. In terms of the process, these include: the likelihood that pre-recording will secure a more contemporaneous and accurate account than later evidence; an encouragement of early guilty pleas; the ability to edit the child's evidence to minimise the impact of breaks or evidence which is not admissible; the ability to schedule hearings which can take advantage of judicial time which is not available for a number of days for a trial; and, more rarely, the pre-recorded evidence can be used in the event of a retrial.

[31] *Evidence of Children & Special Witnesses: Guidelines for the Use of Closed Circuit Television, Videotapes, and Other Means for the Giving of Evidence*, Western Australia 2005

[32] See the Australian Law Reform Commission's analysis in Chapter 26 of *Family Violence - A National Legal Response* (ALRC Report 114) (2010).

2.31 All those we contacted in Australia emphasised that the primary purpose of these provisions is to help avoid or mitigate the adverse effects on the child witness, both in the short and long term. In particular, the fact that the special hearing occurs substantially before the trial itself allows the healing process to begin at an early stage – in the words of the Child Witness Service "Pre-recording allows the child to move on with their life sooner without the threat of a trial"[33]. Furthermore, the experience of going to court is more manageable, as it does not depend on the conduct of the rest of the trial, and the child's appearance can be scheduled for a time of day when they are most likely to be able to cope with the questioning.

2.32 This approach is not, however, seen as a perfect solution. Interestingly, there was – anecdotally at least – little evidence of an improvement in conviction rates following the introduction of special hearings. This could be due to a number of factors, including the fact that some cases are coming to trial that would otherwise, on the basis of the evidence available, not do so; there may also be some downside in terms of there not being the immediacy of impact of the child in the witness box. But this was not seen as a major problem, as practitioners returned to the point that the reason for this procedure is to avoid the re-traumatisation of the child.

2.33 Consideration of the Australian experience raised a few further points, many of which have been reinforced in the other jurisdictions. These included that:

- It is essential to have the best available quality of technology, particularly where the evidence is to be played to a jury. In the early years, there were several technical problems which disrupted the conduct of the hearings; and even now, there is a sense that juries can be put off by a poor picture or poor sound quality
- There are difficulties in securing special hearings close in time to the initial complaint. An attempt in Victoria State to legislate that the special hearing must occur within 21 days of committal for trial had to be repealed because it proved impossible to meet. Problems were encountered in gathering other evidence in time (especially forensic), in securing timeous disclosure, and in general preparedness of parties for the case. In Western Australia, where trials can take 8-12 months to come to court, the special hearing tends to occur within the first 6-8 months. Case management is therefore essential.
- There is now a focus not on the procedure – which is almost universally accepted – but on the quality of questioning as the key to securing the best quality of evidence in the least damaging way. In the words of one commentator "The style, nature and technique of questioning are the primary reasons for cross-examination unduly and/or improperly upsetting, confusing or distressing the child."[34]

Case Study 2: Moving towards the Full Pigot - England & Wales

2.34 Section 27 of the Youth Justice and Criminal Evidence Act 1999 provides that a video-recorded interview with a vulnerable or intimidated witness before the trial may be admitted by the court as the witness's evidence-in-chief. This has meant that the "Achieving

[33] Email correspondence, Western Australia Child Witness Service, 10 Mar 2014

[34] See *Proposed reforms for the cross-examination of child witnesses and the reception and treatment of their evidence*, David Caruso, (2012) 21 JJA 191 at 197

Best Evidence" interview is routinely used as the evidence-in-chief where such an interview has taken place. For many years the UK Government did not, however, commence section 28 of the Act, which provides for the video-recorded cross examination and re-examination of a young or vulnerable witness. This changed in early 2014 with the introduction of pilot testing of section 28 hearings in Leeds, Liverpool and Kingston-upon-Thames. The pilot was intended originally to last until the end of September 2014, but it is understood that it has now been extended for a further period of time. Members of the Review Group observed section 28 proceedings in both Leeds and Liverpool.

2.35 In the pilot scheme, a section 28 hearing can be held for witnesses aged 16 and under, or for those with physical or mental health problems that mean they are vulnerable. It is the responsibility of the police and the Crown to identify vulnerable witnesses (where, as in most cases, they are appearing for the prosecution). The police are primarily responsible for ensuring that an ABE interview occurs and is suitably video-recorded. It is for the Crown formally to notify the Court, usually at the Magistrates Court, that this is a section 28 case, that they will be applying for special measures and that the case requires fast tracking. The application for special measures, including a section 28 hearing, is then made at the Preliminary Hearing, when a date will be set. Applications for special measures are rarely objected to and even more rarely refused.

2.36 In practice, section 28 hearings are set a number of months after the Preliminary Hearing, to allow for full disclosure and consideration of the ABE interview. At the same time that the section 28 hearing is arranged, there is also set a date for the "ground rules" hearing, where the conduct of the hearing will be agreed. This usually occurs in the week preceding the section 28 hearing. The judge may also require regular updates prior to these hearings on the preparedness of counsel for the section 28 hearing.

2.37 The Ground Rules Hearing was described as the key to the success of the pilot. It must be attended by the advocates who will participate in the section 28 hearing, and also the intermediary, if one has been appointed. The principal matters discussed and determined at this hearing are: the likely length of cross examination, the nature of the questioning (including limitations on "putting the defence case") and any particular considerations required given the particular vulnerability of the witness. In both Leeds and Liverpool, it was the practice to require defence counsel to submit their proposed questions in advance for approval in a Ground Rules Hearing Form. This form also required counsel to certify that they have read the Judicial Protocol on the Implementation of section 28, and the relevant toolkit on the Advocate's Gateway (which provides guidance on the way to cross-examine children in an age and development appropriate way).

2.38 This has meant that the questions are not only phrased appropriately (e.g. avoiding types of questioning that are likely to confuse the witness) but are focused only on those issues which require to be addressed in the cross-examination. Counsel are forced to prepare thoroughly and carefully. As a result, section 28 hearings tend to be much shorter than cross-examination in the trial itself – most lasting under 20 minutes. Counsel are clearly expected to stick closely to the pre-agreed list of questions, subject to variations permitted by the judge as the need arises. The Ground Rules Hearing and agreed practice note of that which is agreed must be drawn up by the advocates and submitted to the judge.

2.39 The section 28 hearings themselves take place in a court setting, with a live link to a video interview suite within the court building. A day or so before the hearing, the witness views a video of their ABE interview. On the day, they arrive at the interview suite and in most cases the judge and counsel will meet them there to introduce themselves before going up to Court. In Court the entire proceedings are recorded, including the preliminary stages of establishing video link contact. The judge explains to the witness what is going to happen, emphasises the importance of answering truthfully (particularly saying "I don't know" or "I don't understand" where appropriate). The hearing is taken under oath or a promise to tell the truth unless the witness is under 12 years old. The defendants always attend if in custody. If on bail, they have the choice to attend, and do so in roughly half of the hearings.

2.40 The cross examination is then conducted with the witness being able to see counsel on screen, and in the court there is a full screen view of the witness. In all respects the process is then like a normal video-link examination. In some cases the presiding judge has deemed it appropriate that he or she and counsel should join the witness in the video suite in order to carry out the questioning. This has occurred where the witness has had particular communication difficulties, and where the witness was very young and close interaction was required to engage their attention.

2.41 As the hearing ends and the witness is allowed to go, there is a brief discussion with counsel as to whether there needs to be any editing of the recording. As the questions are predetermined, this does not happen often.

Intermediaries

2.42 Section 29 (2) of the Youth Justice and Criminal Evidence Act 1999 provides that one form of special measure available to vulnerable witnesses is the use of an intermediary. According to the Act, the function of the intermediary is to communicate to the vulnerable witness, 'questions put to the witness, and to any persons asking such questions, the answers given by the witness in reply to them, and to explain such questions or answers so far as necessary to enable them to be understood by the witness or person in question'.

2.43 The Ministry of Justice is responsible for the policy for the Witness Intermediary Scheme matching service and the scheme is operated by the National Crime Agency (NCA) on the Ministry's behalf. There is a system of Registered Intermediaries who are specialists in communication, drawn from a variety of professions, such as speech and language therapists, occupational therapist, psychologists, social workers, special need teachers, psychiatric nurses or other mental health professionals. The NCA recruit Registered Intermediaries who are vetted by the Ministry of Justice, and trained by the City Law School on the criminal justice system and their role within it. It is also possible to apply to use non-registered intermediaries.

2.44 The Ministry of Justice has outlined the role of the intermediary as helping "victims and witnesses with communication needs to give their best evidence in criminal investigations and at trial by ensuring that they can understand questions put to them and can communicate their answers effectively. To do this they:

1) Carry out an initial assessment of the witness's communication needs to:
   – evaluate abilities and needs;

– evaluate whether they have the particular skills to help for that witness;
– establish rapport so they can help the witness to give their best evidence.

2) Give advice to help the police, prosecution and the Court achieve best evidence during the investigation and trial stages of a case, i.e.
– how a witness communicates;
– the witness's levels of understanding;
– how to phrase questions to the witness in order to achieve best evidence.

3) Help with pre-trial preparation, such as a court familiarisation visit.

2.45 It was the emerging cadre of intermediaries who were instrumental in the development of the Ground Rules Hearing as a means of ensuring appropriate communication with the witness in the court setting. This was because it became clear that a formal procedure was required to allow for the presentation of the intermediary's advice to the Court.

2.46 As a general rule, intermediaries are used for all witnesses aged 11 and under, and for older witnesses where that is necessary because of particular barriers to effective communication. It is for the Crown to identify when an intermediary should be used for their witness. It was emphasised that the sole function of the intermediary is to facilitate communication, rather than provide any other kind of support or advice to the witness.

2.47 In both centres visited, the judiciary were enthusiastic about using intermediaries, who make a contribution to the process in a number of ways: first, in the preparation of a report, prior to the ground rules hearing, about the witness, identifying the implications of their age and/or vulnerability; secondly, in discussing and explaining the report at the ground rules hearing, helping the judge and counsel ensure that the lines of questioning will be appropriate; and thirdly, in facilitating communication at the hearing itself. They are particularly useful in finding ways for the witness to cope with and communicate concepts they find difficult – (e.g. young children have difficulty dealing with concept of time and sequence, and visual aids often help)[35].

Case Study 3: a different approach - Norway

2.48 Norway has a population of 5.1m, in a country with a total area of 385,252 km^2 (Scotland's is 78,770 km^2). Courts in Norway are organized into three levels: sixty-five city/district courts (tingrettene, typically the court of first instance), six Courts of Appeal (lagmannsrettene, typically the court of second instance), and the Supreme Court (Høyesterett). All courts, and all the judges, handle civil, criminal, and administrative cases. In criminal cases, decisions are made by judges together with lay members of the court. Lay members are drawn from a list drawn up by the local authority of those willing and suitable to perform the role.

2.49 Criminal investigations are undertaken by the Police (or other authorised investigating agency). The Prosecution Service is a department of the Norwegian Police.

[35] For a detailed description of the effectiveness of an intermediary (in a non section 28 case), see D. Wurtzel, *The youngest witness in a murder trial: making it possible for very young children to give evidence* Crim. L.R. 893 (2014)

Under the relevant legislation[36], criminal trials are based on oral proceedings, and evidence must be heard in court. The indictment is the only document that the court receives prior to the main hearing of the case; judges are not permitted to see police records before the trial opens. Typically, the court comprises one professional judge and two lay judges. In addition to the prosecution and defence counsel, the complainer also has the right to legal representation in Court.

Judicial hearing of evidence

2.50 Criminal Procedure Regulations[37] provide for the taking of evidence in a judicial hearing prior to trial for certain witnesses and certain cases. Judicial hearings are available for witnesses who are either under 16 years old or who have a mental disability, in cases where either the witness is the alleged victim of a sexual offence or of an offence of violence, or has been the witness to violence (usually in a domestic setting). The regulations provide that such a hearing should happen as soon as possible after an incident is reported, and no more than two weeks later, unless there are special circumstances preventing this. In practice, however such hearings often take place more than two weeks later, because of the difficulties in assembling all the parties who need to be present – only around 40% of cases in Oslo take place within the 2-week deadline. These hearings were also described as "judicial forensic interviews". The number of these hearings in Norway has risen dramatically – due to a number of factors, including broadening the eligibility of cases – over the past 20 years from around 200 in 1994 to over 2500 in 2013. The interviews are video-recorded and played as evidence in the trial.

2.51 Prior to the introduction of the network of Barnehus (State Children's Houses) in 2008 hearings were conducted at interview suites at the police station. There are now 11 Barnehus across Norway, which provide custom designed facilities for the hearings and other services to support child witnesses (see below). These include dedicated interview rooms, featuring high quality audio and video links to a conference/viewing room for all those entitled to observe the proceedings.

Participants

2.52 The hearing is under the control of the judge. Also present at the hearing will be a large number of participants, as follows: Interviewer; Counsel for the complainer; Substitute guardian for the child; Defence lawyer; Police/prosecuting lawyer; Police Investigator; Advisor from the Children's House; Representatives from Child welfare services (if necessary). There will also be a Technician to operate the audio/video viewing and recording. There may also be a need for an interpreter. This is an increasing and challenging requirement as Norway becomes more multi-cultural. The accused is not usually present, although it is the norm that he/she is informed that the session will be taking place.

2.53 It is notable that, given that this hearing takes place a short time after the incident is reported, there may not even be an identified defendant who has been charged. In this case, a lawyer is appointed to represent the defence's interests in anticipation of future

[36] Straffeprosessloven (Norwegian Criminal Procedure Act) 1981, as amended
[37] Criminal Procedure Regulations of 2 October 1998 no. 925.

proceedings. Under the current jurisprudence of the European Court, this appears to be compliant with the Convention.

2.54 Other than the witness, the critical participant is the police interviewer. All police officers in Norway are required to take a 3-year Bachelor's degree in Policing. On top of that, those undertaking forensic interviews with child and vulnerable witnesses are subject to intensive training for 6 months before becoming qualified to conduct interviews. They are subject to face-to-face tuition, on-the-job training and coaching and rigorous examination.

Process

2.55 Normal practice is for the child witness to be informed of their visit to the Barnehus the night before the hearing. The interviewer will let the child's parent or guardian know what to expect from the time the child arrives, and will discuss any needs the child may have, and anything about the child that might help the interviewer establish a rapport with him/her.

2.56 At the Barnehus the participants will meet in advance of the hearing. The interviewer will set out her plan for the interview, and potential lines of questioning are discussed. This is an opportunity for Defence counsel to suggest what questions they would wish to see asked. These meetings usually last 15-20 minutes. It is normal practice for the Police to have interviewed the suspect prior to the judicial hearing, which allows for any alternative narrative to be tested with the child.

Interview

2.57 The interview itself follows a structure based on the internationally established Protocol from the National Institute of Child Health and Human Development (NICHD)[38]. The interview is comprised of seven phases:

1. Preparations
2. Building trust
3. Formalities
4. Case/theme introduction
5. Narrative interview
6. Probing – theme by theme, and challenge if necessary
7. Finalization

2.58 The nature of the questioning has to be appropriate to the age and development of the child in question. The Oslo police has recently decided to develop a particular specialism in particularly young children (pre-school age), as the type of questioning needs to be markedly different from that for older children. Age tends also to determine the length of the interviews - younger children will tend to require shorter sessions and longer breaks, which can mean a much longer time spent overall at the Barnehus. It was clear from the discussion that the nature of the evidence provided can vary enormously, depending on the child's own state of mind and emotion. Breaks could also be taken for the interviewer to

[38] The National Institute of Child Health and Human Development (NICHD) Protocol: Interview Guide, available at http://nichdprotocol.com/the-nichd-protocol/

discuss with the Judge and other participants what further lines of questioning might be appropriate.

2.59 After the interview, the child is, if appropriate, given a medical examination on site by specialist staff from the University hospital. It was suggested that at times information useful to the investigation emerges during the medical examination, as, for example, a child may be more willing to talk to the doctor or nurse about the injuries he or she has received. The child is also assessed for any further welfare or child protection measures and support that may be required.

The Barnehus

2.60 As referred to above, the Barnehus at Oslo is part of a network across Norway, introduced in 2009. The purpose of the facility is to provide a safe environment for the children to be interviewed and assessed. It appears that, unlike some comparable facilities in Scotland, it is a principal purpose of the Barnehus to be a centre for the holding of judicial forensic interviews – in other words, its primary purpose is to support the criminal trial process. Among the many benefits identified by all concerned was that the wrap-around service provided by the Barnehus staff allowed the police to concentrate on their primary responsibility, the appropriate interviewing of the witness; and that additional therapeutic and medical support could be instantly accessed, making the experience of the interview less traumatic.

2.61 The Barnehus in Oslo was an outstanding facility – well designed and extremely well equipped to provide a non-threatening and reassuring atmosphere. It was clear that there needed to be significant investment and maintenance to ensure the quality of the facilities and the support service provided. The police interviewer emphasised the importance of using the best available technology for the video recording process, as this makes the presentation of the evidence far more effective.

Conclusion

2.62 Practitioners in Norway were clear that this approach was producing far better results, both in terms of the quality of evidence and the promotion of the child's wellbeing, than police-station or court-based alternatives. An evaluation of the Barnehus system in 2012[39] concluded that the model was working as it was intended, although there were issues that needed to be addressed around the future governance of the network, the likely resource requirements in the face of increasing demand, and the capacity for the network to cope with children with special needs. There was also evidence that the witnesses themselves found this process helpful and positive.

Evidence of children – lessons to be drawn

2.63 As detailed above, Scotland has introduced a number of measures designed to make the experience of child and vulnerable witnesses less traumatic. As the case studies from England, Australia and Norway show, however, Scotland is still significantly lagging behind those at the forefront in this field. Practitioners from all of these jurisdictions are convinced

[39] *Barneshus-evalueringen,* Politihogskolen (Norwegian Police University College) 2012

that there are clear benefits to be had from a systematic and structured approach to the use of audio-visually recorded forensic interviews as a witness' principal evidence, and from the pre-recording of cross-examination. What is more, these benefits accrue both to the witnesses themselves, in terms of their ability to cope with and recover from the ordeal, and to the administration of justice, in terms of greater certainty and efficiency.

2.64 Common law trial procedures were designed in an age where child and vulnerable witnesses were unlikely to appear; and in some jurisdictions, they were positively discouraged from doing so[40]. Even where there was some openness to the testimony of child witnesses, it was not a frequent occurrence, and no provision was made for their participation. As has been seen, in recent decades the number of child and vulnerable witnesses being called to give evidence has increased dramatically. They have, however, been introduced into a system that was ill-equipped to accommodate them, with the result that there have been a series of adjustments to the law and practice that at best only partially address their needs.

2.65 Scottish Ministers have stated their ambition to make Scotland "the best place in the world to grow up in"[41], and encourage an approach which directly addresses the specific needs of children and young people[42]. The criminal justice system, as all other public services, requires to consider how best to contribute to achieving that ambition. In developing proposals for improving the treatment of child and vulnerable witnesses, there are a number of lessons to be drawn from consideration of the experience of other jurisdictions. It should be noted that some of these lessons can be applied to the potential introduction of pre-recorded evidence more generally, and should be borne in mind.

The evidence of children and vulnerable witnesses – a systematic approach

2.66 There is a compelling case that the evidence of a child or vulnerable witness should be captured in advance of any trial, in the form of a forensic interview preferably as soon as possible after the initial complaint. Properly conducted, and often taking place within hours or days of the reported incident, such interviews are the best way to elicit a reliable and comprehensive account of the reported incident. With this measure alone, a considerable burden is lifted off the witness, as their substantive account is made only once, very early on in the process. It also benefits the trial process, as the principal evidence is available for all the parties at the start of process, without the risk that the account may change. It appears that Scotland is only now taking the first steps to introduce what is common practice in common law jurisdictions, and the apparent intention of the relevant European legislation[43], the routine use of the pre-recorded initial interview as the evidence-in-chief. It is, however,

[40] Cf the opinion of Lord Goddard, LCJ: "The jury could not attach any value to the evidence of a child of five. It is ridiculous to suppose that they could. To call a little child seems to us to be most undesirable, and I hope it will not occur again." *R v Wallwork* (1958) 42 Cr App Rep 153

[41] See e.g. Policy Memorandum to the Children and Young People (Scotland) Bill (enacted in 2014) at http://www.scottish.parliament.uk/S4_Bills/Children%20and%20Young%20People%20(Scotland)%20Bill/b27s4-introd-pm.pdf

[42] Known as "Getting it right for every child (GIRFEC)" – see http://www.scotland.gov.uk/Topics/People/Young-People/gettingitright/background

[43] Article 24(1) of EU Directive 2012/29 states: "……. Member States shall ensure that where the victim is a child: (a) in criminal investigations, all interviews with the child victim may be audiovisually recorded and such recorded interviews may be used as evidence in criminal proceedings;…."

doing so in an ad hoc way, using the recorded Joint Investigative Interview alongside other forms of prior statement.

2.67 The advantages of capturing the evidence in recorded form early are reinforced where further examination of the witness is also recorded prior to the trial hearing. If it is accepted that the experience of appearing at Court is potentially harmful to young and vulnerable witnesses, not least because the trial may occur many months after the initial report, then every step should be taken – consistent with fairness to the accused – to avoid that harm occurring. In the words of the former Lord Chief Justice of England and Wales, Lord Judge:

> "…our ambition should be that the number of children whose lives are distorted by the forensic process shall be reduced and then kept to an irreducible minimum"[44]

2.68 This means that cross-examination or its equivalent should also take place in advance of the trial, again as soon as is reasonably possible, to minimise the potential harm to the witness, and to maximise the quality of the evidence that is elicited. Again, there seems to be in Scotland an ad hoc recognition of the usefulness of such an approach, with the occasional application for evidence to be taken on commission. But it appears from the English and Australian examples that it is possible to devise a structured and systematic approach within the adversarial tradition to accommodate the full pre-recording of such evidence. Furthermore, it seems that these new procedures have been implemented with the broad support, or at least acceptance, of all participants in the legal system including defence agents and advocates. There has not been any significant challenge to these processes on the grounds that they are inherently unfair, although the English pilot is still relatively young. This may be in part due to the involvement of defence agents in overseeing the running of the pilot, to ensure that their interests are taken into account.

2.69 It should not, therefore, be beyond the Scottish system to do likewise in the short to medium term. Such an approach would focus first on securing a high quality level of audio-visually recorded investigative interview in the expectation that this would be used as the evidence-in-chief at any potential future trial – to the exclusion of other forms of prior statement. Such an interview should occur as soon as possible after a complaint has been made. As soon as the recording has been made available to all the parties in the case, arrangements should be for the subsequent examination of such witnesses on behalf of or by the defence and under the supervision of a judge, to be recorded for use at the trial. It is arguable that this subsequent examination should take place within days or weeks, rather than months, of the initial interview. It should be immediately preceded by a ground rules hearing to ensure an appropriate quality of questioning.

2.70 One of the apparent weaknesses of the English and Australian systems is the time lag of several months between the initial interview and the subsequent cross-examination. This increases the possibility that the witness, through no particular fault of their own, produces a less consistent or reliable account across the various stages of examination. This is partly mitigated by the witness being able to view their initial interview immediately

[44] The Rt Hon the Lord Judge: *The Evidence of Child Victims: the Next Stage* Bar Council Annual Law Reform Lecture, 21st November 2013

prior to the cross-examination, but this is not an ideal solution. The reasons for this time lag appear primarily to do with disclosure; it is argued that if the cross-examination occurs early on, the process is vulnerable to material that emerges later. The defence will not have had an opportunity to examine the witness with the complete knowledge or relevant material that may affect the defence case and, consequently, the line of questioning they would wish to pursue with the witness.

2.71 It is probably fair to say, however, that the unforeseen emergence of material that substantially changes the nature of the case is relatively infrequent. Where new material does emerge, it is often in a predictable form, and in many cases there is still no further need to examine the witness. This is not to exclude this possibility altogether. It may well be necessary for there to be the safety net of being able to recall a witness for further examination, either at another pre-recorded session or, in the last resort, at the trial itself. But this should not prevent an attempt to capture the entirety of a witness' evidence as soon as possible after the events in question, to secure the best possible evidence and allow the witness to get on with their life.

2.72 It may be possible in the longer term to move to an approach closer to that used in Norway, where the entire examination of the child witness usually takes place in a single session within weeks of the original complaint. In such an approach, the interviewer would be responsible for incorporating questions on behalf of the defence, in the same way as is done at the Barnehus at present. Such a radical change to current procedures may be too bold a change to undertake in a single step, given the current adversarial processes and traditions prevailing in Scotland; but it should be seen as the ideal to which we should aspire.

2.73 Whether Scotland moves immediately to the Norwegian model, or chooses a transitional approach similar to that taken in England and Wales, it is essential that the framework for the collection and presentation of this evidence within the trial process is structured, consistently applied and commonly understood. This means that there needs to be collaboration between all those participating in the justice system – the Crown, defence agents, Court Service, judiciary, victims and witnesses organisations and government – to develop a set of procedures, supported by guidance and training, which preserve the integrity of the trial's truth-finding function and its fairness to the accused and all others concerned. The development of such procedures would need to take account of the further considerations below.

<u>Interviewing and cross-examination</u>

2.74 In all the jurisdictions considered there was a strong emphasis on the quality and appropriateness of the questioning - and the importance of this is reinforced by the weight of academic research in this area[45]. This applies both to the initial interview and to any subsequent questioning, including that on behalf of the accused.

Forensic interviewing

[45] See *Facilitating children to give best evidence: Are there better ways to challenge children's testimony?* Emma Davies, Emily Henderson and Kirsten Hanna, (2010) 34 Crim LJ 347, which reviews the literature at 351-353

2.75 In relation to the initial interview (and this includes consideration of the Norwegian-style forensic interview) each jurisdiction applied an interview structure based on theories of cognitive development. The National Institute of Child Health and Human Development (NICHD) Protocol is the primary example of such an approach. Its techniques were designed to integrate advances in scientific understanding about memory and children's linguistic and cognitive development. The aim of this style of interview is to provide a structure that will allow the interviewer to draw out a narrative from the witness by means of open questioning, and will also minimise the risk of questioning that will compromise the integrity of the interview. The Protocol has been adopted in a wide number of jurisdictions, and research suggests that using this approach will greatly enhance the quality of the evidence that is produced.[46] This is of fundamental importance. It should be self-evident that the quality of the evidence elicited in the initial interview of the child or vulnerable complainer will have a substantial impact on the conduct of the rest of the proceedings. A good interview will expose all the main issues, provide a comprehensive account of the complaint, allowing both parties to explore and focus on the principal issues that may require further investigation and subsequent examination; a poorly-conducted interview represents a missed opportunity, and may distort, rather than aid the trial process.

2.76 The research cited demonstrates that the comprehensiveness, reliability and accuracy of a child's testimony are hugely dependent on the quality and nature of the questions themselves – and that this factor outweighs any other (such as the environment in which the interview takes place). This means that those questioning the witness at any stage need to be properly and specifically trained in the questioning of young children and vulnerable witnesses, according to an established system that can be consistently applied. Such a system already exists in the form of the NICHD Protocol, which has international recognition, and it is surprising that at present in Scotland there has been an inconsistent approach to its use. The current Guidance on Joint Investigative Interviewing of Child Witnesses in Scotland (2011) makes only passing reference to the Protocol, instead suggesting a looser structure.

2.77 The risk with this current approach is that there will not be the quality and consistency required for the criminal justice process. It is acknowledged that section 7 of the Victims and Witnesses (Scotland) Act 2014 will place a duty on those conducting JIIs to have regard to the Guidance issued by Scottish Ministers, and this may help to improve consistency. The Review has not investigated in depth whether Joint Investigative Interviews as currently carried out would routinely match the standards required of a forensic interview. There is, however, research evidence that the quality of JIIs is variable at best, and would benefit from a more rigorous and systematic approach to ensuring consistency in high quality interviewing[47]. There is substantial expertise available to support the further

[46] See Pipe, Orbach, Lamb et al *Do Case Outcomes Change When Investigative Interviewing Practices Change?* Psychology, Public Policy, and Law 2013, Vol. 19, No. 2, 179–190; also *Tell Me What Happened: Structured Investigative Interviews of Child Victims and Witnesses*, ed Michael E. Lamb, Irit Hershkowitz, Yael Orbach, Phillip W. Esplin. Chichester: Wiley 2008; The Review also benefited from the presentation *Developmentally appropriate investigative interviews*, by David La Rooy and Michael Lamb, given at Judicial Institute, Edinburgh January 2014.

[47] See La Rooy et al, *Joint investigative interviews with children in Scotland,* 2012 SLT 164 and *Joint Investigative Interviews (JIIs) conducted with children in Scotland: a comparison of the quality of interviews conducted before and after the introduction of the Scottish Executive (2011) guidelines* 2014 SLT 217

development of a more thorough approach to interviewing child and vulnerable witnesses, and this should be pursued as far as possible.

Cross-examination

2.78 Cross-examination presents further challenges in the context of pre-trial evidence hearings. Article 6 (3)(d) of the European Convention on Human Rights provides that the accused has the right:

> "to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".

2.79 Common law jurisdictions meet that requirement through the general availability for the defence to cross-examine the witness in court. As set out at the start of this chapter, however, there is a growing consensus that traditional forms of cross-examination are particularly unsuited to the case of child and vulnerable witnesses, because –

> "First, the traditional adversarial cross-examination is not a reliable method of either testing the truthfulness of what a child has previously said, or of obtaining from them further information that is accurate….Second, for children it is potentially abusive."[48]

2.80 In the context of pre-recording a child or vulnerable witness' evidence, the challenge is therefore to find a means of examining the witness on behalf of the defence that is not aggressive or threatening, but still meets the Convention's requirements. The European Court of Human Rights has accepted that restrictions can be made on direct contact between suspect and witnesses, provided such measures are "strictly necessary" and that "any difficulties caused to the defence by a limitation on its rights" are "sufficiently counterbalanced by the procedures followed by the judicial authorities"[49].

2.81 As a general rule, restrictions such as closed-circuit TV or screens have been deemed compatible with Article 6(3)(d).[50] But the critical issue is that the accused must have the chance to challenge the evidence by having questions put directly to the witness.[51] And this must be done in a way that allows the accused to observe the evidence being given – the court has held in a case where witnesses who were kept anonymous and whose interview was transmitted only by audio, that such interviews could not be considered "a proper substitute for the possibility of the defence to question the witnesses in their presence and make their own judgement as to their demeanour and reliability"[52].

2.82 The solution in England has been to modify the style of questioning in line with current academic research, according to toolkits and guidance provided on a website called the Advocates Gateway (www.advocatesgateway.org). The toolkits available on the website provide advocates with clear guidance on appropriate forms of questioning – for example

[48] John Spencer: *Children and Cross Examination: Time to change the rules?* Ch 9: Conclusions p178
[49] *PS v Germany* no 33900/96, 20 Dec 2001, [2002] Crim LR 312
[50] *Hols v Netherlands* no 25206/94 19 Oct 1995
[51] *AS v Finland,* no. 40156/07 28 Sept 2010
[52] *Van Mechelen & others v Netherlands* (1997) 25 EHRR 647

using simple, unambiguous language and open questions, and avoiding language that is likely to confuse or lead the witness, such as "tag" questions (He didn't do it, did he?), double negatives (It's not impossible then…), or legal jargon. Counsel are required to certify that they have acquainted themselves with this guidance prior to conducting a section 28 hearing.

2.83 There are also limits on the extent to which Counsel can put the defence case to the witness, or suggest to the witness that he or she is lying. This follows the landmark case of *R v B*[53] where the Lord Chief Justice stated that the trial process must and increasingly has catered to the needs of child witnesses and that the forensic techniques of the advocate, in particular in relation to cross-examination, had to be adapted to enable the child to give the best evidence of which he or she is capable, saying:

> "…. the advocate may have to forego much of the kind of contemporary cross-examination which consists of no more than comment on matters which will be before the jury in any event from different sources. ……. Comment on the evidence, including comment on evidence which may bear adversely on the credibility of the child, should be addressed after the child has finished giving evidence."[54]

2.84 This modified approach to cross-examination has largely been achieved through the requirement to agree questions in advance of the section 28 hearing.

2.85 There is a less systematic approach to this in Australia, although commentators have remarked that the culture of cross-examination has changed, particularly in respect of child witnesses, where it is realised that aggressive questioning of a vulnerable witness often does more harm to the defence case than good. The need for appropriate questioning is recognised in practice directions and other guidance, which warn against the use of "complex phrasing, legal jargon, repetitive questions, and harassing, intimidating and humiliating tactics. Such approaches tend to increase the potential for error in the evidence of children as well as cause them undue stress."[55]

2.86 The Norwegian approach is considerably more distant from what we would recognise as traditional cross-examination. As detailed above, the interview consists only of a structured approach according to the NICHD protocol, in which the police interviewer is the only person who questions the witness directly during the evidential hearing. He or she can take suggestions from the defence lawyer as to lines of questioning, and that is deemed sufficient to meet the Article 6 requirement allowing the examination of the witness on behalf of the accused. The Norwegian experience, and that in continental systems where an inquisitorial approach is taken, raises broader questions about the nature and role of cross-examination in general, which are explored in the next chapter.

[53] [2010] EWCA Crim 4

[54] [2010] EWCA Crim 4 At [42]

[55] *Bench Book for Children Giving Evidence in Australian Courts,* Australasian Institute of Judicial Administration 2012 at 4.9

Training and qualifications

2.87 As is evident from the preceding paragraphs, the interviewing and subsequent questioning of children and vulnerable witnesses requires specific understanding, knowledge and skills. This is not a trivial matter. In relation to the forensic interviewing of children, the well-being of the child and the integrity of the entire judicial process may well depend on the quality of the initial interview. This means that the interviewer requires an understanding of how the child's developmental stage, or the vulnerable witness' particular needs, will affect his or her ability to respond to the questions put. It requires an understanding of the psychological research into the cognitive development of the child, and an ability to apply the principles underpinning interview structures such as the NICHD Protocol. This is not something that can be achieved peremptorily - it was no coincidence that training for interviewers in Norway lasted for six months. If, as is currently the case, the principal interviewer for a JII will be a police officer, Police Scotland should review whether its current approach to training and maintaining the competence of its interviewing officers requires to be updated or upgraded. There may also be scope for the Scottish Government to revise its guidelines in relation to Joint Investigative Interviews given that they will need to reflect their increasing use as evidence in chief.

2.88 Similar considerations apply also to legal practitioners and the judiciary in relation to procedures that involve the participation of children or vulnerable witnesses. As detailed earlier in this report, there has been substantial growth in the number of cases involving children and vulnerable witness – and it has been estimated that a significant majority of High Court cases (perhaps as high as 80%) now involve sexual offences. This means that it is essential for there to be a body of suitably trained and qualified practitioners able to take on the particular requirements of such cases. It is the case that the Judicial Institute and the Faculty of Advocates both provide some tailored training for their respective constituencies in relation to children in court, referring to the latest research, tools and techniques. There is currently no specific, formalised training for solicitors or for solicitor advocates in this area, although relevant aspects may be covered in related training courses (for example, those relating to children's hearings or to family law procedures).

2.89 The question should now be considered whether this should be taken to the next stage, with a requirement for those involved in the questioning of such witnesses to be "ticketed" for such cases. At present, advocates in England cannot participate in a section 28 proceeding unless they can certify that they have read and absorbed the relevant materials on the Advocates Gateway. This would appear to be a bare minimum requirement. If the volume of cases involving such witness is likely to remain high, then more formal and standardised arrangements may be required. It is appreciated that the "ticketing" of legal practitioners is a thorny issue. But it is also essential that pratitioners are properly equipped to perform their duties, particularly where the wellbeing on witnesses and the quality of evidence is at stake.

Case management and the role of the judiciary

2.90 A common theme in the jurisdictions considered was that the judiciary needs to take a leading and active role in managing the process. This was perhaps most marked in the section 28 pilot in England, where there is a formal case management procedure (preliminary hearing, ground rules hearing and plea case management hearing), supported

by regular "mentions", or ad hoc case management hearings[56]. The rationale behind this is that one of the main benefits to the courts of pre-recorded evidence is that it drastically reduces the duration of the trial hearing itself. This will only occur if all of the issues relating to the pre-recorded evidence have been addressed in advance of the trial – not only whether the pre-recorded hearing was conducted properly, but also questions such as whether cross-examination was undertaken with a sufficient level of disclosure, is it clear and agreed that the pre-recorded witnesses will not be needed at the trial, and have all issues of admissibility be considered and addressed? At times it appeared that the bureaucratic burden on the Court, and particularly the Bench was more onerous than it needed to be. There was, however, widespread enthusiasm for an approach which provided a clear framework within which Counsel would work, and ensured that the trial itself was far more efficient.

2.91 As detailed above, the Australian experience is that the judge does need to take an active role in managing the questioning of the witness at the special hearing; there is less emphasis on managing the conduct of the case across the timespan of the trial itself. In the Norwegian case, it was considered very important that the forensic interview was conducted under the supervision of a judge, in part because this did represent the only opportunity for the defence to have the witness examined, and this needed to be done in a judicial setting.

2.92 The issue of case management raises the question of how far the timing of the proceedings can be managed so that a case is dealt with efficiently. In the common law jurisdictions the requirement for cross-examination, tied as it is to full disclosure of Crown evidence, appears to entail a delay of some months before the pre-recording can take place. As detailed above, attempts in Australia to force early hearings did not succeed, and it is a matter of months before the hearing occurs. According to the timetable set out for the section 28 pilot, the section 28 hearing should take place within about 16 weeks of the first hearing**.** This contrasts sharply with the Norwegian example, where the judicial hearing is meant to take place within two weeks of the reported incident (and possibly before a charge has been laid), and even where this is not possible, still takes place within weeks rather than months.

2.93 All three examples indicate that, where evidence is being captured prior to the trial, the relevant judge does need to take particular responsibility for the quality of the proceedings. With pre-recorded evidence, this is particularly relevant to the issue of the admissibility of the evidence captured. It is inevitably the case that material from many initial interviews, and potentially from some cross-examinations will be either irrelevant or inadmissible. There needs to be the facility, procedure and culture to allow for the appropriate editing of the recordings prior to their use in Court. Experience from Australia and England suggests that, with reasonably firm judicial oversight, there soon emerges a culture whereby appropriate edits to recorded material are agreed with little controversy.

Technology

2.94 Practitioners in all of the jurisdictions considered agreed that it was essential to have a high quality of technology. Clearly reliability is of major importance – some of the benefits

[56] See *Case Management in Young and Other Vulnerable Witness Cases*, an Advocates Gateway toolkit, available at http://www.theadvocatesgateway.org/images/toolkits/1aCaseManagement211013.pdf

of pre-recording will be lost if the equipment does not function properly on the day, requiring a rerun of the session at a later date. But equally important is the quality of the visual and audio recording itself. There was substantial anecdotal and research evidence that the quality of the recording makes a considerable difference to the impact and acceptability of evidence – judges and juries are particularly disengaged by poor quality recordings. One of the criticisms of pre-recorded evidence (and of live-link evidence too) is that it does not have the same immediacy as that of a witness giving evidence in court. The merits or significance of this are debatable. Given the sanctity of the jury's deliberations, it is very difficult to research the impact that viewing evidence on a screen has on the outcome of real trials. Such research as there has been – using mock jurors - suggests that the viewing of evidence on screen is unlikely to have much effect on the outcomes of jury deliberations[57]. Further and more comprehensive research, under the auspices of Professor Cheryl Thomas at University College London, is under way in which real jurors are interviewed as to the quality of their experience, in order to explore this issue further.

2.95 The issue here, however, is that if there is any "barrier" effect of observing a witness' evidence on screen, then this can be mitigated by making the image and sound as high resolution as possible, and ensuring that the interaction between the questioner and the witness is as clear as possible.

Facilities

2.96 The facilities at which the recording sessions occur should be as conducive as possible to the comfort and peace of mind of the witness, and should not replicate a courtroom setting. There are of course options in the provision of the infrastructure required to carry this out. At present, in England pre-recorded cross-examinations take place in the specially adapted suites within the court premises which were already made available for live video links. These suites, while serviceable to a certain degree, are not ideal. A number of senior voices in England have expressed the view that the preferred option would be to site the pre-recording suites elsewhere – in the words of former Lord Chief Justice Lord Judge:

> "My broad thesis is that the day will surely come, and in my view it has already arrived, when the requirement for the physical presence of a child witness or victim in the court building will be, and should be, regarded as an antediluvian hangover from laughable far off days of the quill pen and the ink well."[58]

2.97 Court buildings do not lend themselves to being child-friendly, however sympathetically furnished – although there was an excellent example of good quality design within Court premises at the Central Criminal Court in Dublin, where the children's interview suite was designed by the children's charity Barnado's. Even this, however, did not compare with the facilities at the Barnehus in Oslo. Here every attention had been given to the detail required to make the interview experience both as supportive as possible, with a

[57] According to a study of different techniques for presenting evidence to mock juries "there was no clear or consistent impact as a result of these divergent presentation modes, suggesting that concerns over the use of special measures by adult rape complainants (at least in terms of juror influence) may be overstated" *A 'Special' Delivery? Exploring the Impact of Screens, Live-Links and Video-Recorded Evidence on Mock Juror Deliberation in Rape Trials*, Louise Ellison and Vanessa E Munro, Social & Legal Studies 2014 23: 3

[58] The Rt Hon the Lord Judge: *The Evidence of Child Victims: the Next Stage* Bar Council Annual Law Reform Lecture, 21st November 2013

high quality catering facility, bright and comfortable waiting areas and interview suites, and as effective as possible, with the ability to change the environment to make it most conducive to eliciting high quality evidence, and suitable facilities for the practitioners taking part in and observing the hearing.

2.98 It is recognised that in Scotland use is made of video-link locations both within and outwith Court premises. Some of the court-based video rooms are quite spartan. External facilities can be found either in Scottish Court Service dedicated sites, of which there will be 17 by January 2015, or in premises run by local authorities, colleges and other public authority buildings. The quality of these will, inevitably, vary. The Scottish Court Service should consider the extent to which it can work with other partners to improve the quality and accessibility of video-link facilities. There are other facilities in Scotland, such as child protection suites or Children's Hearing Centres, designed to accommodate children for similar purposes and it may be worth exploring the scope for their future use to provide an appropriate setting for taking the evidence of a child or young person for later use at trial.

Other special measures - intermediaries

2.99 It was also evident from the English and Australian experience that there is a useful role that could be played by an intermediary, provided that the purpose and terms of that role were clearly defined. The Review first came across the concept in Ireland, where Section 14 of the Criminal Evidence Act 1992 provides that the court may order that questions be put to a witness through an intermediary, if satisfied that, having regard to the age or mental condition of the witness, the interests of justice require it. Although much of the written material in Ireland refers positively to the potential provision of intermediaries, the evidence from practitioners was that they were very infrequently used. This was seen to be due to the vagueness of the statutory provisions, in particular as to who would be suitably qualified to be an intermediary. There was also some uncertainty as to the role that the intermediary was there to play.

2.100 In contrast, however, there appeared to be a well-established system of intermediaries in England and Wales. As detailed in para 2.39 above, the judiciary in England were generally supportive of the use of intermediaries. There was a well-defined role for them in providing information and advice prior to the section 28 hearing, and facilitating communication at the hearing itself. There were, however, concerns that the system of State Registered Intermediaries in England was overburdened, with the demand far higher than that which could be comfortably met by the relatively small number of registered intermediaries. There were also issues about the ability of the Defence to access registered intermediaries for their witnesses. It was possible for intermediaries from outside the registration scheme to be used, but this gave rise to questions about the standards and qualifications required from such persons.

2.101 There may well be a role for registered intermediaries in Scotland, deployed along the lines of the scheme in England and Wales. The introduction of such a scheme would have to occur alongside the appropriate training of court-based lawyers and the judiciary. Given the likely resource constraints and high volume of demand, it may be that the focus of the scheme should be on those witnesses with particular special needs, such as certain

medical conditions, that require correspondingly particular specialist knowledge to assist with their communication.

Conclusions and recommendations

2.102 The way in which child and vulnerable witnesses are treated in Scotland, although recently improved, still falls far short of the standards set in other jurisdictions. The overwhelming weight of research and practical experience suggests that the best way to secure reliable evidence from a child or vulnerable witness, in a manner that minimises any further harm to them, is to remove them as far as possible not only from the traditional courtroom setting but also from the traditional styles of questioning and cross-examination. It is not merely a case of adapting the system we have, but of constructing a new approach, based on the wealth of scientific and experiential evidence available.

2.103 **In that context, there is a compelling case that the approach taken in Norway provides the most appropriate environment and procedures for taking the evidence of a young or vulnerable witness.** In terms of the environment, not only is the Barnehus a custom designed facility, away from the Court building, with high quality facilities in every aspect, it is also a one-stop shop for the child's needs in the longer term, with immediate access to medical, child protection and welfare services. As for the procedures, most child witnesses will undergo just one forensic interview, with a fully trained interviewer, no more than a few weeks after the incident has been reported, and often within a fortnight.

2.104 The Norwegian example is, however, a considerable distance from where we currently stand in Scotland. To adopt such a model would require a substantial transformation in the law, culture and procedures and an equally substantial investment in appropriate facilities. The gap is greatest in terms of the legal procedures and culture. The idea that the full evidence of a child can be taken so early in the process, before all material have been disclosed, and that there should be no direct questioning of the witness by either Counsel is particularly alien to Scottish legal practice as it currently stands. Such a transformation may take time and may need to take place within a broader revision of our legal culture and practices.

2.105 An alternative approach would be to devise a Scottish version of "the Full Pigot", drawing on the English and Australian examples, framed as they are within similar adversarial systems. As has been seen, such an approach appears to be emerging in an ad hoc and unstructured fashion with the increasing use both of Joint Investigative Interviews as the evidence in chief, and the taking of evidence on commission for the cross-examination. This haphazard approach is the least desirable way to proceed. If the Full Pigot is to be adopted, it would need to consist of the following elements:

- A framework for the systematic use of audio-visually recorded Joint Investigative Interviews as the evidence-in-chief of a young or vulnerable witness. The development of this framework will require the collaboration of the police, local authorities, the judiciary, the Crown, defence agents and counsel. Such recorded interviews should be the default option for such a witness' principal evidence and should replace the use of other forms of prior statement as evidence in chief.

- A review of the protocols to be applied by and training for those conducting the interviews. An approach based on the NICHD Protocol would provide the quality and consistency required.

- The introduction of a systematic and structured approach to the pre-recorded cross-examination of child and vulnerable witnesses under judicial supervision, drawing on the experience of the section 28 pilot scheme in England and the approach in Western Australia. This should replace the current ad hoc practice of applications to hear evidence on commission.

- In designing a scheme for pre-recording cross-examination, every effort should be made to shorten the time period between the initial forensic interview and the cross-examination hearing. This may mean require, for example, a rigorous approach to disclosure by the Crown, and the structuring of Legal Aid to support the participation of Defence Counsel in earlier hearings.

- As with the initial questioning in a JII, advocates involved in the questioning of a child witness need to have a suitable understanding of appropriate questioning techniques, as should the presiding judge. Training should be widely available, and use made of resources such as the Advocates Gateway to reinforce appropriate behaviour. Consideration should be given to the extent to which the judiciary, the Crown and defence should be prequalified to participate in cases involving child and vulnerable witnesses.

- The English approach of a ground rules hearing prior to the recording session, at which lines of questioning are agreed seems to have merit; for this to work well, the bench must be prepared to take an active role in setting the parameters for the cross-examination and re-examination of the witness.

- Where a child or vulnerable witness is to be examined, there is a useful role to be played by appropriately qualified intermediaries, both in providing advice to the Court in advance as to the particular communications issues that will need to be addressed, and in facilitating communication on the day. This may need to be restricted to those with particular special needs.

2.106 The current treatment of children and vulnerable witnesses in criminal trials is not satisfactory, and a systematic and consistent approach is needed to ensure that the right measures are put in place across Scotland. A decision therefore needs to be taken as soon as possible on the future procedures to be deployed for such witnesses. There are a number of considerations to take into account in deciding whether to adopt the Norwegian or the “Full Pigot” model.

2.107 One of these considerations will be costs – in both the short and long term. The introduction of either model will require significant effort and expenditure in terms of facilities and infrastructure, legislative and procedural change and, critically, training for all those involved. The Review was not equipped to research in any detail the implementation costs of the two approaches. It would, however, seem reasonable to assume that the more radical transformation to the Norwegian model might incur higher transitional costs, but there may be every possibility that it would prove more or at least no less efficient in the longer term.

2.108 The Review strongly felt that the concept of a Barnehus-style facility, with custom-designed facilities and support services for the child witnesses, was equally applicable to

both models. Regardless of which procedures for taking evidence are adopted (the forensic interview or the JII plus cross-examination), the provision of a secure and non-threatening environment which helps witnesses feel able to give their account freely would be a major contribution both to the administration of justice and to the promotion of the well-being of some of the most vulnerable members of our society. It would also complement the current general thrust of policy in Scotland towards promoting and protecting the well-being of children.

2.109 Most importantly, the key to securing the best possible evidence from young or vulnerable witnesses is the quality of the questioning. Again, this applies to both models, although the focus of any training will differ according to the model adopted. It is of critical importance that those questioning young or vulnerable witnesses are appropriately trained and qualified, according to the highest international standards.

2.110 The Review therefore recommends that:

- **Consideration is urgently given to the development of a new, structured scheme that treats child and vulnerable witnesses in an entirely different way, away from the court setting altogether. The options for this include:**
    - **a Norwegian-style judicially-supervised forensic interview for all aspects of the child's evidence; this represents the approach most likely to minimise the adverse effects on the child or vulnerable witness, and to produce. It would, however, require a major shift in legal practice and culture; and**
    - **a version of "the Full Pigot", in which the standard practice would be for a Joint Investigative Interview to be used as the evidence in chief, and standardised procedures put in place for the pre-recording of cross-examination**

- **Regardless of which approach is taken, the Scottish Court Service should explore the scope for improving the quality of facilities available for child and vulnerable witnesses, including the scope for the greater use of locations outwith Court premises, In doing so it should draw on the example of the Barnehus network in Norway.**

- **In implementing either scheme, there must be sufficient investment in the quality of interviewing, questioning and examination, applying the highest international standards and requiring appropriate training and qualification.**

CHAPTER 3: Admissibility of Statements

3.1 As detailed in the introduction to this report, the core premise that the Review has explored is how to facilitate the introduction of audio and video-recorded statements as the best evidence in criminal trials. This chapter considers some of the issues around the how the law would need to be reformed to secure the general admissibility of such statements. In considering the desirability and practicality of moving to a system that uses pre-recording routinely, it may in many cases involve less complexity than with children and vulnerable witnesses. A substantial proportion of testimony, particularly that of third party witnesses, is relatively uncontroversial and often not subject to cross-examination. There would potentially be substantial benefits for efficiency of the system if a large number of witnesses did not need to attend the trial diet, thus reducing churn, and making the court experience much more convenient for witnesses.

3.2 At present the principal basis on which pre-recorded statements are susceptible to exclusion as evidence in Scotland, and in other jurisdictions based wholly or partly on common law, is under the hearsay rule. The rule excludes "out-of-court statements tendered for the purposes of directly proving that the facts are as asserted in the statement"[59] or ""a statement not made in oral evidence in the proceedings that is evidence of any matter stated"[60]. Section 259 of the Criminal Procedure (Scotland) Act 1995, effectively defines hearsay as "evidence of a statement made by a person otherwise than while giving oral evidence in court in criminal proceedings"[61]. This chapter explores the genesis and prevalence of the hearsay rule, how exceptions in relation to prior statements are currently applied, and how best to reform the law to allow the admissibility of pre-recorded prior statements as proof of fact.

Hearsay – background

3.3 In civil law systems, exclusionary rules of evidence, including the rule against hearsay, are generally unknown. The concept of hearsay is sometimes recognised, and there are some constraints on its use[62]. Even though a number of jurisdictions contain within their criminal codes requirements to adhere to the principles of "immediacy" and "orality", these requirements in practice are usually circumvented. The Dutch system provides a striking example of this. The Dutch Code of Criminal Procedure[63] dates from 1926. Immediacy is the leading principle; that is, that evidence should be provided in its original form[64]. This was undermined almost immediately by a decision of the Supreme Court in the same year, known as the *de Auditu* case[65], which provided that written statements may be

[59] Mason, CJ in *Walton v The Queen* (1989) 166 CLR 283 (HC) (Australia)
[60] section 114 (1), Criminal Justice Act 2003 (England and Wales)
[61] section 259 (1), Criminal Procedure (Scotland) Act 1995:
[62] See John Jackson and Sarah Summers, *The Internationalisation of Criminal Evidence,* at p70 and at p332.
[63] Wetboek van Strafvordering, 1926
[64] The principle of immediacy can be found in several legal provisions in the Wetboek van Strafvordering. These include Article 301(4) which provides that only material (declarations, pieces of evidence) that has been dealt with during trial can be used as evidence against the suspect and Article 342(1) which stipulates that "A witness statement is taken to mean a statement of facts or circumstances made at the hearing which the witness has personally observed or experienced." See also Articles 338, 348 and 350.
[65] Dutch Supreme Court 20 December 1926 ECLI:NL:HR:1926: BG9435.

used as evidence provided that these have been referred to in court. Since then, the Dutch criminal justice system has evolved whereby the trial relies almost exclusively on written accounts of the testimony given by witnesses earlier in the process.

3.4 In every common law jurisdiction that the Review considered, however, there are arrangements to exclude hearsay evidence from criminal trials[66]. The nature of these arrangements varies from an entirely common law approach (in Canada) to statutory regimes either replacing or supplementing previous common law rules. Like many other comparable jurisdictions, Scotland[67] has introduced statutory codification of hearsay law, while still retaining some aspects of common law. The relevant provisions are contained in sections 259-261 of the Criminal Procedure (Scotland) Act 1995, which drew upon the Scottish Law Commission's Report on Hearsay Evidence in Criminal Proceedings published earlier that year.

3.5 There have been many analyses of the development of the exclusion of hearsay evidence from criminal trials in common law jurisdictions and the justification for its continuation. At the heart of the origin of the rule is the idea that evidence that cannot be presented directly in Court is inherently less reliable than direct testimony. In the words of John Spencer:

> "The basic premise of the traditional exclusionary rules was that certain types of evidence are weak, and hence liable to mislead the court, and for that reason ought to be suppressed."[68]

3.6 The reasons why it was thought that such evidence is inherently less reliable are numerous. According to the Scottish Law Commission, these include[69]: that it is not the "best evidence" available; that it usually has not been under oath; that the absence of the witness in court means that their demeanour cannot be observed, and their credibility or reliability is thereby harder to judge; that jurors, as laypeople, are ill-equipped to evaluate hearsay; that the evidence becomes distorted through repetition; that it is more susceptible to being concocted; and that it cannot be tested by cross-examination. The classic judicial statement of this comes from Lord Normand in *Teper v R*[70]:

> "The rule against the admission of hearsay evidence is fundamental. It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination, and the light which his demeanour would throw on his testimony is lost."

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[66] The Review considered the rules against hearsay in Australia, Canada, England & Wales, Hong Kong, Ireland, New Zealand, South Africa and the USA. The picture in civil proceedings is more mixed: Scotland, England & Wales and Hong Kong have abolished the hearsay rule in civil cases by statute; in other jurisdictions the rules against hearsay are applied similarly (but not always identically) to both civil and criminal cases.

[67] It is recognised that Scotland is widely considered to be a "hybrid" rather than purely common law jurisdiction. In this area of the law of evidence, however, it is assumed that Scotland in the main shares the traditions and characteristics of common law systems.

[68] JR Spencer, *Hearsay Evidence in Criminal Proceedings* 2nd Ed (2014) para 1.8

[69] *Hearsay Evidence in Criminal Proceedings* (Scot Law Com No 149) (1995) Ch 3

[70] [1952] A.C. 480 at 486

3.7 As the Scottish Law Commission points out in its analysis[71], many of these justifications do not bear much scrutiny in the modern environment. Subsequent commentators have reinforced this view.[72] The very idea that the hearsay exclusion is a safeguard ensuring that the Court hears only the best evidence was challenged by Auld LJ[73], who agreed with Prof Spencer that the weakness of the principle of relying solely or mainly on oral testimony is that it requires us:

> "to accept two remarkable scientific propositions: first, that memory improves with time; and secondly, that stress enhances a person's powers of recall."[74]

3.8 There is also a wealth of evidence that the demeanour of a witness in the witness box is not a particularly sound guide to the reliability or credibility of that witness. In the words of one commentator:

> "The assertion in hundreds of judicial opinions for over a century that live testimony is more reliable than a "cold record" is inconsistent with an enormous body of evidence presented in social science literature"[75].

3.9 There is, however, one justification of the hearsay rule: the need for cross-examination. It is this that continues to carry significant weight with the legal profession and legislators. Almost any article or textbook discussing cross-examination will start with Wigmore's assertion that cross-examination is

> "…beyond any doubt the greatest legal engine ever invented for the discovery of truth" [76]

3.10 Given that this precept is instilled in every court practitioner in the common law world from the outset of their training, it is no surprise that there is great caution over evidence which cannot be subject to the operation of that engine. This has no doubt been substantially reinforced in the UK and Ireland by the attention given in recent years to Article 6(3)(d) of the European Convention on Human Rights[77], which provides that:

> "(3) Everyone charged with a criminal offence has the following minimum rights: …

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[71] Op cit, para 3.4 et seq

[72] See e.g. JR Spencer *Hearsay Evidence in Criminal Proceedings* 1.20 et seq

[73] *Review of the Criminal Courts of England and Wales*, LJ Auld (2001) para 80

[74] see Law Comm 245, para 10.31

[75] Richard Pierce Jr., *District Court Review of Findings of Fact Proposed by Magistrates: Reality Versus Fiction*, George Washington Law Review 81 GEO. WASH. L. REV 1236 (2013). The academic literature on this topic is extensive – triggered by two articles in particular: Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV 1075, 1075 (1991); and J A Blumenthal, *A Wipe of the Hands, a Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility,* 72 Neb. L. Rev 1157 (1993). A useful summary of how the literature has developed since these articles can be found in Amna M. Qureshi, *Relying on Demeanour Evidence to Assess Credibility during Trial: A Critical Examination,* Social Science Research Network, Jan 2014 http://ssrn.com/abstract=2384966

[76] J. Wigmore, Evidence § 1367, p. 32 (J. Chadbourn rev. 1974).

[77] See paras 5.39-5.41 below

> d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him….."

3.11 This is a form, although a much less rigid one, of the "right to confrontation" which is embodied in the Sixth Amendment to the US Constitution.

3.12 The lingering sense that there is something inherently suspect about second-hand evidence, reinforced by the need to retain the right to confront or examine witnesses perhaps explains why the hearsay rule persists in every common law jurisdiction that the Review considered. Many jurisdictions have reviewed their hearsay arrangements in the last 20 years or so[78], often leading to new statutory regimes. All of the reviews and the subsequent statutory codification have been based on the essential proposition that it should be presumed that hearsay evidence will be excluded unless there is a good countervailing reason to admit it. Common law has long recognised that there were circumstances in which there should be exceptions to the exclusionary rule, instances in which hearsay evidence should come before the Court. These included statements made as part of the *res gestae* or *de recenti* statements made by persons who are deceased at the time of the trial, and statements against interest (usually by the accused). These long-standing exceptions have been supplemented both in common law and in statute by further categories of statement deemed to be admissible as proof of fact. The history of the development of hearsay law in common law jurisdictions has essentially been about defining and expanding the conditions in which the presumption of exclusion should be deemed to be rebutted on a case by case basis.

3.13 There are broadly two approaches that have been taken. Some jurisdictions have sought to define the specific circumstances in which a hearsay statement may be admitted. Thus the Criminal Justice Act 2003 contains a suite of provisions in sections 114-136 that define a number of different circumstances in which hearsay may be admitted in England and Wales, focusing primarily on a) cases where the witness is unavailable and b) cases relating to business documents. A similar approach has been taken in the 1995 Commonwealth Evidence Act in Australia, which has a general exclusion of hearsay (section 59) followed by a number of exceptions. These exceptions apply only to "first hand" hearsay, and do explicitly cover circumstances where the witness is unavailable[79] (section 65) and where he or she is available to give evidence (section 66).

3.14 The approach in Scotland follows a similar approach. Hearsay provisions are included in section 259 et seq of the Criminal Procedure (Scotland) Act 1995 which define the circumstances in which such evidence must be admitted and which stem from the witness' unavailability, as defined in section 259(2) of the Act.

3.15 Other jurisdictions have opted for an approach that defines the criteria to be applied to any hearsay statement, rather than defining specific circumstances. Thus in Canada,

[78] As well as the Scottish Law Commission report in 1995, there have been Law Reform Commission reviews of Hearsay in New Zealand (1989-99), England & Wales (1997), Australia (as part of a wider review of Evidence legislation, 2006), Hong Kong (2009), South Africa (2008), and Ireland (2010).

[79] The definition of availability in Australian law is given in the Dictionary to the Evidence Act 1995, and has been subject to expansion through judicial interpretation to include witnesses who refuse to give evidence - *R v Suteski* (2002) 56 NSWLR 182

which has no statutory provision in this regard, the common law has evolved to the point where a hearsay statement is admissible if it passes the two tests of necessity and reliability[80]. New Zealand has taken a similar approach, although in statute. Section 18 of the New Zealand Evidence Act 2006 provides that:

> "18. A hearsay statement is admissible in any proceeding if—
> (a) the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and
> (b) either—
> (i) the maker of the statement is unavailable as a witness; or
> (ii) the Judge considers that undue expense or delay would be caused if the maker of the statement were required to be a witness"

3.16 Anecdotal evidence suggests that in England there is widespread use of the judicial discretion allowed for in section 114 (1)(d), which allows admission of hearsay evidence if "the court is satisfied that it is in the interests of justice for it to be admissible"; thus circumventing the complex rules contained in the rest of the Criminal Justice Act 2003. Scotland has not a similar "interest of justice" safety valve. The statute defines when hearsay is admissible, and thus when it is not, irrespective of these interests.

Prior statements by witnesses

3.17 The focus of this Review is the admissibility of statements by witnesses given before the trial which may be adduced as evidence, even if they may be available to give evidence in court. In addition to the generality of hearsay provisions, there are, in some jurisdictions, particular rules relating to out-of-court statements made by such witnesses.

3.18 In Scotland, the position has become increasingly complex over the past twenty years. Formerly, prior statements of witnesses were rarely used in criminal trials. Indeed in solemn cases, especially High Court cases, very often the prosecutor would not even have these statements, as distinct from what was (at least ostensibly) a precognition, in court. Practice has varied over the years but the advent of "disclosure" has resulted in a proliferation of statements in the hands of the lawyers. The reason for this may be the coincidence of the development of disclosure to cover police statements and the occurrence of two further innovations. First, in the case of *Jamieson (No 2)*[81]*,* the High Court highlighted the evidential value of a witness accepting a prior statement as being the truth. *Jamieson* allowed a statement to be used as proof of fact if a witness in court cannot remember either what happened, or even what they said to the police in their statement, but where the witness acknowledges the truth of the statement. The purpose behind this exception is to permit the content of the particular passage in the statement to become part of the witness's evidence where it would be unreasonable for the witness to recall a particular detail (e.g. a car registration number).

[80] The landmark case being that of *R v Khelawon* [2006] 2 S.C.R. 787, 2006 SCC 57; a useful description of the procedure for the admission of evidence under the principled approach to hearsay following *Khelawon* is given by Chartier J in *R v Woodard* [2009] MBCA 42, at 46

[81] *Jamieson v HM Advocate (No 2)* 1994 JC 251

3.19 Secondly, Parliament not only codified and broadened the law of hearsay[82] but it also encouraged the use of statements almost as a substitute for testimony, where the witness could be said to have "adopted" their content. Under section 260 of the 1995 Act it is possible to admit the prior statement of a witness who is available to the court if: the statement is in a document, including a recording in audio or video format (but is not a precognition); it is "adopted" by the witness as his/her evidence; and the witness is competent. This has raised delicate questions of law about what amounts to "adoption" of the statement by the witness[83].

3.20 All of this has resulted in statements being the apparent basis for the examination and cross examination of witnesses. It is important to grasp just what is involved here and why this development may not be conducive to the ascertainment of truth. First, the statements under consideration are not formal documents, such as affidavits, prepared with scrupulous care for accuracy and completeness by lawyers for use in the court process. They are prose versions of what a police officer understands the witness to be saying. Although the witness may have been asked to sign the final version, which may only be a few pages of handwritten text, as a means of authentication, he may not have studied the completed work with a view to ensuring its accuracy as distinct from completing his attendance in a police station. The statement may not cover all aspects of the event under enquiry for a large number of reasons, such as the fact that at the relevant time the officer making the enquiries may well not be apprised of the full facts as disclosed in all the statements and other material. Yet the absence of the mention of a particular matter may be founded upon heavily in the eventual trial. Most important, the question and answer sessions which have preceded the compiling of the statement are not normally recorded electronically. What the witness actually said and what exactly it was in response to are not known. Put shortly, even with the best will in the world and the assumption of *bona fides* on the part of the police, much can be lost (forever) in translation.

3.21 The judges came to be extremely exercised by this development. Their concerns were expressed in two particular cases[84]. In one[85], Lord Bonomy commented that the tactic of using prior statements was one in which "the purpose is not clearly identified at the outset and … the examination proceeds in a fairly haphazard way". He went on to suggest that the use of a prior statement in the manner suggested in the legislation could only be used where the witness's memory was deficient. That was later rejected in a case[86] which explored the problems now prevailing in criminal cases where a witness may or may not accept that he has made a particular statement (or part of it), may or may not remember (or purport to remember) the relevant event (or part of it) and may or may not be seen to have "adopted" the statement in the course of his evidence. It is sufficient, as a generality, for the statement to be used as proof of fact, if a witness states that, at the time he was giving his statement, he was telling the truth and acknowledges that he made the particular statement (or it is

[82] Criminal Procedure (Scotland) Act 1995 s 259 following upon the Scottish Law Commission Report No 149 : "Hearsay Evidence in Criminal Proceedings"

[83] See for example, the varying opinions of Lords Bonomy, Emslie and Marnoch in *A v HM Advocate* [2012] HCJAC 29, referring in particular to the earlier cases of *Sean Hughes v HM Advocate* [2009] HCJAC 35, *Niblock* v *HM Advocate* [2010] HCJAC 21 and *Hughes v HM Advocate* [2010] HCJAC 84.

[84] *Hughes v HM Advocate* 2009 JC 201 and *A v HM Advocate* 2012 JC 343

[85] A (supra) at para 1

[86] *Rehman v HM Advocate* 2014 SCCR 166, Lord Justice Clerk (Carloway), delivering the Opinion of the Court at para [50]

proved by other means). However, all of this makes it very difficult to charge juries and significant deficiencies have been identified in that regard[87].

3.22 The law relating to the admissibility of prior statements which are not adopted by the witness is also complex. If the statement is *consistent* with the witness testimony, it is generally excluded (in England, this is known as the "rule against narrative"). The reasoning behind this is to exclude self-serving statements made to bolster the witness' credibility (particularly that of the accused). Such a statement may be admitted only if it falls within the common law exceptions to the hearsay rule, such as being *de recenti*, but it can only go to the credibility of the witness, rather than the truth of its contents. An exception to this rule, as has been noted in the previous chapter, occurs in section 270M of the Criminal Procedure Act 1995, which allows, as a "special measure" to be applied for, for the prior statement of a vulnerable witness to be admitted as the evidence-in-chief of that witness, without the need for that witness to adopt that statement in court.

3.23 Particular considerations apply to statements by an accused. These are highly complicated and ripe for simplification, as detailed in the Carloway Review[88]. For current purposes, the principles to be applied were set out in *McCutcheon*[89] as follows:

> "(i) It is a general rule that hearsay, that is evidence of what another person has said, is not admissible as evidence of the truth of what was said.
>
> (ii) Thus evidence of what an accused has been heard to say is, in general, not admissible in his exculpation, and accordingly the defence are not entitled to rely on it for this purpose. Such evidence can only be relied upon by the defence only for the proving that the statement was made, or of showing his attitude or reaction at the time when it was made, as part of the general picture which the jury have to consider.
>
> (iii) There is, however, an exception where the Crown have led evidence of a statement, part of which is capable of incriminating the accused. The defence are entitled to elicit and rely upon any part of that statement as qualifying, explaining or excusing the admission against interest".

3.24 If the prior statement is inconsistent with the witness' testimony, then it may be admitted in order to cast doubt on the witness' credibility. This falls under section 263(4) of the 1995 Act, which states:

> "In a trial, a witness may be examined as to whether he has on any specified occasion made a statement on any matter pertinent to the issue at the trial different from the evidence given by him in the trial; and evidence may be led in the trial to prove that the witness made the different statement on the occasion specified"

3.25 Often a witness is cross-examined on the inconsistencies between his/her current testimony and one or more previous statements, without having the prior statement in front of them. Furthermore, where such statements are used in solemn cases, there requires to be appropriate direction to the jury as to the use they can make of such statements – that

[87] See *A* (*supra*) and compare *Rehman* (*supra*). For a summary case see *Matulewicz v Brown* 2014 SCCR 154
[88] *Carloway Review,* Ch 7 – Exculpatory and Mixed Statements
[89] *McCutcheon v HM Advocate* 2002 SLT 27

they go to the witness' credibility, but not to the truth of their content. This is a subtle and sophisticated legal point. Regardless of the skill of the judiciary in being able to frame such directions, there must always be the risk that the jury is left in a state of uncertainty by directions to the effect that different statements must be used in different ways, particularly if there are a number of statements which have been introduced under different hearsay provisions.

3.26 This last issue, relating to the use that can be made of a witness' prior statements has been addressed in Australia. Following the recommendation of the Australian Law Reform Commission[90], intended to simplify jury instructions on prior inconsistent statements, section 60 of the Commonwealth Evidence Act 1995 provides that:

> "The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of the fact intended to be asserted by the representation."

3.27 The effect of section 60 is that, if a representation (statement) is admitted into evidence for a non-hearsay purpose, it then becomes relevant for all purposes, including the truth of the content of the statement. Thus, a prior inconsistent statement that is initially used to challenge the credibility of a witness may ultimately also be considered as proof of the truth of its content.

3.28 A similar approach is taken in England and Wales under section 119 (prior inconsistent statements) and section 120 (other previous statements of witnesses) of the Criminal Justice Act 2003. Under both provisions, a prior statement "is admissible as evidence of any matter stated of which oral evidence by the witness would be admissible", provided certain conditions are met. This does not, however, mean that the approach in England and Wales is relatively straightforward; indeed these provisions have been described as "a body of law that is both complicated and…obscure. As such it is surely the most unsatisfactory aspect of the 2003 Act"[91].

Admissibility of recorded statements – the way forward

3.29 The rule against hearsay was developed in an era in which audio-visual recordings of the statements of a witness were unknown. Its principal purpose was as a safeguard against the inherent unreliability of statements that could not be seen or heard by the fact finder in their original form, and that were reproduced either as a written document prepared by a third party or from the mouth of another witness. In other words, the law of hearsay existed to counteract the risk that the report of what the person allegedly making the statement actually said may be inaccurate or indeed fabricated. It seems somewhat antediluvian, therefore, that a rule with such roots should provide a barrier to the admission of evidence that does not suffer from the characteristics which were perceived as resulting in that inherent unreliability.

3.30 A pre-recorded statement raises no doubt as to what the witness has said. It is not filtered through the pen of a police officer or other third party. It provides good evidence of

[90] See Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), [142]–[146].
[91] JR Spencer, *Hearsay Evidence in Criminal Proceedings* para 12.54.

the way in which the witness said it – if one of the justifications of excluding hearsay was that the witness' demeanour cannot be observed. In fact, given the greater proximity to the events under scrutiny, it is likely to represent the best evidence – better than the evidence that would be given in court at a much later date. In other words, the use of pre-recorded evidence is not asking the court to accept the evidence given from outside the witness box; it merely moves the witness box to another time and another place.

3.31 There appears to be little reason to preclude the admission of pre-recorded statements on the grounds that technically, as out-of-court statements, they are hearsay. This is particularly the case for those statements that can be captured in conditions designed to ensure that they are suitable for court use; where, for example, a witness gives a statement in a controlled environment, such as a police office, either under some form of commitment to tell the truth or understanding that knowingly making false statements may be treated as perjury. This is essentially the basis on which statements from vulnerable witnesses can be admitted under section 270M of the Criminal Procedure (Scotland) Act 1995. Similarly, "Achieving Best Evidence" interviews are admitted in England and Wales under section 29 of the Youth Justice and Criminal Evidence Act 1999. Even where the conditions of the recording are not controlled – for example at the scene of an incident where a statement is made to a police officer using a body-worn camera – it would seem artificial and not conducive to the interests of justice to impose a blanket presumption against the admission of what may be highly relevant and probative material[92].

3.32 It would be simplest to replace the current hearsay regime with an inclusionary rule which allows all statements of witnesses which have been audio or video recorded to be regarded as potential proof of fact. The general rule should be that such evidence is admissible if it is relevant and probative unless there is good reason, in the interests of justice, to exclude it. An inclusionary rule would mean that a great deal of what currently falls within the scope of the hearsay rule will be admissible without recourse to legal argument. Where there are doubts about the inherent reliability or accuracy of evidence from a secondary source, these are matters which should normally go to the weight to be attached by the fact finder.

3.33 An inclusionary rule in respect of audio-video recordings would not mean the abolition of the hearsay rule altogether. The rule would still apply to statements that have not been audio-video recorded. Furthermore, a general power to exclude evidence in the interests of justice would allow a judge to exclude double hearsay (i.e. such a statement including what the witness heard another person saying). This is particularly important where its admission would potentially compromise the accused's right to a fair trial. It will therefore also be important to ensure that safeguards remain in place to secure continuing compliance with the European Convention on Human Rights and the broader principles of fairness to which the justice system aspires.

[92] See College of Policing. *The Essex Body Worn Video Trial* (2014), a key finding of which was "Officers with BWV frequently mentioned the evidence gathering benefits of the cameras – particularly for capturing context, comments and emotion accurately."

Examination

3.34 The first of these safeguards is relatively straightforward. As has been detailed earlier, the most enduring justification for the rule against hearsay is that it tends to apply to witnesses who are not present at trial to have their testimony tested by cross-examination. Equally, Art 6(3)(d) of the Convention requires that everyone charged with a criminal offence has the right to examine or have examined witnesses against him. It will therefore be necessary , where a witness' evidence in chief is given in the form of a pre-recorded statement, for that witness to be available for further examination and cross-examination should that be required.

3.35 The introduction of a system which relies heavily on the admissibility and widespread use of pre-recorded evidence in chief will raise significant questions about the role, procedures for and format of cross-examination. It has already been seen that it is a requirement of the European Convention that the accused has the opportunity to examine, or have examined on his or her behalf, the witnesses against him or her. This is a requirement that, following Wigmore's dictum concerning the power of cross-examination[93], is generally currently met in Scottish criminal trials by the opportunity available to the defence to cross-examine the witness either at trial or, if appropriate, during the taking of evidence on commission. If, however, the system is changed so that a substantial number of witnesses are not required to attend court on the trial date, further consideration is needed of the arrangements to be introduced to ensure that the right to examine or cross-examine is still respected.

3.36 There are, however, important qualifications and clarifications to this right. First, as provided for in legislation in many jurisdictions, and acknowledged by the European Court, this requirement can be disapplied where the witness has a legitimate reason for not presenting himself for further examination, such as death, physical or mental incapacity of some sort or the possibility of or justified fear of harmful consequences if they appeared in court. These cases are relatively uncommon (although by no means unknown). They are, however, not the principal focus of this review. It should, however, be noted that the ability to pre-record the cross- or further examination of a witness at another location may in some cases help overcome some issues of incapacity or infirmity that prevents the witness from travelling to court, or of fear, if the cross-examination can be carried out in an alternative secure environment.

3.37 Secondly, it is important to understand that the Convention right is not a right to adversarial cross-examination at the trial, but the right "to examine or have examined" a witness. This then raises three consequential potential points of departure from the current standard practice in Scotland in terms of who carries out the examination, when and where it is done and the manner in which it is done.

Who carries out the examination

3.38 A general reversal of the rule against hearsay does, therefore, need to be taken forward in full awareness of the measures that will be required to safeguard the accused's right to a trial in those cases where there has been no opportunity to question a key witness

[93] See para 3.18 above

on his or her testimony. Consideration of practice in other jurisdictions and the related European jurisprudence however, makes it clear that this examination need not occur at the determinative trial hearing, and need not involve the direct questioning of the witness by the accused's representatives. In the Dutch legal system, witnesses are examined by the investigating judge as part of the preparation for the final trial. This examination does not take place in public, but in the presence of representatives of the defence, who can either suggest lines of questioning to the judge or ask questions directly. There is not necessarily a full transcript of this examination; the trial judge may rely on the written report of the investigating judge. Equally, the Norwegian approach to questioning children allows for questioning in advance of the trial by the forensic interviewer, who may take suggestions for lines of questioning from the defence lawyer.

3.39 It is clear from the examples considered in both the Netherlands and Norway, that the Convention is complied with, even where the defence does not directly question the witness. The examination may be undertaken, for example, by a police officer (as in the case of child witnesses in Norway) or by an investigating judge (as in the Netherlands). What appears to be important is that there is a line of questioning that considers the interests of the accused (or the potential accused where he or she has not yet been identified), and that this is usually achieved by allowing a representative of the accused to suggest or propose questions to the person carrying out the examination. In the words of the European Court, "Having regard to the special features of criminal proceedings concerning sexual offences….. [Article 6(3)(d)] cannot be interpreted as requiring in all cases that questions be put directly by the accused or his or her defence counsel, through cross-examination or by other means"[94] and that it is acceptable for the questioning to be put by a third party provided that the arrangements for doing so are "sufficient to have enabled the applicant to challenge [the witness'] statements and his credibility in the course of the criminal proceedings"[95]. It is, however, essential that the examination is conducted under the supervision of an independent and impartial authority, and that the defendant has the opportunity for legal advice in relation to the examination[96].

When and where the examination is carried out

3.40 It is now well established that the examination of witnesses need not take place at the trial itself. This is a conclusion to be drawn not only from the examples of inquisitorial systems that have been considered, but also from the pilots of s28 hearings in England and the increasing use of taking evidence on commission in Scotland. The distinction between the inquisitorial approach and the common law systems is that, in the latter, the early and pre-recorded cross-examination is in respect of a special category of witnesses; it is seen as an exception to the norm for a particular purpose, rather than a routine form of procedure.

3.41 As became clear in the consideration of the issues arising from the Cadder[97] case, the rights to a fair trial in Article 6 of the European Convention apply to the entire criminal investigation and prosecution process, and not just to the final trial diet itself. This means that, on the one hand, procedures have to be consistent with Article 6 rights from the moment that a suspect is identified and apprehended; but on the other, the introduction of

[94] *SN v Sweden,* no.34209/96, ECHR 2002-V, para 52
[95] *ibid*
[96] *Melnikov v Russia,* no. 23610/03, 14 January 2010
[97] *Cadder v HM Advocate* [2010] UKSC 43

the safeguards required, such as those needed to preserve the Convention right of examination, need not be confined to the final trial diet. According to the summary of the issue by Jackson and Summers[98], the European Court of Human rights has, while endorsing in general the principle of immediacy, held that "to use as evidence…statements made at the pre-trial stage is not in itself inconsistent with paragraphs 3(d) and 1 of Article 6 provided the rights of the defence have been respected"[99], and that to achieve this, it is essential to have the opportunity to challenge "the depositions either when they are made or at a later stage"[100].

3.42 It follows from this that the setting for the cross-examination need not be in the courtroom. In the Netherlands, witnesses are interviewed by the investigating judge in chambers, and in Norway children are interviewed in the suites at the Barnehus. What is, however, necessary, according to Jackson and Summers[101], is that the hearings are supervised by an impartial judicial authority. In their view it is not, therefore, legitimate for a jurisdiction to delegate the management of the further examination of a witness to the prosecuting authorities.

The style of examination and its control

3.43 It is perhaps a caricature to contrast the often aggressive and confrontational nature of cross-examination within the adversarial traditions of most common-law jurisdictions, with the investigative and explorative nature of questioning within inquisitorial systems. In its crudest form, an adversarial system turns the trial into what some may perceive to be a form of sport, where the object is to defeat the opposing side rather than to assist the court in the discovery of the truth[102]. The purpose of cross-examination, as it is currently understood by some, is not necessarily to test the accuracy of a witness' evidence, but to eliminate, or at least mitigate, the probative effects of the testimony. This does not necessarily mean that cross-examination should be hostile – as Rumpole would have it:

> "the art of cross-examining is not the art of examining crossly but the gentle task of leading a witness politely into a fatal admission"[103]

3.44 Leaving aside the situation where the cross-examiner genuinely seeks only to adduce evidence on other matters from the witness or to clarify ambiguities left unresolved by the examiner, the role of true cross-examination is essentially destructive, aiming to undermine or discredit the witness and their testimony[104], or to prevent potentially harmful

[98] *The Internationalisation of Criminal Evidence*, section 10.3.2 pp 342-366

[99] *Kostovski v Netherlands* 20 November 1989 at para 41. See also *Unterpringer v Austria* 24 November 1986

[100] Ibid.

[101] *The Internationalisation of Criminal Evidence*, section 10.3.2.2 pp 345-349

[102] For example, Goodpaster characterises the American adversary trial as: "a regulated storytelling contest between champions of competing, interpretive stories that are composed under significant restraints" in which "..[t]he parties and their attorneys are…attitudinally and ethically committed to winning the contest rather than to some other goal, such as discovery of truth or fairness to the opposing side". Gary Goodpaster, *On the Theory of American Adversary Criminal Trial,* 78 J. Crim. L. & Criminology 118 (1987-1988)

[103] John Mortimer, *Rumpole and the Reign of Terror*, Viking 2006

[104] Often found in its most extreme form in the American context – for example, a current US training textbook promotes its techniques, inter alia, to "Prepare for devastating impeachment; Close off any escape routes for the witness; Punish the evasive or "I don't know" witness; Control the crying witness" as part of "the definitive guide to preparing killer cross-examinations" - Larry Pozner and Roger Dodd, *Cross-Examination: Science and Techniques,* Second Edition

testimony coming to light at all. This traditional approach is no longer seen as appropriate in the context of young or vulnerable witnesses. The "ground rules" hearing prior to hearings under section 28 of the Youth Justice and Criminal Evidence Act 1999 has developed to a point where the actual questions to be asked of the witness are submitted to the Court in advance for approval, to ensure that they are not inappropriately framed or pursue irrelevant and unnecessary lines of enquiry.

3.45 It is not the Review's position that Scots criminal law and practice in relation to cross-examination should be radically overhauled overnight, introducing inquisitorial procedures, even to the extent that questioning is undertaken by a third party. It is, however, important to recognise that we are not bound to a system which allows the unfettered questioning of the witness at the trial diet. If a substantial element of the evidence against an accused is available in its final form at an early stage of the proceedings, new considerations come into play.

3.46 One of the intended benefits of a system using pre-recorded evidence is that it should mean that far fewer witnesses need to be required to attend the trial diet. This benefit would be obviated if it became routine that all witnesses were still cited to attend on the off-chance that they may require to be cross-examined. This should be avoided. The ability to view the evidence in chief from the outset of the proceedings should give the defence time to determine which witnesses should be subject to cross-examination, and apply to the Court accordingly.

3.47 Furthermore, as the section 28 pilots in England have demonstrated, early sight of the evidence in chief allows the defence to plan and prepare its line of questioning in advance. It may therefore be appropriate, in making an application to call a witness for further examination for that application to include an indication of the issues which it is proposed to explore and potential lines of questioning. The success of this would depend on the willingness of the bench to exercise control over that questioning if it strays without good reason from the lines originally proposed. It should at the very least be possible to reduce the extent of fruitless cross-examination, and improve its focus.

3.48 As a corollary of identifying that evidence which might be at issue, it should also be easier to identify that evidence which is not contested and can be entered as such, giving greater force to the section 257 of the 1995 Act and more readily meeting the intention behind it, to make the best use of Court time by focusing only on those matters which are at issue.

Safeguards where examination not possible

3.49 There will, of course, be situations in which the witness is not available for examination by the defence. It is consideration of these situations which are currently catered for in the suite of exceptions to the hearsay rule in section 259 of the 1995 Act. Under an inclusionary rule, any pre-recorded statement by a witness who is no longer available will be prima facie admissible. But there would have to be a mechanism by which the Court would have to be satisfied that the admission of such evidence would not compromise the accused's right to a fair trial.

3.50 The key European decision on this issue is that of the Grand Chamber in *Al-Khawaja v United Kingdom*[105]. The case turned on the possible conflict between the English law in relation to hearsay (in particular the exceptions rendering hearsay admissible under the Criminal Justice Act 2003) and Art.6(3)(d) of the European Convention on Human Rights. The focus, therefore, of the Court's consideration were those cases in which a defendant is convicted in part or wholly on the basis of the evidence from a witness to whom the accused was unable to put questions.

3.51 In *Al-Khawaja*, the Grand Chamber decided that in certain cases it is possible for the defendant to have a "fair trial" as required by Article 6 where the main body of the prosecution evidence comes from witnesses whom he was unable to question or have questioned. However, a fair trial is possible in such circumstances only where two conditions have been met:

> 1) there should be a really good reason for the witness's absence from the trial, such death or (justifiable) fear; and
> 2) there are sufficient other safeguards to guard against a miscarriage of justice resulting from the defendant's inability to question his accusers – there needs to be further means of assuring that the evidence is demonstrably reliable or that its reliability can be properly tested and assessed.

3.52 So where no examination is possible, and the relevant evidence is the only basis on which a conviction can be based, the ECtHR jurisprudence is clear that there will need to be other safeguards in place. This may be achieved by continuing to apply the statutory framework in the 1995 Act, or a set of principles based on the *Al-Khawaja* judgment, to statements by witnesses whom the defence has had no reasonable opportunity to examine either before or at the trial, particularly where that evidence forms the dominant element of the prosecution case. This is a matter that is being addressed in Lord Bonomy's Review of post-corroboration safeguards[106].

3.53 In the context of this and Lord Bonomy's Review, it may be worth considering whether an exclusionary hearsay rule is in any case one that still has a place in a modern criminal justice system. It has been seen that some jurisdictions, including Scotland, have developed complex legal architecture designed to allow the admission of hearsay statements in a number of circumstances, whilst preserving (although with diminishing effect) the core principle. This is not consonant with the aim of producing rules of evidence that are simple to understand and apply, which allow the admission of all probative and relevant evidence for the finders of fact to assess. It is at odds with "the modern emphasis on the free assessment of evidence unencumbered by restrictive rules"[107]. An inclusionary rule, under which all forms of what is currently termed hearsay could be admitted to be weighed by the finder of fact, unless it was contrary to the interests of justice for it to be so admitted (taking into account the Convention jurisprudence on the matter) may merit serious consideration.

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[105] (2012) 54 EHRR 23. For a useful commentary on this case, see JR Spencer *Hearsay Evidence at Strasbourg: a Further Skirmish, or the Final Round?* Arch. Rev. 2012, 1, 5-8. *Khawaja* follows the decision of the UK Supreme Court in *R v Horncastle* [2009] UKSC 14; [2010] 2 A.C. 373

[106] *The Post-Corroboration Safeguards Review Consultation*, Question 4 and *The Post-Corroboration Safeguards Review - Report of the Academic Expert Group*, Chapter 8

[107] Wilkinson: Evidence 204 referring to the precept "*testimonia ponderanda non numeranda sunt*";

Oaths

3.54 At present, the general rule is that, for a prior statement to be admissible as to the truth of its contents, it must be "adopted" by the witness, whose testimony is under oath in the witness box. With a relaxation of the rule against hearsay and the general admission of prior, pre-recorded statements without the need for a witness to adopt such statements in the courtroom, there is a question as to whether such a witness needs to undertake some form of oath at the time the statement is recorded. As seen earlier, the fact that they are not made under oath was seen as one reason for excluding hearsay statements.

3.55 The Review has not conducted a detailed consideration of the value and role of the oath or affirmation. It recognises that this is an issue that has been debated for many years[108]. Until now, the debate has primarily focused on the religious nature of an oath in contrast to a non-religious affirmation. As a subset of this debate, the question has been raised whether any formal commitment to tell the truth is required, given that the solemnity of the occasion and the importance of telling the truth (and the potential consequences of lying) should already be evident. However, the absence of a valid oath or affirmation does not render the witness' evidence inadmissible. As the Lord Justice-General (Macneil) said in *McLaughlin v Douglas*[109]:

> "….The obligation on a witness to tell the truth, the whole truth and nothing but the truth is an obligation imposed by law irrespective of any oath…"

3.56 This debate has of course been conducted in a context where evidence is usually given in court. The case for the abolition of the oath has yet to be accepted in Scotland and other common law jurisdictions.

3.57 There are exceptions in the case of children or others who are regarded as unable of understanding the oath and who are usually admonished to tell the truth. The use of joint investigative interviews as the evidence in chief of a witness, where the witness' understanding of truth-telling should be explored by the interviewer, but where there is now no judicially supervised process, represents a further move away from the traditional approach. This is, however, a special case. Where evidence will routinely be taken from "standard" witnesses at a venue other than the court, it may be that there should be a procedure which makes it clear to the witness that he or she is participating in a legal proceeding which requires a truthful account.

3.58 As has been discussed, pre-recorded statements may come in a variety of forms, for example:

- A formal statement recorded in dedicated facilities at a police station or court building
- A spontaneous statement made directly to a police officer wearing a body-mounted camera at the scene of an incident
- A similar statement recorded on a mobile phone

[108] See Criminal Law Revision Committee *Eleventh Report: Evidence (General)* 1972
[109] (1863) 4 Irv 273

- A self-generated statement either by Skype-style live link or pre-recorded and sent in digital form.

3.59 It is likely that only it is in the first case, where a witness attends a police office, court or other official building to record his or her evidence, that it will be practical to require a formal promise to tell the truth. It would not be hard to devise a procedure and form of words by which a witness could affirm that they understood their statement was being taken for the purposes of being presented in Court as testimony, and that they were under the same obligation to tell the truth as if they were doing so live in court at the trial.

3.60 In the case of spontaneous or near contemporaneous statements delivered to a camera-wearing police officer or holder of a mobile phone, such a procedure would not be practical. There may be cases where such an eye-witness can follow up such a statement with a more formal statement recorded at the police office shortly afterwards, in which he or she may be able to adopt the statement made at the scene. There will normally need to be a further opportunity for the witness to be questioned or examined on behalf of the defence, at which this may occur. Where this is not possible or desirable, if the evidence is still admissible (taking into account the ECHR considerations above), the finder of fact would have to consider whether the fact that it was not made under oath affected the weight to be attached to the statement, balancing also the effect of it being made contemporaneously.

3.61 It may take longer to devise a system whereby statements can be generated and submitted by a witness without the supervision of a police officer, court official or other person in authority – e.g. by merely uploading to a secure website a statement that the witness has themselves prepared and recorded. Even then it would be quite possible for the process of submitting or uploading the statement to require the witness to affirm that their statement represents a truthful account – in much the same way that a person applying online for an insurance policy certifies that the information they have supplied is accurate.

Conclusion

3.62 The primary concern of this Review is to explore how the task of ascertaining the truth in a criminal trial can be supported by the presentation of what is genuinely the best available evidence. The presentation of actual witness statements that have been audio and video-recorded should not be barred by the technicality of the rule against hearsay, which was designed to protect the finders of fact from inherently unreliable accounts. It is also the case that the current and increasing use of written prior witness statements at trial should be discouraged. The Review therefore concludes that:

- **Primary legislation should provide for the general admissibility of audio and video-recorded witness statements as proof of fact, subject to exclusion in the interests of justice**

- **Procedures will require to be developed to allow for the makers of these statements to be subject to further examination or cross-examination where required, although the form and content of that cross-examination need not follow current adversarial practice**

- **The introduction of recorded statements should pave the way for the elimination of the use of prior written statements at trial**

- **Further consideration should be given to whether the rule against hearsay as a whole should be replaced by an inclusionary rule, subject to an interests of justice test**

- **In order for recorded witness statements to be admissible, it may be necessary to devise procedures that replicate the effect of the oath or affirmation, in terms of the witness making explicit their understanding that they are under a duty to provide a truthful account.**

Chapter 4: Modernising Criminal Trial Procedures

Introduction

4.1 The Review has considered the implications of making recorded statements generally admissible as best evidence. Such a step would represent a shift in the nature of the criminal trial, requiring a modification of trial procedures and a change in some of the assumptions underpinning the system today. The trial hearing itself would become the culmination of an evidence gathering and testing exercise, rather than the entire exercise. This would move the concept of the trial further away from the traditional adversarial approach, with its focus on the trial diet itself[110], and closer to methods deployed successfully to record what is regarded as evidence in inquisitorial systems.

4.2 If there were to be substantial changes in the way that evidence is collected and presented at court, there will need to be corresponding changes in the procedures to accommodate that evidence. At present, Scots criminal procedure is designed to ensure that, if and when the case reaches trial, all the relevant evidence can be presented to the finder of fact through the principal medium of witnesses giving oral testimony in the witness box, either in the form of eyewitness accounts or descriptions of other forms of circumstantial evidence. The weight of preparation is directed towards the end of the process; an end which, as has been seen, is getting more and more distant, in terms of time lag, from the incident.

4.3 Innovations in recent years have sought to interpose hearings prior to the trial diet in order to ensure that the necessary preparation has taken place. The introduction of Preliminary Hearings in the High Court following the Bonomy Report of 2002[111] was intended to impose some discipline on solemn proceedings by delaying the setting of the trial diet date until the court is satisfied that the case is ready for trial. The system meant that cases were no longer indicted for trial, in custody cases within 110 days, but to a Preliminary Hearing within the same timescale[112]. In non-custody cases the time limit was and is 11 months[113].

4.4 The idea was that there should be initial communication between the prosecutor and the defence in advance of the Preliminary Hearing[114]. Both parties would require to complete a form stating their preparedness for trial[115]. This form[116] took some time to devise and revise. Its advantage was that it ought to have provided counsel and agents with a

[110] In Ireland, the "unity of the trial" is an important legal concept with quasi-constitutional force, which has inhibited the introduction of pre-trial case management procedures generally (although these are beginning to be introduced) – see *People (AG) v McGlynn* [1967] IR 232, where the Irish Supreme Court held that an uninterrupted 'unitary' jury trial is essential to the requirements of due process. In the USA, the constitutional right to confrontation has severely limited the scope for testimonial statements to be made prior to the trial itself, particularly following the US Supreme Court Decision in *Crawford v. Washington* 541 U.S. 36 (2004*)*

[111] *Improving Practice - 2002 Review of the Practices and Procedure of the High Court of Justiciary*

[112] 1995 Act s 72

[113] 1995 Act s 65

[114] That is what good practitioners would have done anyway but the practice had fallen into desuetude

[115] 1995 Act s 72E

[116] Act of Adjournal (Criminal Procedure Rules) 1996 rule and form 9A4

check list for advance preparation. Thereafter, at the Preliminary Hearing, all preliminary matters, including pleas in bar of trial, objections to the relevancy or competency of the indictment, objections to the anticipated evidence, applications under the rape shield laws[117] or for disclosure and any other matter which could be disposed of in advance of trial, would be dealt with[118]. Once that had been done, the most important feature was that, at that same Preliminary Hearing, an appropriate date for a trial would be allocated. This was supposed to be a fixed diet in all but a few cases, within, in custody cases, 140 days and, in non-custody cases, 12 months of the appearance on petition. The idea was a neat one. There was to be *a* Preliminary Hearing, even if there was scope for a "further" Preliminary Hearing to be held before the appointed trial diet[119]. However, the trial diet ought to have been appointed at the first Preliminary Hearing[120] no matter what. There would therefore be active case management in that sense.

4.5 What happened in reality was different and initially very disappointing. It will readily be appreciated that the Preliminary Hearing system was designed to deal with all preliminary pleas and issues in advance of the trial and then to fix a trial diet, within the time limits, which could be relied upon to proceed as scheduled. It was intended that preparedness of both parties would be addressed at the Preliminary Hearing and a trial diet fixed having regard to the nature and extent of any further preparations that might be needed. Initially, however, many in the profession did not approach it in that way; rather both the Crown and the defence saw it as sounding the starting gun for serious preparation rather than being the end point of that course. The effect was that, whereas there ceased to be a churn of trials, with admittedly a consequent saving in the cost of witnesses and related matters, there was an almost identical churn of Preliminary Hearings. This was even although some efforts had been made to persuade the Legal Aid Board to structure payments in a manner which encouraged the proper operation of the Preliminary Hearing system[121].

4.6 The system only came into its own when new judges were introduced with a view to taking a much more pro-active role in the Preliminary Hearing systems, and to maintain a uniform and effective approach to them. The object of these judges was to produce an efficient system which complied with the intention of the legislature and to ensure that trials were held within a reasonable time. With voices which would, by degrees, publicly embarrass or compliment the practitioners, they achieved a system which has resulted in the parties lodging almost all notices on time, carrying out all necessary preparation in advance of the Preliminary Hearing, or at least to the stage when it could safely be said that the case would be ready for trial within a defined time-scale. They were in a position to argue any preliminary pleas or issues at the Preliminary Hearing. In turn, the judges did not shirk from making the relevant decisions at the Preliminary Hearing. They would decide any points then and not postpone matters to a later, and especially to the trial, diet and, by implication, to another judge. Most important, the judges did not allow late applications as a matter of course. The effect of this has been that, over the last few years, the average number of Preliminary Hearings per case is less than 2. Since it cannot be less than 1, and some

[117] 1995 Act s 275
[118] 1995 Act s 72
[119] 1995 Act s 72(9)
[120] 1995 Act s 72A
[121] The first Preliminary Hearing is paid at the rate of 1½ days time, even if the court appearance is only 15 mins

cases involve complex matters requiring multiple hearings, the system is now seen as working as it should. The practitioners appear to be content with it and realise that allowing items to be received or discussed late is the exception and not the rule. The trial diet adjournment rate is about 15%, and the gap created by that statistic is relatively easily filled by an equivalent (but no more than that) overloading of diets with "floating" cases.

4.7 The Bonomy Review was followed by proposals in the McInnes Report of 2004[122], to strengthen the role of intermediate diets in summary proceedings, again intended as a check on the preparedness of each party for the forthcoming trial. There is less certainty about whether the revised approach to intermediate diets has produced an increase in the efficiency and effectiveness of court proceedings similar to that which has – admittedly after a number of years – been experienced in the High Court. Similarly the Bowen report of 2010[123] tackles similar issues for solemn cases in the Sheriff Court, recommending revisions to the process that broadly mirror those in the High Court. Provisions enacting some of the Bowen recommendations are contained in the Criminal Justice (Scotland) Bill[124] which is currently under consideration by the Parliament. Under the new provisions cases will be indicted only to a First Diet. The date on which the trial is appointed to take place will be for the sheriff, and not the Crown, to determine.

4.8 With the introduction of the routine taking of evidence by video-recording, it would be appropriate to look again at the structure of the trial procedure and the requirements for hearings, given that the weight of preparation for the trial can be brought forward. It would also be appropriate to consider the role of the judiciary in managing cases to ensure that the objectives of the proposed reform, in terms of providing the most effective and efficient means of administering justice, are met.

A new model for criminal trial procedures

4.9 The Review has considered the core elements that would be required to be introduced to provide an option to use pre-recorded statements of witnesses to be used as evidence in chief. As detailed in the previous chapter, primary legislation would be required to provide that a statement given by a person and recorded in audio and video format during the preliminary stages of an investigation may adduced at trial as evidence of fact, unless the court considers it contrary to the interests of interests to do so. Such a statement would be regarded as the witness's evidence-in-chief, in whole or in part. In such a case, it would be appropriate also to provide that such a person may not be cited to attend for a trial or other diet without the authority of the court.

4.10 Legislation would then also provide for the court to make provision by way of Act of Adjournal for:

(a) the preparation and authentication of a statement to be used as evidence of fact;
(b) the notification by a party of his intention to use such a statement as evidence of fact;
(c) the further examination or cross-examination of the person; and

[122] *Report of the Summary Justice Review Committee,* 2004
[123] *Independent Review of Sheriff and Jury Procedure* 2010
[124] Sections 63-68

(d) the attendance of the person at a trial or other diet appointed by the court.

4.11 In terms of (a), the preparation and authentication of the statement, the **Act of Adjournal** would provide that a statement to be used as evidence-in-chief may be authenticated by a certificate from the maker, or the taker, of the statement attached to the audio and video file. In addition, there should be a requirement that a statement to be so used must contain a statement from the maker either within its content or added thereafter that its content is the truth so far as the person can recall. The form of this commitment can be prescribed as appropriate[125].

4.12 In terms of procedure, there will of course be variations between solemn and summary cases. For **solemn cases**, where a party wishes to use a statement as evidence-in-chief in whole or in part, he should include the name of the person on the witness list and state at the commencement of that list that it is the intention of the party so to do under reference to the witness's number. Under the rules of disclosure, the statements should have been made available "as soon as practicable" after the accused's first appearance[126], and at the time of indictment at the latest. This will allow each party to consider the nature of the actual evidence that will be presented at trial, and to determine whether or not any witness should be examined further or cross-examined.

4.13 Where a party seeks to examine further or to cross-examine a witness whose statement is to be used as evidence-in-chief, he should make an application to the court stating the purpose of the examination or cross-examination and any subject matter to be covered which is not already referred to in the statement. Such an application may be made at any time up to or at the Preliminary Hearing or First Diet and, no doubt, on special cause shown, at a later point.

4.14 Upon hearing the application, the court may authorise the leading of further examination or cross-examination to take place either before the court, or a commissioner at such time and place in advance of trial as the court shall deem appropriate (and this may encompass the changes in respect of child and vulnerable witnesses envisaged in Chapter 2). The court should have an express power to limit the extent of the examination or cross-examination both in relation to subject matter and duration.

4.15 As with other forms of evidence, it will be open to the parties either to agree appropriate editing of the pre-recorded statements to remove any inadmissible content; or, where there is a dispute over the admissibility of the witness statements, in part or in whole, to seek a determination at the Preliminary Hearing or First Diet. In the latter case, it will then be the responsibility of the party presenting the statement to ensure it is edited as required prior to its presentation at the trial diet.

[125] See previous Chapter section on oaths, paras 3.54 -3.61

[126] S121 (2) Criminal Justice and Licensing (Scotland) Act 2010. The relevant Crown Office guidance states that "The general rule is that in all solemn cases, the Crown should provide the defence such copies of witness statements as are then in the possession of the Crown, within 28 calendar days of the accused's first appearance."

4.16 In relation to **summary cases,** this should be the opportunity to introduce reforms to the summary justice system so that the process mirrors, where appropriate, that taken in the High Court and being introduced for Sheriff and Jury trials following the Bowen Report. At present the intermediate diet and trial diet are both fixed at the first calling, with the former preceding the latter by up to four weeks. This has a number of consequences, including the scheduling in Court time of a large number of trials which will not proceed on the appointed day. On average, evidence is led in only around a third of trials called in the summary courts, and in some of the busier Courts, this figure is below 30%. This means that the Courts are required to overbook Court trial days, in the expectation that the majority of trials will not in fact proceed. This brings with it considerable inefficiencies for all those involved, including those witnesses cited to attend.

4.17 The availability of pre-recorded evidence in chief should make it easier to introduce a system in which the trial diet is not fixed unless the Court is satisfied at the intermediate diet that the case will be ready to go to trial. This means that the intermediate diet would become a much more significant pre-trial case management hearing (and may need to be renamed as such). In this model, where a party wishes to use a recorded statement as evidence-in-chief in whole or in part, he should, at the first calling, move the court to adjourn the case for trial and request that an intermediate diet be fixed. He should as soon as reasonably practicable thereafter notify the other party of the name of the person whose statement is to be so used[127]. At or prior to that diet a party may apply to the court to examine further or to cross-examine that person and the rules relative to applications in solemn cases should apply *mutatis mutandis* to such applications. The intermediate diet or pre-trial hearing would then become the final opportunity for such applications, and for the court then to determine whether the trial should proceed, when it should so, and what evidence will be led and which witnesses examined.

4.18 This model is relatively simple, but it has the potential to transform the way in which solemn and summary business is conducted. There will often be situations where the entirety of the prosecution case – the actual evidence that is due to be presented to the court at the trial diet – is available to the defence in the form it will be presented at a very early stage in the proceedings. There are very significant implications of this. First, it will strengthen the basis on which decisions about early guilty pleas can be made, and this may need to be reflected in the approach taken to sentence discounting. Secondly, in the absence of a guilty plea, the defence will be in a better position to consider its line of defence. The corollary of this advantage to the defence is that there should be less reason for vague or incomplete defence statements. Furthermore, as the model envisages, the parties should be in a position to identify at an early stage those witnesses for whom further examination or cross-examination may be required, and the issues which require to be addressed with them.

[127] According to the COPFS manual, the general rule is that in all summary cases where the accused is on bail or ordained to appear, the Crown should provide the defence such copies of witness statements as are then in the possession of the Crown, not less than 28 calendar days before the Intermediate Diet; where the accused is remanded, the Crown should provide the defence such copies of witness statements as are then in the possession of the Crown, not less than 7 calendar days before the Intermediate Diet.

4.19 The opportunity to assess the readiness for trial will therefore be enhanced if some or all of evidence to be led is already available to the Court. More than merely assessing readiness, it will allow the case to be appropriately managed, as the court will be able to ensure that, if a trial is to take place, the matters in dispute have been properly identified and the only witnesses required to attend the trial are those who should be examined on those matters. With the actual evidence in chief that will be presented to court available to both parties, the court will be able to explore with the parties which witnesses will be required, the nature of the defence and the length of time that is likely to be required, and set the parameters for the trial appropriately. This will, therefore, require a pro-active approach to management of the case by the judiciary.

Judicial case management

4.20 It is evident from the experience of both the Bonomy reforms and the English section 28 pilots that procedural change requiring the early and active engagement of the participants is best achieved when driven by the active engagement of the judiciary. The Review took as one of its starting points the persistent concern that churn in the system was at the heart of the difficulties in achieving the efficient administration of justice. It has already been stated that the non-attendance of witnesses at trial may be one cause of churn and delay. In relation to the earlier stages of the criminal justice procedure, major causes of churn appear to relate to the lack of preparation of the parties and/or the unavailability of key evidence, with hearings continued or adjourned to allow the parties more preparation time or to secure the required evidence.

4.21 The use of pre-recorded witness statements should not only reduce the delays caused by non-attendance, but, as suggested above, should also facilitate the early preparation of the case by both parties. It is quite possible; however, that this will only occur if the judiciary is prepared and able to exercise more active control. This case is compellingly put in the Bowen Report itself, as follows:

> "5.15 Apart from witness issues, First Diets are normally continued for reasons relating to lack of preparation by either side, or to enable a plea to be adjusted. It is however, clear both from anecdotal evidence and from examination of the reasons behind the statistics in courts where continuation of First Diets are rare, that a firm and consistent judicial approach has a clear positive impact on the efficient and effective disposal of business at that stage. "
>
> …
>
> 5.18 Consistency of approach is again critical in the area of case management. Some sheriffs are considered to be proactive in this area whilst others appear to take a more passive approach. *A proactive shrieval approach appears to improve the standard of preparation.* Whilst a variety of opinions were expressed on the appropriateness of judicial case management, it is fair to conclude that most court users recognise that it has a place in the modern criminal justice system. *Stronger judicial case management produces a clearer focus on individual cases and prevents them drifting*." (*emphasis added*)

4.22 This judicial control will, in the case of the new approach to criminal procedures, need to extend to the management of the cross-examination process. It is to be anticipated that some parties may seek, as some form of insurance tactic, to call all the witnesses listed, regardless of the value or otherwise of their further examination**.** Any tendency in this direction would need to be discouraged. As explored in the previous Chapter[128], it is quite consistent with the concept of a fair trial, and the concomitant rights under the Convention, that questioning should be contained within reasonable limits. The challenge will be for the judges and sheriffs to have the confidence to impose those reasonable limits and ensure that the parties adhere to them.

Changes to infrastructure

4.23 The Review is aware that, for the systematic introduction of a scheme whereby witness evidence is pre-recorded, stored and edited for its later presentation in Court, there would need to be developed an information technology infrastructure and applications that could handle the high volume of material involved.

4.24 The components of that infrastructure would need to include substantial and secure digital storage capacity, on which the "raw material" could be stored as well as the final evidence once it has been edited and prepared for presentation in court. It would also need to include a means by which material could be identified and cross-referenced so that it could be used in Police, Crown, Court and other case management systems; and there would be a need for all parties to a case to be able to access relevant material in an appropriate manner.

4.25 The Review's understanding is that current IT systems do not have sufficient capacity, are not appropriately configured and cannot interact in the way that would be required. At present, evidential material such as CCTV images and interview with the suspect in a crime is held in a variety of locations, usually according the to the legacy system of the police force of the area prior to the creation of Police Scotland. The Crown also has some capacity to store digital evidence. The storage capacity of these systems is not sufficient to take in a substantial increase in volume of material. More importantly, there is no common means of access to the evidence stored, nor the protocols and software to allow the systems of the various parties to share material on a routine basis.

4.26 It would require a substantial investment in both storage and processing facilities. Progress is however, being made. Police Scotland is currently migrating to a unified IT system, known as i6, which will resolve the inconsistencies currently experienced because of the incompatibilities of the legacy systems from the eight predecessor forces. Even more pertinently, the Scottish Government's Justice Digital Strategy contains a commitment to the creation of a "digital evidence vault to securely store all documents, audio, pictures and video content, preserving citizens' privacy". This vault would be accessible by all participants in the legal system, addressing many of the issues of communication and interaction referred to above. It would seem appropriate for the design and development of that vault to incorporate the potential future use of pre-recorded witness statements.

[128] Paras 3.34-3.48

4.27 There would, perhaps, be less new investment required in the facilities in the Courts for the presentation of this evidence, although it would be important to ensure that it was of sufficiently high quality to minimise any "barrier" effect. What would need further consideration, however, is the specification for, number and location of recording suites. As has been seen, there is a weight of opinion behind the siting of recording facilities for children and vulnerable witnesses away from Court premises. There is however, already work under way to increase the use of video-linked hearings, under the Cross-Justice Video-conferencing project.

Conclusion

4.28 The preparation and admission of pre-recorded witness statements will allow criminal trial procedures to be radically altered. Their availability early on in the process will shift the weight of preparation for the trial even further towards the first stages, and will give scope for the proper consideration, in advance of the final trial diet, of those matters which are genuinely at issue. It should cut through the current practice of using written witness statements as a prop for eliciting or undermining live testimony in court. The Review therefore concludes that:

- **Criminal trial procedures should be revised along the lines of the model described in paragraphs 4.9 et seq, whereby pre-recorded witness statements are disclosed, and a reasoned application must be made to the Court to authorise further examination of any witness whose recorded statement is to be used**

- **Consideration should be given to reforming the summary trial procedure so that the trial diet is not fixed until the Court is satisfied at the intermediate diet that the case will be ready to go to trial.**

- **The successful introduction of this model will depend on the willingness of judges and sheriffs to exercise active and robust case management, including careful control over the form and nature of further examination and cross-examination**

- **The Scottish Court Service and partners in the justice system will need to develop a high quality, high capacity and fully integrated information technology system to cope with the volume of witness statements that will require to be capture, stored, edited and presented**

Chapter 5: Conclusion

5.1 The conduct of criminal trials needs to change. The environment in which the criminal justice system operates and the society it serves has changed. In particular, it has moved into a digital age in which our personal conversations, business transactions and interactions with the wider world are increasingly conducted online and on screen. Much of what we do and what we say can be and often is captured on camera.

5.2 Our criminal law and practice needs to keep pace with these changes to remain relevant in modern society. But more than that, it has a duty to exploit the opportunities that new technology brings where there is genuine benefit to the administration of justice. The increasing complexity of some crimes combined with the tightening constraints on all public services means that there is already considerable strain on the justice system. Cases take longer to process, with, arguably, a detrimental effect on the ability of the system to do what it is meant to do – ascertain the truth. This strain could be eased substantially if we were to take advantage of the increasingly high quality, now ubiquitous medium of video-recording.

5.3 This is not to say that we should abandon the principles of a fair trial and the interests of justice in pursuit of technological innovation. It is critical that any change that is introduced is done so with a view to enhancing the administration of justice – not just in its efficiency, but also its quality. It has been the core premise from the outset of this review that there are significant benefits to be gained through the extended use of pre-recorded statements from witnesses. The evidence from other jurisdictions where they are used in relation to child and vulnerable witnesses suggests that these benefits can be realised. It is clear that the technology is now sufficiently advanced in terms of the quality of reproduction that it can provide testimony for the finders of fact as a genuine substitute for live appearance[129]. There are benefits in the ability to schedule the recording of witness statements and examination for the courts, for witnesses and jurors and for the parties; there are efficiencies in the final trial deriving from a procedure that means original statements are edited and appropriate controls placed on cross-examination. And, critically, there is every reason to think that the evidence gathered and presented will be more accurate and reliable if taken substantially closer to the incidents in question than the trial diet – in other words, it will make a positive contribution to the ascertainment of the truth.

5.4 The involvement of children and vulnerable people in criminal trials requires an approach that takes full account of the scientific evidence in relation to the potential harm to them of an inappropriate process, and in relation to the best way to elicit a comprehensive and reliable account. Chapter 2 detailed how other jurisdictions have moved further than Scotland in applying the knowledge about and understanding of the factors affecting young and vulnerable witnesses to remodel their criminal trial procedures. It is the conclusion of this review that a similar transformation is required in Scotland, with the development of a new and systematic approach, rather than the piecemeal and ad hoc changes in practice that are currently occurring.

[129] Further evidence on this will arise from the research currently being carried out by Professor Cheryl Thomas of University College London into the impact on juries of different forms of presenting witness testimony.

5.5 Chapters 3 and 4 developed the case for a transformation in the way that the evidence of witnesses in general is captured and presented. As the previous chapter describes, the introduction of a new approach will require a change in the culture and behaviours of the participants in the system. The experience in Australia and England, as well as in Scotland following the Bonomy Report, suggests that, despite the strength of adversarial traditions in these systems, practitioners are prepared to adapt to new procedures which involve pre-recording. It takes leadership from the judiciary at every level, with the willingness to adopt a robust approach to case management, the identification of the benefits to all concerned, and adjustments to the system of remuneration to incentivise the early engagement of the defence in particular.

5.6 It is notable that the Review found little practice as yet of the use of recorded statements as evidence in chief where the witness is not young or particularly vulnerable. This was true even in the primarily inquisitorial Dutch system which relies on the compilation of a dossier of evidence by an investigating judge. This instead places the greatest store on the written account of witness statements rather than the statements themselves (even when they are available in audio- and video-recorded form).

5.7 The lack of readily identifiable exemplars elsewhere should, however, not be a reason to draw back from seeking to modernise the justice system. It is the opportunity for Scotland to take a lead in harnessing the opportunities that new technologies bring to improve the quality and accessibility of justice. As detailed in the previous chapters, it will require some investment in infrastructure (although much is already under way under the Justice Digital Strategy) and substantial changes in the law, in procedures and in the practices and attitudes of those participating in the criminal justice system.

5.8 This Report is therefore submitted for the consideration of the Scottish Government and partner organisations represented on the Justice Board. It is acknowledged that the proposals in this Report have not yet been tested with the wider legal profession, other organisations with an interest in justice issues or the general public. It is a report based essentially on research rather than public consultation. If the proposals are to be taken further, careful consideration will need to be given to how the wider justice community and the public should be engaged in their further development.

5.9 It is hoped that this Report will be seen as the catalyst for a programme of reforms that will bring a better experience for those called to give evidence in criminal proceedings, a system of justice that deals with cases speedily, effectively and fairly, and one which remains relevant, trusted and respected by the Scottish people.

Annex A: Cases & Legislation List

Cases

Scotland

A v HM Advocate [2012] HCJAC 29,
Hughes v HM Advocate [2009] HCJAC 35,
Hughes v HM Advocate [2010] HCJAC 84.
Jamieson v HM Advocate (No 2) 1994 JC 251
McCutcheon v HM Advocate 2002 SLT 27
McLaughlin v Douglas (1863) 4 Irv 273
Matulewicz v Brown 2014 SCCR 154
Niblock v HM Advocate [2010] HCJAC 21
Rehman v HM Advocate 2014 SCCR 166

England & Wales

R v B [2010] EWCA Crim 4
R v Wallwork (1958) 42 Cr App Rep 153

Privy Council/UK Supreme Court

Cadder v HM Advocate [2010] UKSC 43
Teper v R [1952] AC 480 (PC)
R v Horncastle [2009] UKSC 14; [2010] 2 A.C. 373

Australia

R v Suteski (2002) 56 NSWLR 182
Walton v The Queen (1989) 166 CLR 283 (HC)

Canada

R v Khelawon [2006] SCC 57
R v Woodard [2009] MBCA 42

ECtHR

Al-Khawaja and Tahery v United Kingdom [2011] ECHR 2127; (2012) 54 EHRR 23.
A S v Finland App no 40156/07. ECtHR, 2010
Hols v Netherlands no 25206/94 19 Oct 1995
Kostovski v Netherlands 20 November 1989
Melnikov v Russia, no. 23610/03,
PS v Germany no 33900/96, 20 Dec 2001, [2002] Crim LR 312
SN v Sweden, no.34209/96, ECHR 2002-V
Unterpringer v Austria 24 November 1986
Van Mechelen & others v Netherlands (1997) 25 EHRR 647

Ireland

People (AG) v McGlynn [1967] IR 232

Netherlands

De Auditu case: Dutch Supreme Court 20 December 1926 ECLI:NL:HR:1926: BG9435.

New Zealand

R v M, R v E [2011] NZCA 303.

USA

Crawford v Washington 541 U.S. 36 (2004),
Michigan v Bryant, 131 S Ct 1143 (2011)

Legislation

Scotland
Criminal Procedure (Scotland) Act 1995
Criminal Procedure (Amendment) (Scotland) Act 2004
Vulnerable Witnesses (Scotland) Act 2004
Criminal Proceedings (Reform) (Scotland) Act 2007
Criminal Justice and Licensing (Scotland) Act 2010
Victims and Witnesses (Scotland) Act 2014

Australia
Acts Amendment (Evidence of Children and Others) Act 1992 (WA)
Evidence Act 1906 (WA)
Commonwealth Evidence Act 1995
Evidence (Children and Special Witnesses) Amendment Act 2013 (Tas)

Ireland
Criminal Evidence Act 1992
Criminal Justice Act 2006 (Part 3)

New Zealand
Evidence Act 2006

Norway
Straffeprosessloven (Norwegian Criminal Procedure Act) 1981
Criminal Procedure Regulations of 2 October 1998 no. 925.

UK (E+W)
Youth Justice and Criminal Evidence Act 1999
Criminal Justice Act 2003

USA
Federal Rules of Evidence 1975
18 U.S. Code § 3509 - Child victims' and child witnesses' rights (1990)

Annex B: Reference Material

This Annex lists the range of written materials considered in the course of the Review – it therefore extends beyond those materials explicitly referenced in the body of the Report.

Articles and Speeches

Abbreviations used

Am. J. Comp. L.	American Journal of Comparative Law
Arch. Rev.	Archbold Review
Cardozo L. Rev.	Cardozo Law Review
Cornell L. Rev	Cornell Law Review
Crim. L.J.	Criminal Law Journal
Crim. L.R.	Criminal Law Review
Geo. Wash. L. Rev.	George Washington Law Review
IJCR	International Journal of Children's Rights
IJEP	International Journal of Evidence & Proof
IJLS	Irish Journal of Legal Studies
J. Crim. L. & Criminology	Journal of Criminal Law and Criminology
J Police Crim Psych	Journal of Police Criminal Psychology
JICJ	Journal of International Criminal Justice
JJA	Journal of Judicial Administration
LCP	Law and Contemporary Problems
Melb. U. L. Rev	Melbourne University Law Review
N.C. J. Int'l L. & Com. Reg.	North Carolina Journal of International Law and Commercial Regulation
Neb. L. Rev.	Nebraska Law Review
New Eng. L. Rev	New England Law Review
NIJJ	National Institute of Justice Journal
SLT	Scots Law Times
U. Pitt. L. Rev	University of Pittsburgh Law Review
Victoria U. Wellington L. Rev	Victoria University, Wellington Law Review

Author	Title	Source
Bala, Nicholas, et al	The Competency of Children to Testify: Psychological Research Informing Canadian Law Reform	IJCR 18 (2010) 53–77
Bala, Nicholas, et al	Hearing the voices of children in Canada's criminal justice system: recognising capacity and facilitating testimony	Child and Family Law Quarterly, 22, (2010) 21-45
Blumenthal, Jeremy A.	A Wipe of the Hands, a Lick of the Lips: the Validity of Demeanor Evidence in Assessing Witness Credibility	72 Neb. L. Rev. 1157 (1993)
Brown, Marian K.,	Reform and Proposed Reform of Hearsay Law in Australia, New Zealand, Hong Kong and Canada	Annual Conference of the International Society for the Reform of Criminal Law 2007
Carloway, Lord	Scots Criminal Evidence and Procedure – Meeting the Challenges and Expectations of Modern Society and Legal Thinking	Criminal Law Conference, Murrayfield, May 2013
Caruso, David	Proposed reforms for cross-examination of child witnesses (Aus)	(2012) 21 JJA 191
Charleton, Peter	Sexual Violence: Witnesses and Suspects	IJLS 1 (2009) 1
Cooper, Debbie	Pigot unfulfilled: video-recorded cross-examination	[2005] Crim. L.R. 456
Cooper, Penny	Letter: re Testimony through a Live Link in the Perspective of the Right to Confront Witnesses	[2014] Crim. L.R. 451-452
Cooper, Penny	Bowler as well as Umpire?	Counsel magazine, June 2014
Damaska, Mirjan	Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study	Faculty Scholarship Series. Paper 1591. (1973) http://digitalcommons.law.yale.edu/fss_papers/1591
Damaska, Mirjan	Free Proof and its Detractors	43 Am. J. Comp. L. 343 1995
Daniele, Marcello,	Testimony through a Live Link in the Perspective of the Right to Confront Witnesses	[2014] Crim. L.R. 189
Davies, Emma, Henderson, Emily , and Hannah, Kirsten	Facilitating children to give best evidence	(2010) 34 Crim. L.J. 347

Dubelaar, Marieke	Reliable Witness Evidence	Doctoral Thesis Summary, University of Leiden, NL (2014)
Ellison, Louise and Munro, Vanessa E	A 'Special' Delivery? Exploring the Impact of Screens, Live-Links and Video-Recorded Evidence on Mock Juror Deliberation in Rape Trials	Social & Legal Studies 2014, Vol. 23(1) 3–29
Friedman, Richard D.	Face to face: rediscovering the right to confront prosecution witnesses	IJEP 8 (2004) 1-
Goodpaster, Gary	On the Theory of American Adversary Criminal Trial,	78 J. Crim. L. & Criminology 118 (1987-1988)
Harris, Sarah	Toward a Better Way to Interview Child Victims of Sexual Abuse	NIJJ 267, 12 (2010)
Henderson, Emily	Pre-recording Children's Evidence in New Zealand: R v M; R v E	(2011) 35 Crim. L.J. 300.
Henderson, Emily	Reforming the cross-examination of children: the need for a new commission on the testimony of vulnerable witnesses	Arch. Rev. 2013, 10, 6-9
Henderson, Emily	All the Proper Protections—The Court of Appeal Rewrites the Rules for the Cross-Examination of Vulnerable Witnesses	[2014] Crim. L.R. 91
Henderson, Emily et al	Pre-recording children's evidence: the Western Australian experience	[2012] Crim. L.R. 3-14
Henning, Terese	Control of cross-examination - a snowflake's chance in hell	(2006) 30 Crim. L.J. 133
Judge, Lord	The Evidence of Child Victims: the Next Stage	Bar Council Annual Law Reform Lecture, Nov 2013
Judge, Lord	Half a Century of Change: The Evidence of Child Victims	Toulmin Lecture in Law and Psychiatry, March 2013
Keane, Adrian	Towards a Principled Approach to the Cross-examination of Vulnerable Witnesses	[2012] Crim. L.R. 407-420.
La Rooy, David, Lamb, Michael and Memon, Amina	Forensic Interviews with Children in Scotland: A Survey of Interview Practices Among Police	J Police Crim Psych (published online 2 July 2010)
La Rooy, David et al	Joint investigative interviews with children in Scotland	SLT 18 (2012) 163-172
La Rooy, David et al	Joint Investigative Interviews conducted with children in Scotland (*follow-up article)*	SLT 31 (2013) 217-219

Lyon, T.D., & Dente, J.	Child witnesses and the Confrontation Clause.	102 J. Crim. L. & Criminology 1181-1232 (2012)
Marcus, Richard L	Completing Equity's Conquest? Reflections on the Future of Trial Under the Federal Rules of Civil Procedure,	50 U. Pitt. L. Rev. 725, (1989)
Marchant, Ruth	How Young Is Too Young? The Evidence of Children Under Five in the English Criminal Justice System	Child Abuse Review (2013), published in Wiley Online Library
Marsil, Dorothy F. et al)	Child Witness Policy: Law interfacing with Social Science	65 LCP 209 (2002)
Minzner, Max,	Detecting Lies Using Demeanor, Bias, and Context	29 Cardozo L. Rev. 2557 2007-2008
Murphy, P.	No free lunch, no free proof: the indiscriminate admission of evidence is a serious flaw in international criminal trials'	JICJ 8 (2010) 539
Nagorcka, Felicity, Stanton, Michael & Wilson, Michael	Stranded Between Partisanship and the Truth? A Comparative Analysis of Legal Ethics in the Adversarial and Inquisitorial Systems of Justice	29 Melb. U. L. Rev. 448 2005
O'Brian, William E.	Confrontation: the defiance of the English courts	IJEP 15 (2011) 93-115
Parker, Jacqueline	The Rights of Child Witnesses: is the Court a Protector or Perpetrator?	17 New Eng. L. Rev. 643 1981-1982
Pierce, Richard J., Jr	District Court Review of Findings of Fact Proposed by Magistrates: Reality Versus Fiction	81 Geo. Wash. L. Rev. 1236 (2013)
Pipe, Margaret-Ellen Orbach, Yael et al	Do Case Outcomes Change When Investigative Interviewing Practices Change?	Psychology, Public Policy, and Law 2013, Vol. 19, No. 2, 179–190
Porter, Stephen and ten Brinke, Leanne	Dangerous decisions: A theoretical framework for understanding how judges assess credibility in the courtroom	Legal and Criminological Psychology (2009), 14, 119–134
Powell, Martine, Fisher, Ronald & Wright, Rebecca	Investigative Interviewing	Psychology and Law – An Empirical Perspective, eds N Brewer & K Williams, Ch 2.

Qureshi, Amna M.,	Relying on Demeanour Evidence to Assess Credibility during Trial: A Critical Examination	Social Science Research Network, Jan 2014 http://ssrn.com/abstract=2384966
Redmayne, Mike	Confronting Confrontation	LSE Law, Society and Economy Working Papers 10/2010
Richards, Janet Leach	Protecting the Child Witness in Abuse Cases	Family Law Quarterly, Volume 34, Number 3, Fall 2000, 393 http://ssrn.com/abstract=1753800
Selcuk, Hatice	The actual role of the principle of immediacy in the Dutch criminal procedure	Master in Law Thesis Tilburg University 2012
Sleight, Kevin	Some aspects of child witness procedures in Western Australia	Jury Court Judges Triennial Conference – Auckland, Nov 2010
Smith, Lindsley	Juror Assessment of Veracity, Deception, and Credibility	Communication Law Review, Volume 4, Issue 1 (2002) 45-70
Spencer, JR	Hearsay evidence at Strasbourg: a further skirmish, or the final round? A comment on *Al-Khawaja and Tahery v UK* in the Grand Chamber	Arch. Rev. 2012, 1, 5-8
Stewart, Hamish	Khelawon: The Principled Approach to Hearsay Revisited	Canadian Criminal Law Review [12] (2008) 95-114
Stone, Marcus	Instant lie detection? Demeanour and credibility in criminal trials	[1991] Crim L.R. 821
Taylor, David,	Hearsay and the Right of Confrontation in American Trials by Jury	International Symposium: Combination of Anglo-American Legal system and Civil Law System in Criminal Evidence Law, 2011
Tinsley, Yvette & McDonald, Elisabeth	Use of Alternative Ways of Giving Evidence by Vulnerable Witnesses: Current Proposals, Issues and Challenges;	42 Victoria U. Wellington L. Rev. 705 (2011)
Weigend, Thomas	Should We Search for the Truth, and Who Should Do it?	N.C. J. Int'l L. & Com. Reg. [Vol. XXXVI 2010], 389-414
Wellborn, Olin G. III	Demeanor	76 Cornell L. Rev. 1075 (1991).

Westera, Nina J. *, Kebbell, Mark R. Milne, Becky	Losing two thirds of the story: a comparison of the video-recorded police interview and live evidence of rape complainants	[2013] Crim. L.R. 290
Zander, Michael	*(Commentary on)* The Report of the Scottish Civil Courts Review	Scottish Civil Justice Network Conference, 2009

Books

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Davidson, Fraser P	Evidence	Edinburgh, Thomson, W Green, 2007
Jackson J & Summers S	The Internationalisation of Criminal Evidence	Cambridge, UK: CUP 2012
McEwan, Jenny	Evidence and the Adversarial Process (2nd ed)	Oxford, UK: Hart Publishing, 1998
McGrath, Declan	Evidence	Round Hall, Dublin 2004
Ormerod, David	Hearsay under the Criminal Justice Act 2003	*Unpublished handout*, May 2014
Raitt, Fiona & Keane, EH	Evidence - Principles, Policy and Practice (2nd ed)	Edinburgh, W. Green, 2013
Spencer, John	Hearsay Evidence in Criminal Proceedings (2nd ed)	Oxford, UK: Hart Publishing, 2014
Spencer, John & Lamb, Michael (eds)	Children and Cross-Examination: time to change the rules?	Oxford, UK: Hart Publishing, 2012
Tak, Peter	The Dutch Criminal Justice system (3rd ed)	Nijmegen, NL: Wolf Legal Publishers 2008

Guidance Material

Jurisdiction	Author	Title	Date
Australia	Child Witness Service, WA	Guidelines for the Use of Closed Circuit Television, Videotapes, and Other Means for the Giving of Evidence	2005
Australia	Supreme Court of Queensland	Bench book direction 10 - Evidence of Affected Children	Undated current
Australia	Supreme Court of Queensland	Bench book direction 10A - Child Witnesses	Undated current

Australia	Supreme Court of Queensland	Bench book direction 11 - Special witnesses	Undated current
Australia	Supreme Court of Queensland	Practice Direction - Case management in complex criminal cases	Undated current
Australia	Supreme Court of Queensland	Practice Direction - Criminal proceedings	Undated current
Australia	Judicial Commission of NSW	Bench book – Civil proceedings *(also covers hearsay in crim proceedings)*	2013
Australia	Judicial Commission of NSW	Bench book – Criminal trials	2013
Canada	Centre for Children and Families in the Justice System	Using Special Accommodations and Testimonial Aids to Facilitate the Testimony of Children: Video-recorded Evidence	2007
England and Wales	Crown Prosecution Service	Guidance to Prosecutors: Hearsay (England) http://www.cps.gov.uk/legal/h_to_k/hearsay/	Undated current
England and Wales	Home Office	Guidance for the Police Use Of Body-Worn Video Devices	2007
England and Wales	Ministry of Justice	Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, and guidance on using special measures	2011
England and Wales	Sussex Police	Guidelines on Body Worn Video	2012
England and Wales	Judiciary of England and Wales	Judicial Protocol on the implementation of section 28 of the Youth Justice and Criminal Evidence Act 1999: 'Pre-recording of cross-examination and re-examination'.	2013
England and Wales	Joyce Plotnikoff	A more flexible approach to vulnerable witnesses and defendants (extract from Equal Treatment Bench Book)	2014
N Ireland	Police Service of Northern Ireland	Use of Video/Photographic Evidence for Identification Purposes	2010
Scotland	Scottish Executive	Guidance on the Questioning of Children in Court	2003
Scotland	High Court of	Practice Note No. 2 of 2005	2005

	Justiciary	Child Witnesses: Discretionary Powers	
Scotland	Scottish Government	Guidance on Joint Investigative Interviewing of Child Witnesses in Scotland	2011

Reviews and Reports – Scotland

Author	Title	Date
Scottish Law Commission	Report on Hearsay Evidence in Criminal Proceedings	1995
Lord Bonomy	Review of the practices and procedure of the High Court of Justiciary	2002
Scottish Executive	Modernising Justice in Scotland: The reform of the High Court of Justiciary	2003
SP John McInnes, QC	Report of the Summary Justice Review Committee	2004
Scottish Executive	Smarter Justice, Safer Communities Summary Justice Reform	2005
Lord Coulsfield	Review of the Law and Practice of Disclosure in Criminal Proceedings in Scotland	2007
Scottish Executive Social Research	On the Record: Evaluating the Visual Recording of Joint Investigative Interviews with Children	2007
Lord Gill	Report of the Scottish Civil Courts Review	2009
SP Edward Bowen CBE TD QC	Independent Review of Sheriff and Jury Procedure	2010
Audit Scotland	An Overview of Scotland's Criminal Justice System,	2011
Lord Carloway	Carloway Review	2011
Scottish Government Social Research	Evaluation of The Reforms to Summary Criminal Legal Assistance and Disclosure	2012
National Statistics	Criminal Proceedings In Scotland, 2012-13	2013
CI Fiona Armour, ACPOS, and Prof Kenneth Scott, UWS/SIPR	A Study of Witness Non-Attendance at Courts in Scotland	2013

Reviews and Reports - other jurisdictions

Jurisdiction	Author	Title	Date
Australia	Law Reform Commission	Report on Uniform Evidence Law	2006
Australia	Law Reform Commission	Family Violence - A National Legal Response (extract on pre-recorded evidence)	2010
Canada	Prof Nicholas Bala et al, Canadian Research Institute for Law and the Family	Testimonial Support Provisions for Children and Vulnerable Adults (Bill C-2): Case Law Review and Perceptions of the Judiciary	2011
England and Wales	Home Office, Chair: HH Judge Thomas Pigot	Report of the Advisory Group on Video Evidence	1989
England and Wales	The Law Commission	Evidence in Criminal Proceedings: Hearsay and Related Topics	1997
England and Wales	Auld, LJ	Review of the Criminal Courts of England and Wales	2001
England and Wales	Home Office, Burton et al	Are Special Measures for Vulnerable and Intimidated Witnesses Working?	2006
England and Wales	Joyce Plotnikoff and Richard Woolfson, Nuffield Foundation/NSPCC	Young witnesses in criminal proceedings A progress report on Measuring up?	2009
England and Wales	Prof Penny Cooper, Kingston University	Highs and Lows: The 4th Intermediary Survey	2014
England and Wales	College of Policing, Owens et al	The Essex Body Worn Video Trial	2014
Hong Kong	Law Reform Commission	Hearsay in Criminal Proceedings	2009
Ireland	Working Group on the Jurisdiction of the Courts (Fennelly)	The Criminal Jurisdiction of the Courts	2003
Ireland	Law Reform Commission	Hearsay in Civil and Criminal Cases (Consultation paper)	2010
Ireland	Dept of Justice and Equality	Report of the Working Group on Efficiency Measures in the Criminal Justice System	2012
Ireland	Law Reform Commission	Sexual Offences and Capacity to Consent	2013
New Zealand	Hanna et al, NZ Law	Child Witnesses in the New	2010

	Foundation	Zealand Criminal Courts: A Review of Practice and Implications for Policy	
New Zealand	Cabinet paper	Child witnesses in the criminal courts (1)	2011
New Zealand	Cabinet paper	Child witnesses in the criminal courts (2)	2013
New Zealand	Law Commission	The 2013 Review of the Evidence Act 2006	2013
Northern Ireland	Department of Justice Northern Ireland	Special Measures for Vulnerable Witnesses in Northern Ireland	2013
South Africa	Law Reform Commission	Review of the Law of Evidence (Hearsay and Relevance) (Discussion Paper)	2008

Presentations and Course materials

Jurisdiction	Title	Presenter
Ireland	Child Protection and Interviews	Sgt. Marie Daly, An Garda Síochána
Ireland	An Garda Síochána Investigative Interviewing Model (GSIM)	Sgt Geraldine Noone, An Garda Síochána
Ireland	The Court Presenter System in the Dublin Metropolitan Region	Sgt Brendan Brogan, An Garda Síochána
Ireland	Restorative Justice in a Court Context,	Kathryn Carolan & Garda Martin Maloney, An Garda Síochána
Ireland	Strategic Approach to Offender Recidivism - Adult & Youth Crime Case Management	Inspector Healy, An Garda Síochána
Scotland	Legal Aid Implications of Child witnesses	Catriona Whyte
Scotland	Developmentally appropriate investigative interviews	David La Rooy
Scotland	Joint Investigative Interviewing of Children in Scotland	Martin Henry
England and Wales	Piloting s28 of the Youth Justice and Criminal Evidence Act 1999 (recorded cross-examination)	HH Judge David Aubrey