Evidence and Procedure Review

CHILD AND VULNERABLE WITNESSES PROJECT

PRE-RECORDED FURTHER EVIDENCE WORK-STREAM

PROJECT REPORT

Scottish Courts and Tribunals Service

September 2017

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FOREWORD by The Rt Hon Lady Dorrian, The Lord Justice Clerk

There is a widespread recognition that, in a civilised and modern society, all those who come into contact with the criminal justice system must be treated with respect, and be allowed to engage meaningfully with it. For children and other vulnerable witnesses, this means finding ways to take their evidence in an environment and in a manner that does not harm them further, but allows their evidence to be given and tested fully and appropriately. We have recognised that our current methods, while always improving, do not meet the highest mark, and we need to develop our own, Scottish, solutions to the challenge.

In 2015, in the first Evidence and Procedure Review report, we made the frank admission that, in respect of measures designed to make the experience of child and vulnerable witnesses less traumatic, "Scotland is still significantly lagging behind those at the forefront in this field". The purpose and effect of that Report, however, was to galvanise both discussion and implementation of a programme of work designed to return Scotland and its criminal justice system to the forefront of practice. It is too soon to say that we have got there; but we have started to take the steps that both bring us more in line with the good practice in other jurisdictions, and will take us towards the highest standards.

This report is part of that process. It sets out our ambition for the long term future, with a model that takes its inspiration from some of the most advanced practices in place across the world, particularly the Scandinavian "Barnahus" or Child's House model. It recognises that, if we are to continue to improve the quality of justice, and the fairness of the trial for all concerned, we need to take new approaches to discovering the truth in our criminal justice system.

The model was developed by a working group of practitioners and from across the justice sector. I was very pleased to chair this group, and I am very grateful to all its members for their enthusiasm, energy and positive contribution to the production of this Report.

Lady Dorrian

EXECUTIVE SUMMARY

i. The Pre-Recorded Further Evidence Work-stream Group of the Evidence and Procedure Review Child and Vulnerable Witnesses Project commenced work in August 2016. The Group, chaired by The Rt Hon Lady Dorrian, The Lord Justice Clerk, was tasked with addressing two issues:

- considering the current arrangements for the taking of evidence of a vulnerable witness by commissioner with a view to creating some consistency in the approach used; and,
- developing a future vision for taking the evidence of child and vulnerable adult witnesses in a way that maximises the use of pre-recording of evidence in advance and removes the need for such witnesses to have to attend court to give evidence at trial.

This report summarises the Group's views on both.

ii. Data collected on behalf of the Group indicate that while procedures for the taking of evidence by commissioner have not been widely used to date, their use is becoming more common, particularly in proceedings being dealt with in the High Court involving child witnesses. Anecdotal evidence indicates that practitioners have been reluctant to submit applications for the taking of evidence by commissioner because commission hearings are regarded as being onerous to organise and conduct and are therefore perceived as being a last resort when there is no other way of securing a vulnerable witness's evidence.

iii. The Group considered the existing High Court of Justiciary Practice Note No. 3 of 2005 - Taking of Evidence of a Vulnerable Witness by a Commissioner[1] and decided that it required updating to reflect current thinking on approaches to enabling vulnerable witnesses to give their best evidence and to reflect those elements of best practice that are emerging from the more frequent use of commission procedures.

iv. The Group developed a new High Court of Justiciary Practice Note to provide detailed guidance on the approach to be taken by practitioners in submitting an application for the taking of evidence by a commissioner; and guidance to the court on the issues on which it must satisfy itself in granting such an application. The Practice Note effectively requires a Ground Rules Hearing to be held in which the approach towards taking the evidence of a child or vulnerable adult witness can be discussed in detail between the court and the parties.

v. The Group considered that at present the taking of evidence by commissioner commonly happens too long after the alleged offence first comes to light for

[1] High Court of Justiciary Practice Note No. 3 of 2005 – Taking of Evidence of a Vulnerable Witness by a Commissioner. At: http://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/practice-notes/criminal-courts/high-court---practice-note-3-of-2005---taking-evidence-of-a-vulnerable-witness-by-a-commissioner.pdf?sfvrsn=8

vulnerable witnesses - particularly young children - to be able to give their best evidence. The terms of the relevant provisions of the Criminal Procedure (Scotland) Act 1995 serve to discourage earlier submission of vulnerable witness applications and it is suggested that a number of amendments should be made to the legislation. If applications for the taking of evidence by commissioner are to be made sooner, however, practice also needs to change in relation to the gathering, consideration and disclosure of evidence.

vi. In setting out a longer term vision for taking the evidence of child and vulnerable witnesses, the Group considered that children under the age of 16 years who are complainers in cases involving the most serious crimes should be spared involvement in the court process altogether. Such children should have their complete evidence taken in the course of visually recorded forensic interview(s) conducted by highly trained, expert forensic interviewers who are skilled at taking the evidence of children. There should be no direct questioning of such children by lawyers.

vii. This “Level 1” vision is resource intensive at the early stage of criminal investigations. It will require increased investment to establish a body of highly trained, skilled and experienced interviewers and to upgrade equipment and facilities in which to conduct and visually record forensic interviews. However, it is important to recognise there will be concomitant benefits in relation to reliability of evidence and reduced trauma to victims and witnesses. There may also ultimately be resource savings in relation to the cost of trials. It was not possible for the Group accurately to estimate the cost of implementing the Level 1 vision, compared to the current cost of the conventional trial, and the broader societal costs. Accordingly, until the Level 1 vision is fully established and costed, the Group considered that use of this approach for children who are witnesses (but not complainers) in relation to serious offences should be at the discretion of the investigating officer who can assess the most appropriate approach for gathering the child's evidence. However, there should be scope for the Level 1 vision to apply to a broader category of children in the future.

viii. Where an adult complainer is vulnerable in multiple ways, it might be appropriate to apply the “Level 1” vision to take their evidence. It is expected that this would happen rarely. It would again be at the discretion of the investigating officer based on an assessment of the most appropriate approach to taking the witness's evidence.

ix. Until the “Level 1” vision can be extended to all children, in the majority of cases tried in the solemn courts complainers aged 16 and 17 years old, child witnesses aged less than 18 years, vulnerable adult complainers and vulnerable adult witnesses should have their investigative interview or witness statement visually recorded for use as their evidence in chief. Cross-examination and further examination should be undertaken using procedures for the taking of evidence by commissioner. Such witnesses should not be required to attend court to give evidence at trial unless they choose to do so.

x. Where no visually recorded statement has been taken and a written statement is produced, this written statement should be used as the witness's evidence in chief. Cross and further examination should be undertaken using procedures for the taking of evidence by commissioner.

xi. Where the nature, extent or materiality of the evidence is such that to proceed by way of commission appears to be disproportionate, the witness's visually recorded police interview or written witness statement should be the subject of a Statement of Uncontroversial Evidence or it should be possible to make an application to the court for the statement to form the witness's complete evidence.

xii. In exceptional circumstances some or all of a vulnerable witness's evidence may require to be given by the witness at trial. In such circumstances special measures should always be applied, preferably in the form of a live television link from a remote location, unless the vulnerable witness specifically requests otherwise. For all such cases a Ground Rules hearing should be introduced as soon as practicable.

xiii. If implemented in full the Group's vision should eventually lead to no child or vulnerable adult witness having to wait until trial to give their evidence in solemn proceedings, or attend court to give evidence at trial unless they choose to do so. However, realisation of this vision will have resource implications, including a shift in resourcing to the front end of investigations and it will, therefore, require to be implemented in a phased way. Priority should in the first place be given to implementing through use of a pilot scheme the vision for children aged less than 16 years who are complainers in High Court proceedings concerning the most serious crimes. The Group recognised that the majority of child witnesses appear in summary cases, but that it would be appropriate to focus at first on the most serious cases in solemn proceedings.

xiv. While these discussions concentrated solely on criminal proceedings, the links between good practice in supporting vulnerable witnesses to give their best evidence in civil cases was also recognised. The Group would encourage further work to ensure that the best practice and procedures recognised in this paper are drawn upon to influence similar best practice and procedures to support and protect child and adult vulnerable witnesses give their best evidence in civil proceedings,

INTRODUCTION

> "I spent all day waiting in a dirty room. Nobody told me what was happening. I felt scared the whole time in case he saw me. It's time for the criminal justice system to treat me with respect." (Feedback provided to Children 1st by a 13 year old girl required to give evidence at a criminal trial, 2016)[2].

1. In March 2016 the Justice Board agreed a new programme of work to take forward the recommendations of the *Evidence and Procedure Review Report*[3] and the *Evidence and Procedure Review*: *Next Steps*[4] report. The Programme Mandate split the work into two distinct projects governed by a single Programme Board comprised of members from the relevant Justice Board agencies. Project 2 (EPR2) focused on developing a new approach to taking the evidence of children and vulnerable adult witnesses, focusing on pre-recorded evidence.

2. EPR2 was further split into a number of work-streams, two of which were led by SCTS. These work-streams were:

- **Joint Investigative Interviews**, looking at how to improve the quality of the investigatory interviewing of children and vulnerable witnesses, so that recordings of these interviews can be readily used as evidence in court proceedings; and
- **Pre-recorded Further Evidence**, exploring options for more systematic approaches to recording the further and cross-examination of children and vulnerable witnesses in advance of trial.

3. For each work-stream a working group was set up consisting of representatives from justice agencies, the legal profession and the third sector, facilitated by the Scottish Courts and Tribunals Service (SCTS) project team. This report summarises the consideration given by the Pre-recorded Further Evidence Work-stream Group to the issues raised in the *Evidence and Procedure Review Report* and the *Evidence and Procedure Review - Next Steps* report. The multi-disciplinary Work-stream Group was chaired by The Rt Hon Lady Dorrian, the Lord Justice Clerk. The Group comprised members from across the criminal justice sector, organisations concerned with the welfare of children, third sector support organisations and academia in Scotland. The Group met fortnightly over a period of seven months. Members of the Group participated in the discussions in their own right and contributed their own views based on their experience in the criminal justice sector. None of the members of the Group attended to represent the formal views of their organisation. The members of the Group are listed in Annex A.

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[2] Children 1st – It's time to transform our justice system. At: https://www.youtube.com/watch?v=nCH6PmRxh3c

[3] Scottish Court Service (2015) – Evidence and Procedure Review Report. At: http://www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/reports-data/evidence-and-procedure-full-report---publication-version-pdf.pdf?sfvrsn=2

[4] Scottish Courts and Tribunals Service (2016) – Evidence and Procedure Review – Next Steps. At: http://www.scotcourts.gov.uk/docs/default-source/SCS-Communications/evidence-and-procedure-report---next-steps---february-2016.pdf?sfvrsn=2

4. The views expressed in the report were developed through collaborative discussion. While a broad consensus on the proposals was reached this does not mean that all the members of the Group accepted every detail of the proposals. The report is intended to set out the broad principles of a future vision. The precise detail of the vision requires further consideration and wider consultation and scrutiny.

BACKGROUND

5. In 2015 the judicially led Evidence and Procedure Review group published its report which contained a number of recommendations relating to the taking of evidence from children and vulnerable witnesses. In particular, the Review recommended that consideration should be

> "…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."

6. In making this recommendation the *Evidence and Procedure Review Report* identified two options for a new approach that could be considered:

- "a Norwegian style judicially supervised forensic interview for all aspects of the child's evidence; … and
- a version of "the Full Pigot"[5], 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".

7. The report noted that the increasing use of Joint Investigative Interviews (JIIs) as evidence in chief and the taking of evidence by commissioner are emerging in an ad hoc and unstructured fashion, which is undesirable. It proposed:

> "The introduction of a systematic and structured approach to the pre-recorded cross–examination of child and vulnerable witnesses under judicial supervision, ...This should replace the current ad hoc practice of applications to hear evidence on commission."

8. The *Evidence and Procedure Review – Next Steps* report, published in early 2016, set out the findings from further discussions led by SCTS on obtaining best evidence from child and vulnerable witnesses. That report recommended that:

[5] "The Full Pigot" refers to cases in which both the evidence-in-chief and the cross-examination of a witness is pre-recorded (as opposed to the "Half Pigot" option in which only the evidence-in-chief is pre-recorded). The term derives from the recommendations of the landmark publication, *Report of the Advisory Group on Video Evidence,* issued by the Home Office in 1989, also known as "the Pigot Report" after its Chair, HHJ Thomas Pigot QC.

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

9. The *Next Steps* report went on to suggest that such a system should be introduced in a phased way to ensure there is not an 'insupportable surge in demand on the justice system's limited resources'. It suggested that it may be appropriate to limit the first stage of work to children under a certain age but did not specify what that age should be.

10. In response to the *Next Steps* report the Justice Board commissioned work aimed at developing proposals to bring consistency to the use of existing approaches for the pre-recording of evidence and the use of that evidence in subsequent criminal proceedings. This work was led by SCTS.

11. The Pre-recorded Further Evidence Work-stream Group focused initially on current approaches to the taking of evidence by commissioner. The existing High Court of Justiciary Practice Note on Taking of Evidence of a Vulnerable Witness by a Commissioner[6] was considered in detail. The Group then went on to consider future approaches to the pre-recording of the evidence of child and vulnerable adult witnesses. The Group recognised that, although the majority of children called as witnesses will be involved in summary criminal proceedings, it would be appropriate to focus at first on the most serious cases in solemn proceedings, as recommended by the *Next Steps* report.

12. The Group's remit and scope, agreed in discussion at the outset of the work, were:

Remit

Initially, to produce revised and updated procedures for the use and conduct of Taking of Evidence by a Commissioner within the current legislative framework.

Thereafter, to develop a Future Vision setting out detailed proposals for:

- extending the pre-recording of further examination so that it becomes the default approach to taking evidence from all child and vulnerable adult witnesses;
- ensuring that pre-recorded further evidence can be effectively used in court, alongside pre-recorded evidence-in-chief, removing the need for child and vulnerable adult witnesses to attend court.

[6] High Court of Justiciary Practice Note No. 3 of 2005 – *Op. Cit.*

Scope

The work will focus on the provisions required to facilitate the effective conduct and subsequent use at trial of pre-recorded evidence taken by a Commissioner. Consideration will be given primarily to the application of the provisions in solemn criminal cases (although it is recognised that the status of cases can change as they progress through the criminal justice process and it might not be possible (or appropriate) to restrict the provisions solely to solemn criminal cases). Application of these provisions will also be limited to cases involving child and vulnerable adult witnesses.

THE CURRENT POSITION

Research on Securing the Best Evidence of Vulnerable Witnesses

13. A considerable body of evidence demonstrates that the process of giving evidence in criminal trials, and in particular the delays commonly encountered in cases reaching trial, can have adverse mental, physical and psychological effects on child witnesses.[7] These adverse effects can be long lasting, particularly for adolescents who are highly distressed by having to give evidence and for children who are required to repeat their story on numerous occasions.[8]

14. Likewise, research on memory and witness testimony shows that while all witnesses forget information over time, younger children are more susceptible to forgetting than older children and adults.[9] Child witnesses are more likely to confuse memories from similar sources and are more willing to guess the answers to questions when their memory has deteriorated.[10] These factors make them more susceptible to being discredited by difficult questioning, which can make them seem inconsistent or suggestible as their memories of events fade. Research also shows that traditional adversarial approaches to cross-examination tend to lead witnesses, particularly child witnesses, to give less reliable and accurate evidence – "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."[11]

15. Visual recording of the cross-examination of certain child witnesses in advance of trial was introduced on a pilot basis in England and Wales in 2015 under section 28 of the Youth Justice and Criminal Evidence Act 1999. Evidence from the section 28 pilot shows that there are clear benefits for child witnesses, and for the system as a whole, in having their evidence taken sooner and in having it visually recorded so that they do not have to attend trial.[12] In particular, the child's

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[7] Goodman, G. S.; Taub, E. P.; Jones, D. P; England, P.; Port, L. K.; Rudy, L.; Prado, L.; Mayers, J. E. B. and Melton, G. B. (1992) – Testifying in criminal court: Emotional effects on child sexual assault victims. Monographs of the Society for Research in Child Development. Volume 57(5) pp. 1-161.
Plotnikoff, J. and Woolfson, R. (2009) – Measuring Up? Evaluating implementation of Government commitments to young witnesses in criminal proceedings. At: https://www.nspcc.org.uk/globalassets/documents/research-reports/measuring-up-report.pdf

[8] Quas, J. A.; Goodman, G. S.; Ghetti, S.; Alexander, K. W.; Edelstein, R.; Redlich, A. D.: Cordon, I. M. and Jones, D. P. (2005) - Childhood sexual assault victims: long-term outcomes after testifying in criminal court. Monographs of the Society for Research in Child Development. Volume 70(2): vii pp. 1-128.

[9] Flin, R.; Boon, J.; Knox, A. and Bull, R. (1992) - The effect of a five-month delay on children's and adults' eyewitness memory. British Journal of Psychology. Volume 83(3) pp.323-36.

[10] Lindsay, S.; Johnson, M. K. and Kwon, P. (1991) - Developmental changes in memory source monitoring Journal of Experimental Child Psychology. Volume 52(3) pp. 297-318.
Waterman, A. H. and Blades, M. (2013) - The effect of delay and individual differences on children's tendency to guess. Developmental Psychology. Volume 49(2) pp.215-26.

[11] Henderson, E. (2013) - Reforming the cross-examination of children: the need for a new commission on the testimony of vulnerable witnesses. Archbold Review Vol 10, 6-9

[12] Henderson, H. M. and Lamb, M. E. (2017) – Pre-Recording Children's Testimony: Effects on Case Progression. Criminal Law Review (forthcoming).

involvement in the criminal justice system as a witness, and the stress associated with it, is concluded sooner; the duration of cross-examination is reduced; and more detailed and more reliable evidence is secured as earlier evidence capture reduces the likelihood of forgetting or contamination. The research shows that children having their cross-examination pre-recorded in the pilot concluded their involvement in the criminal justice system an average of four months earlier than children not having their cross-examination pre-recorded.

16. Taken together the research evidence in these areas indicates that better quality evidence is likely to be obtained from child witnesses where they are able to give their account soon after experiencing or witnessing an event. Bringing a child witness's participation in the criminal justice process to a close as soon as possible is also likely to reduce the trauma experienced as a result of having to participate in the process.

17. The *Next Steps* report identifies pre-recording in advance of trial as the preferred approach to early gathering of the evidence of child and vulnerable adult witnesses. This can be done at present through the visual recording of investigative interviews for use as evidence in chief and/or through the taking of full or partial evidence by commissioner. These provisions were introduced by the Vulnerable Witnesses (Scotland) Act 2004 and commenced on a phased basis in 2005 and 2006. However, an evaluation of the implementation of the Act found that the provisions for the use of prior statements and the taking of evidence by commissioner were not used in the two years following implementation.[13]

Visually Recorded Evidence in Chief

18. Visual recording of police investigative interviews with witnesses or of witness statements is not widespread. At present only Joint Investigative Interviews (JIIs), where there are child wellbeing concerns in addition to the possible commission of an offence, are routinely visually recorded. These are carried out only with certain child witnesses, the majority of whom are aged less than 16 years. Police interviews with vulnerable adult witnesses might be visually recorded in some circumstances but for the most part are not. It is fair to say, therefore, that the evidence provided by vulnerable witnesses in the course of giving their account of events to an investigating officer, which could be used as evidence in chief, is rarely visually recorded. This position in Scotland is very different to the situation in England and Wales where Achieving Best Evidence interviews with vulnerable witnesses are routinely visually recorded under section 27 of the Youth Justice and Criminal Evidence Act 1999.

Legislative Provisions for the use of Prior Evidence

[13] Richards, P.; Morris, S. and Richards, E. (2008) – Turning up the Volume: The Vulnerable Witnesses (Scotland) Act 2004. At: http://www.gov.scot/Publications/2008/07/25160344/0

19. Section 271A (2) of the Criminal Procedure (Scotland) Act 1995 (hereafter 'the 1995 Act') requires a party citing or intending to cite a child or vulnerable witness to lodge with the court a 'vulnerable witness notice' specifying the special measure(s) considered to be the most appropriate for the purposes of taking the witness's evidence.[14] The party lodging such a notice is required to include a summary of any views expressed by the witness and to have regard to the best interests of the witness.

20. Section 271H of the 1995 Act specifies the 'giving evidence in chief in the form of a prior statement' and the 'taking of evidence by a commissioner' as special measures which can be authorised by the court for the purposes of taking the evidence of a vulnerable witness. Section 271M sets out the rules that apply when a statement made by a vulnerable witness is lodged as the witness's evidence in chief or as part of their evidence in chief. Section 271I specifies certain rules that must be applied in taking evidence by commissioner. These are:

- the court must appoint a commissioner to take the evidence of the witness;
- the commissioner must be a judge of the High Court where the proceedings are for the purposes of a trial in the High Court;
- in any other case the commissioner must be a sheriff;
- the proceedings can take place by means of a live television link;
- the proceedings must be video recorded;
- the accused will not ordinarily be present in the room where the commission proceedings are being held but is entitled to otherwise watch and hear the proceedings; and
- witnesses are not required to swear to the recording of the commission hearing.

21. These provisions have the practical effect of allowing either the full or partial evidence of a child under the age of 18 years or a vulnerable adult witness to be taken in advance of trial and visually recorded. Ordinarily applications for the taking of evidence by commissioner are made by the Crown. Where the witness's full evidence is to be taken by commissioner the witness will be examined in chief by the prosecutor, cross-examined by the defence lawyer(s) and, if required, further examined by the prosecutor. If only partial evidence is to be taken by commissioner the party citing the witness will make an application under section 271M of the 1995 Act for evidence in chief to be given in the form of a prior statement, alongside an application under section 271I. At the commission proceedings the witness will be cross-examined by the defence lawyer(s) and, if required, further examined by the prosecutor.

[14] Provisions relating to vulnerable witnesses were introduced into the 1995 Act by the 2004 Vulnerable Witnesses (Scotland) Act and subsequently by the 2014 Victims and Witnesses (Scotland) Act.

22. Section 271I of the 1995 Act permits the use of a live television link in commission proceedings. This allows the witness to attend the commission hearing by live television link from a place other than the location where the commissioner, prosecutor, defence lawyers and the accused are present. Alternatively, the witness can attend the commission hearing in person and the accused can view the proceedings via live television link from a different location. The 1995 Act does not place any restrictions on the location in which commission hearings can be conducted, although facilities must be available to enable the proceedings to be video recorded. In practice commission hearings currently almost always take place within court buildings, the witness usually attends in person and the accused usually watches the proceedings via a live television link. (The most common practice at present is for the commission hearing to be held in a room in Parliament House in Edinburgh with the witness attending in person. The accused generally watches the commission hearing over a live television link from a vulnerable witness room in the High Court Lawnmarket building, also in Edinburgh.)

Number of Cases

23. Data on use of the provisions for the taking of evidence by commissioner are not readily available. Anecdotal evidence indicates that prior to implementation of the Victims and Witnesses (Scotland) Act 2014 the provisions were rarely used. Since implementation of this legislation SCTS staff have been required to record information on applications made under sections 271A or 271C of the 1995 Act. Analysis of the data shows that figures are not yet being consistently recorded.

24. Several specific data collection exercises were undertaken to inform the Group's deliberations. An examination of court records showed that in the year from 1 August 2015 to 31 July 2016 a total of 22 witnesses in cases being tried in the High Court had their evidence taken by commissioner. Of these, 17 were child witnesses, who were aged 16 years or less and five were vulnerable adult witnesses. Analysis of the data shows that witnesses giving evidence by commissioner concluded their involvement in the criminal justice system an average of 77 days before trial diet.

25. There is undoubtedly an increase in the use of provisions for the taking of evidence by commissioner in cases being tried in the High Court. In the five months from 1 August to 31 December 2016 a further 13 commission hearings were held to take the evidence of vulnerable witnesses in High Court cases.

26. A separate data collection exercise indicated that in any 12 month period, in the region of 100 child witnesses below the age of 18 years actually give evidence in trials being heard in the High Court. Child witnesses appearing at trials in the High Court almost always do so with the benefit of some form of special measure, most commonly a supporter and either a live television link or a screen. The data are not sufficiently robust to allow firm conclusions to be drawn but analysis suggests that:

- only around half of all child witnesses for whom a vulnerable witness application is granted by the High Court are actually required to give evidence at trial;
- children below the age of 10 years are not being called to give evidence in person in the High Court;
- where children below the age of 10 years are required to be witnesses in cases being tried at the High Court, their evidence is taken by commissioner;
- most children who have their evidence taken by commissioner have already been subject to a visually recorded JII and the prosecutor has made an application under section 271M of the 1995 Act to use this prior statement as evidence in chief; and
- Special measures are very rarely sought in relation to child witnesses being cited by the defence (c.f. paragraph 56).

Guidance on Taking of Evidence by Commissioner

27. Guidance on the taking of evidence by a commissioner was published in 2005 by the then Scottish Executive within its Vulnerable Adults and Child Witnesses guidance pack.[15] The guidance was intended to assist the practical application of section 271I of the 1995 Act. It focuses primarily on parties' statutory obligations in using the approach and identifies the different requirements where the witness is appearing by live TV link compared to where the accused is watching proceedings via a live TV link. The guidance recommends that 'due to the technical requirements associated with the accused watching the proceedings via live TV link', this approach should be sought 'in only exceptional cases'. Anecdotal feedback from practitioners provided during the course of the Group's work indicated that awareness of and reliance on the Scottish Executive guidance is extremely low.

28. A High Court of Justiciary Practice Note was also issued in 2005[16] with the purpose of providing guidance to practitioners on:

- the preparation required for seeking authorisation for evidence to be taken by commissioner;
- identifying the issues the court will expect practitioners to address in the application;
- how the commission will be conducted; and
- how any issues arising from the commission will be dealt with.

Although this guidance focused very much on the practicalities of conducting commissions, anecdotal evidence again suggested that awareness of and adherence to the Practice Note is low amongst practitioners.

[15] Scottish Executive (2005) – Special Measures for Vulnerable Adult and Child Witnesses – a Guidance Pack. At: http://www.gov.scot/resource/doc/220722/0059379.pdf
[16] High Court of Justiciary *Op. cit.*

29. This low awareness of the available guidance has meant that practitioners have developed their own individual practice in making applications for evidence to be taken by commissioner and that the practical arrangements for the conduct of commissions are being made on a case by case basis without the application of common standards. The Group was told of a perception amongst practitioners that commissions are onerous to organise and conduct and that they are an approach of last resort, to be used only if there is no other way of securing the evidence of an essential witness.

IMPROVING PROVISIONS FOR THE TAKING OF EVIDENCE BY COMMISSIONER

30. The Group undertook a detailed review of Practice Note No. 3 of 2005. In doing so the Group recognised the importance of the work being done by a related project group aimed at improving the quality of JIIs conducted with certain child witnesses.[17] The Group acknowledged that this work is intended to increase the frequency with which such interviews are used as the evidence in chief of child witnesses and that this will impact on the use of procedures for the taking of evidence by commissioner in a number of ways. An increase in the use of high quality JIIs as evidence in chief should lead to an increase in applications for the taking of evidence by commissioner as together the procedures will enable a greater number of child witnesses to be kept out of court. It should also impact on the focus of commission hearings since the availability of high quality evidence in chief will remove or reduce the need for evidence in chief to be gathered at the commission stage.

31. It will, however, take time to improve the quality and to increase the use of JIIs. In the meantime evidence, whether in full or in part, will continue to be taken by commissioner and data indicate (c.f. paragraph 25) that use of the relevant provisions is increasing. The Group considered that a new Practice Note was required in order to provide more detailed guidance to practitioners and improve the consistency of approach to the taking of evidence by commissioner. This new Practice Note is reproduced at Annex B.

Scope of the Practice Note

32. Most cases in which evidence has been taken by commissioner have, to date, been cases being tried in the High Court. The Group anticipated that even before the use of JIIs as evidence in chief increases, the number of cases in which evidence requires to be taken by commissioner will increase. This will be driven both by a growing expectation that child witnesses should be kept out of court wherever possible, and as a result of the new Practice Note making it clearer what steps are required to organise the taking of evidence by commissioner. Any such increase in volumes will have a resource and cost impact. The need to develop a coherent and consistent approach, together with the anticipated resource impact led the Group to consider that development of a new Practice Note should be limited, in the first instance, to a Practice Note for the High Court of Justiciary.

33. The Group acknowledged, however, that the growing expectation that child witnesses should be kept out of court will make it inevitable that evidence will require to be taken by commissioner from witnesses cited in cases being tried in the sheriff

[17] Scottish Courts and Tribunals Service (2017) – Evidence and Procedure Review – Joint Investigative Interviews Work-stream: Project Report. At: http://www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/reports-data/evidence-and-procedure-review.docx?sfvrsn=4.

solemn courts. The Group considered, therefore, that in due course a comparable Practice Note for the Sheriff solemn courts should be developed.

Assessment of Witnesses' Needs

34. The legislation requires any vulnerable witness notice submitted to the court to contain a summary of the views of the witness (and in the case of a child witness, the witness's parent as well, unless that parent is the accused) in regard to the appropriateness of any of the special measures available for the purposes of taking evidence. The Group considered that any vulnerable witness notice requesting permission to take a witness's evidence by commissioner requires to contain comprehensive information on the needs of the witness and on the approach to conducting the commission hearing that will support the witness to give their best evidence.

35. In order for this information to be included in the vulnerable witness notice, the party citing the witness will require to undertake a detailed assessment of the witness's communication and support needs. The new Practice Note sets out the full range of issues that require to be addressed. The court needs to be able to satisfy itself that the proposed approach will support the witness to give their best evidence. Every witness is different and an approach that suits one will not necessarily suit others.

Location of Commission Hearings

36. The Group acknowledged that the 'default' approach that has developed of holding commission hearings in Parliament House in Edinburgh with the witness present in person is administratively convenient for the criminal justice system. The approach is not necessarily based on the best interests of the witness, however, and it often results in child witnesses (many of whom, to date, have been aged less than 10 years) having to travel long distances, sometimes staying overnight, to attend a commission hearing. The Group considered that closer attention should be paid to the approach that best suits the witness. This is likely to mean commissions being arranged for circuit hearings taking place nearer to where the witness is located, the parties involved in the commission hearing travelling to where the witness is located, or greater use being made of appearance at commission hearings by live television link from a remote location.

37. The Group recognised that this could have administrative and cost implications for the criminal justice organisations. For example, it might mean all of the parties with the exception of the witness having to travel long distances to undertake a commission hearing. Long travel distances might be avoided, however, if witnesses give their evidence at commission hearings via live television link. Requiring the parties to think more creatively about the most appropriate location (from the witness's perspective) for commission hearings should enable many of the administrative and logistical difficulties to be overcome. The *Evidence and Procedure Review* recommended that child and vulnerable witnesses should be

dealt with 'away from the court setting altogether'. Greater flexibility over the location of commission hearings would enable this aim to be achieved.

Ground Rules Hearings

38. The section 28 pre-recorded cross-examination pilot in England and Wales made a Ground Rules Hearing (GRH) mandatory in all cases in the pilot. The GRH allows for judicial scrutiny of the defence's plans for cross-examining the witness. Issues that must be discussed at the GRH include the witness's communication needs, the length of cross-examination, the nature of defence questioning and any restrictions on putting the defence case to the witness. The defence are required to submit draft questions to the court in advance of the GRH and these require to be approved by the judge, in some cases supported by advice from an appointed intermediary. Advocates are also required to confirm that they have read the relevant guidance on questioning vulnerable witnesses which is provided on the Advocate's Gateway.[18] GRHs are held a week before the cross-examination takes place and the same advocates must attend the GRH as will attend the cross-examination. Likewise, the same judge must preside over the GRH and the cross-examination (and wherever possible, the trial itself).

39. An evaluation of the section 28 pilot provides evidence of the value of GRHs in cases where a witness's evidence is to be taken in advance of trial.[19] Practitioners regarded defence lawyer questioning in section 28 cross-examinations to be more witness-friendly, focused, relevant and pared down than in conventional trials. Section 28 cross-examinations were also perceived to run more smoothly than cross-examination in conventional trials, with less need for judges to interject in proceedings. Both of these effects were felt to be due to the scrutiny that the cross-examination approach received at the GRH.

40. In the early stages of the pilot GRHs were found to take longer than had been expected. The time involved is regarded as depending on the preparedness of counsel. The need to prepare in advance applies to both the defence and the prosecution, who must observe ground rules and carefully prepare any questions that might be required in re-examination. While the need for early preparation and early disclosure can be regarded as burdensome, it results in shorter cross-examination and in turn, trials are shorter. This is regarded as the 'pay-off' for time invested in preparation. As the pilots bedded-in and practitioners became familiar with the requirements of GRHs, the hearings in some areas required less time.[20]

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[18] See The Advocate's Gateway. At: http://www.theadvocatesgateway.org/

[19] Ministry of Justice (2016) – Process evaluation of pre-recorded cross-examination pilot (Section 28). At: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/553335/process-evaluation-doc.pdf

[20] Plotnikoff, J. and Woolfson, R. (2016) - Worth waiting for: The benefits of section 28 pre-trial cross-examination. Archbold Review, Issue 8. At: https://www.archbolde-update.co.uk/PDF/2016/Archbold%20Issue%208%20PRESS.pdf

41. The Group considered that a GRH would be essential in any case in which a child or vulnerable adult witness's evidence is to be taken by commissioner. The new Practice Note requires the party submitting the vulnerable witness application to address many of the issues that are addressed at a GRH. On this basis the Group felt that under current approaches to case management, the preliminary hearing at which the vulnerable witness application is considered should also function as a GRH.

42. The Group's future vision for taking the evidence of child and vulnerable adult witnesses is set out later in this report (see paragraph 61 onwards). The proposed vision would result in a substantial increase in the use of taking of evidence by commissioner but would also allow for evidence to be taken using conventional approaches where this is appropriate according to the vulnerable witness's particular circumstances.

43. Until such a time as the Group's vision is implemented, the Group considered that, as an interim measure, GRHs should be introduced for all cases in the High Court in which a child or vulnerable adult witness is required to give evidence, even where this is to be done using conventional approaches. A GRH is an uncomplicated and highly effective tool to begin the process of changing culture and practice in relation to taking the evidence of vulnerable witnesses by introducing greater scrutiny of approaches to questioning, and builds on what ought to be current good practice by highly skilled legal practitioners.

44. Initially, a GRH may require to take place separately from the procedural hearing. To that extent, GRHs will have resource implications in terms of practitioner time in participating in them. It is important, therefore, that time is allowed for approaches to conducting GRHs in Commission cases to develop and bed-in in response to the new Practice Note before they are rolled out further. Given that the GRH builds on skills which should already be possessed by practitioners, it is anticipated that they should quickly adapt to the new requirements and practices, and the need for separate GRHs should diminish. Once GRHs are operating effectively in commission cases, consideration should be given to phasing them in for all cases involving vulnerable witnesses. This might start with children and vulnerable adult complainers, or children and adult witnesses who are vulnerable by reason of mental disorder.

Timing of Application

45. For "proceedings in the High Court" the vulnerable witness notice requires to be lodged no later than 14 clear days prior to the preliminary hearing; and for "proceedings on indictment in the sheriff court" no later than seven clear days before the first diet. (See Section 271A(13A) and section 271C(12) of the 1995 Act). There are no proceedings on indictment in either court until an indictment is served. Accordingly, commissions can only take place after an indictment has been served.

46. In *MacLennan*[21] the Court recognised this as a difficulty, creating the likelihood of a lengthy interval of time between the gathering of a child's account of alleged events at a JII and any subsequent commission hearing. The same difficulty would arise in other cases where the court has authorised the use of a prior statement as evidence in chief. As the Court observed in *MacLennan* (paragraph 29):

> "….this problem could be solved, however, by introducing a relatively simple provision permitting the evidence of young children to be taken on commission at any time after the appearance on petition."

A similar provision could be introduced in relation to other vulnerable witnesses.

Consideration of Applications for Taking of Evidence by Commissioner

47. Under current provisions the court requires to consider a vulnerable witness notice in the absence of the parties, and where standard measures are sought for children, or otherwise where the court considers the measure sought to be appropriate, to grant it. (See Section 271A(5)(a) and section 271C(5)(b) of the 1995 Act). Where the court is not satisfied that the measure is appropriate, the court must appoint the notice to be heard at a preliminary hearing, or first diet (or, where such diets have already taken place, at a diet prior to the hearing at which evidence will be given)(Section 271A(5)(c) and section 271C(5)(b)). In reality where an application is made for taking of evidence by commissioner the need for practical arrangements has meant that the court is inevitably unable to determine that this is an appropriate measure until those arrangements have been discussed. The issue is thus in practice always remitted to a hearing.

48. The new Practice Note is intended to have the effect of requiring a GRH to take place in any case in which evidence is to be taken by commissioner. Therefore, there is no question that a vulnerable witness notice requesting this approach would be decided in chambers. It is expected that the GRH will be held at the same hearing at which the application is considered and granted (which is currently at the preliminary hearing). The Group considered that, with regard to vulnerable witness notices requesting the taking of evidence by commissioner, section 271A (5) of the 1995 Act should be amended to remove the requirement for such notices to be first considered in chambers in the absence of the parties.

49. If the legislation is amended to enable earlier submission of vulnerable witness notices requesting the taking of evidence by commissioner, consideration

[21] *HMA* v *MacLennan,* 2016 JC 117, para 28. http://www.scotcourts.gov.uk/search-judgments/judgment?id=d5e9fda6-8980-69d2-b500-ff0000d74aa7

will require to be given to the identification or scheduling of an appropriate procedural diet in which applications can be considered and decided.

Application of Section 271D of the 1995 Act

50. Section 271D of the 1995 Act contains provisions enabling the court to review the arrangements for a vulnerable witness 'at any stage in the proceedings'. Section 271I (6) of the Act allows a commissioner to perform the functions of the court in relation to a number of specific sections of the Act.[22] No such provision is made in regard to section 271D of the 1995 Act, for which purposes "court" means the High Court or the Sheriff Court (section 271(5)). Thus a High Court judge, when acting as a commissioner, has no authority to review the arrangements for the taking of a vulnerable witness's evidence. For example, if an application to use a prior statement as evidence in chief or for a child witness to be accompanied by a supporter has been overlooked by the party citing the witness, such an application, made late in the proceedings, cannot be considered by the judge appointed as a commissioner in the case while performing the role of commissioner.

51. The Group acknowledged that the occasions on which a commissioner is required to review the arrangements for a vulnerable witness are likely to be rare, particularly once GRHs are established. Nevertheless, the Group considered that the legislation should be amended to allow section 271D of the Act to be operated by a commissioner if required.

Visual Recording of Commission Hearings

52. Section 271I (2) of the 1995 Act specifies that proceedings before a commissioner must be recorded by video recorder. Under current arrangements the party citing the witness is responsible for organising and paying for the visual recording of the commission hearing. In effect this means that the visual recording of commissions has, to date, been arranged and paid for exclusively by COPFS. Anecdotal evidence from practitioners suggests that a lack of clarity over the availability and cost of visual recording services acts as a disincentive for other parties who cite vulnerable witnesses to request the taking of evidence by commissioner.

53. Under current arrangements a commercial supplier is appointed by COPFS on a case by case basis to undertake the visual recording of commissions. A flat rate daily cost is incurred, regardless of how long the commission hearing lasts or

[22] These sections are:
Section 274 Restrictions on evidence relating to sexual offences;
Section 275 Exceptions to restrictions under section 274;
Section 275B except subsection (2)(b) Provisions supplementary to sections 275 and 275A;
Section 275C Expert evidence as to subsequent behaviour of complainer;
Section 288C Prohibition of personal conduct of defence in cases of certain sexual offences;
Section 288E Prohibition of personal conduct of defence in certain cases involving child witnesses under the age of 12; and
Section 288F Power to prohibit personal conduct of defence in other cases involving vulnerable witnesses.

how many witnesses have their evidence taken during the hearing. The contractor provides a DVD copy of the recording to the Clerk of Court and will provide additional copies at the request of the court. The contractor will also undertake editing of the recording under the instruction of the court.

54. Members of the Group questioned whether it is appropriate that the party citing the witness should be required to arrange and pay for the visual recording of a commission hearing, given that the purpose of taking evidence in this way is to allow a vulnerable witness to give more effectively the evidence that will be used in court proceedings. It was suggested that one option would be for SCTS to take responsibility for arranging and funding the visual recording, given that the commission forms an early part of the trial in criminal cases (and could be an early part of a proof hearing in cases referred from the Children's Hearings).

55. The Group considered that the current approach to arranging and procuring the visual recording of commission hearings should be collectively reviewed by COPFS, SCTS, the defence profession and the Scottish Children's Reporter Administration (SCRA). Any such review will need to take account of multiple issues including:

- The anticipated increase in the volume of commissions with child witnesses expected to arise from the increased focus on keeping children out of court;
- Changes in approach to conducting commissions arising from the new Practice Note; and
- Increased take up of opportunity for defence solicitors and Children's Reporters to request the taking of evidence by commissioner that could follow from a different model of service provision.

Vulnerable Witnesses Cited by the Defence

56. The data available on vulnerable witness notices indicate that it is unusual for defence lawyers to submit vulnerable witness notices in respect of child or other witnesses. The data indicate that in the 12 month period from August 2015 to July 2016 four vulnerable witness notices were submitted by defence lawyers in respect of child witnesses appearing in High Court proceedings. In the seven months from August 2016 to February 2017 a further three notices relating to child witnesses cited by the defence were submitted. Where an application by the defence requests special measures, the use of a supporter is most commonly requested. There is no evidence of defence lawyers requesting the taking of evidence by a commissioner in High Court cases. Anecdotal evidence presented to the Group indicated that, on occasion, defence lawyers failed to give proper consideration to special measures and some vulnerable witnesses attended court with no special measures in place. This should not happen.

57. The Group considered that the provisions for enabling child witnesses to give their evidence as early as possible and outwith the trial should be applied equally to children cited as witnesses in cases being tried in the High Court, regardless of

which party cites them. Therefore, defence lawyers should be actively encouraged to make applications for the taking of evidence by commissioner in respect of any child witness they require to cite in proceedings in the High Court. This can be done through active judicial management. Under current arrangements for the visual recording of commission hearings it would be necessary for the applicant to organise and pay for the visual recording of the hearing. This could well be considered a reasonable outlay in preparing for trial.

Transcription of Evidence Taken by Commissioner

58. The Group explored the question of whether evidence taken by commissioner should be routinely transcribed for use at trial diet. It was argued that where a transcription of a JII being relied on as evidence in chief is provided to the jury, often because the audio visual quality of the recording is inadequate, a transcription of the evidence taken by commissioner should also be provided. It was argued that a jury will be likely to give more weight to that part of the evidence they have a transcript of and, therefore, all parts should be transcribed to ensure a level playing field.

59. Evidence taken in advance of trial in the section 28 pilots in England and Wales is not transcribed for use at trial and this is not regarded as having created any difficulties. The Group considered that if the recommendations of the JII Work-stream Group are implemented and the equipment used for visually recording JIIs is replaced,[23] the need for transcripts of JIIs to be provided to juries will diminish. On this basis the Group concluded that it would not be necessary for transcripts of evidence taken by commissioner to be routinely produced.

60. The new High Court of Justiciary Practice Note for the Taking of Evidence of a Vulnerable Witness by a Commissioner was launched on 28th March 2017[24] and came into effect on 8 May 2017. An initial estimate of the potential cost impact of the new Practice Note arising from an increase in the volume of commission hearings was conducted, and is included in Annex D. The analysis in this Annex does rely on a number of assumptions, and is based on a small sample size and limited information. It should therefore be treated as an initial indication only.

[23] Scottish Courts and Tribunals Service (2017) – *Op. Cit.*

[24] High Court - Practice Note - Number 1 of 2017 Taking of evidence of a vulnerable witness by a commissioner. At: http://www.scotcourts.gov.uk/rules-and-practice/practice-notes/criminal-courts-practice-notes-and-directions

FUTURE VISION FOR VISUALLY RECORDING EVIDENCE IN ADVANCE OF TRIAL

61. The second part of the Work-stream Group's remit was to develop a Future Vision setting out detailed proposals for:

- extending the pre-recording of further examination so that it becomes the default approach to taking evidence from all child and vulnerable adult witnesses: and
- ensuring that pre-recorded further evidence can be effectively used in court, alongside pre-recorded evidence-in-chief, removing the need for child and vulnerable adult witnesses to attend court.

Joint Investigative Interviews

62. At present it is not standard practice for police interviews with or statements taken from child witnesses to be visually recorded. The vast majority of statements made by child witnesses are produced in written form. Visually recorded JIIs are undertaken with some children under the age of 16 years at the time of initial interview where there is information to suggest that the child has been or is being abused or neglected and may be at risk of significant harm. A child who has been subject to a JII will often be the complainer in any court proceedings that follow. Occasionally the child will be a witness rather than the complainer.

63. JIIs can be used as the child's evidence in chief in any subsequent proceedings. However, in order for the child to be kept out of court, the current approach requires the JII to be followed up with separate visually recorded cross-examination and further examination, conducted using procedures for the taking of evidence by commissioner. JIIs are not commonly used as evidence in chief in criminal proceedings for a variety of reasons. Their use in proof hearings in Children's Referrals is more common.[25]

64. The recommendations contained in the JII Work-stream Group Project Report will, if accepted and implemented, improve the quality of JIIs, which will impact on their use as evidence in chief. Likewise, the new High Court of Justiciary Practice Note will go some way towards improving approaches to visually recording the evidence (whether in full or in part) of child and vulnerable adult witnesses (initially those cited in cases being tried in the High Court) in advance of trial. It will require the parties to plan commissions more carefully, which should lead to earlier, more effective hearings and the more consistent capture of better quality evidence. Experience suggests that well-conducted JIIs or visually recorded evidence taken by commissioner can have at least as much impact as evidence given in person at trial.

[25] Scottish Courts and Tribunals Service (2017) – *Op. Cit.*

65. Nevertheless, the Group considered that while improvements in the approach towards both JIIs and the taking of evidence by commissioner are essential in the short term, they do not, and cannot, go far enough towards meeting the recommendation of the *Evidence and Procedure Review Report* to develop 'a new, structured scheme that treats child and vulnerable witnesses in an entirely different way…'.

Obtaining Best Evidence

66. Research evidence shows that traditional, adversarial approaches to securing the testimony of witnesses tend not to be effective in enabling child witnesses, particularly young children, to give their best evidence.[26] Closed questions, questions with multiple components, questions with double negatives and 'tagged' questions (questions that make a statement and then add a short question inviting confirmation) all commonly confuse child witnesses and are not conducive to establishing truth.[27] If the research evidence on the impact of the passage of time on the ability of witnesses, particularly young children, to recall events accurately is also considered (c.f. paragraph 14), it becomes clear that a process of visually recording a child witness's evidence in chief at the point of interview, followed by visual recording of their cross and any further examination many months later is unlikely to be sufficient to enable them to give their best evidence. The Group agreed that 'an entirely different way' of securing the best evidence of child and vulnerable adult witnesses should be developed.

67. The Group considered that any 'entirely different way' of capturing the evidence of such witnesses with the aim of keeping them out of court will require much more extensive visual recording of evidence than currently occurs. Management information provided by Police Scotland indicates that police officers interview or take statements from in the region of 50,000 child complainers and witnesses in cases that result in a crime report each year. At present only around 5,000 of these interviews, which are predominantly JIIs with child complainers, are visually recorded. Resources and facilities required to undertake large-scale visual recording, to store the recordings and transfer them securely between criminal justice organisations are not commonly in place. Therefore, any increase in visual recording has significant resource implications.

68. For this reason, the Group agreed with the recommendation of the *Evidence and Procedure Review – Next Steps* report that a systematic approach to the visual recording of evidence in advance of trial should be introduced in a phased way 'to

[26] See, for example, Lamb, M. E.; La Rooy, D. J.; Malloy, L. C. and Katz, C. (2011) - Children's Testimony: A handbook of psychological research and forensic practice. Wiley.
[27] Andrews, S. A. and Lamb, M. E. (2016) – How do Lawyers Examine and Cross-Examine Children in Scotland? Applied Cognitive Psychology (2016) Volume 30 (6) pp. 953-971. At: https://www.researchgate.net/publication/309106060_How_do_Lawyers_Examine_and_Cross-Examine_Children_in_Scotland

ensure there is not an insupportable surge in demand on the justice system's limited resources'.

69. The Group recognised that the 1995 Act specifies that any child under the age of 18 years who is required to give evidence is a vulnerable witness and must be afforded special measures. The eventual aim should be to ensure that every child witness under the age of 18 years is able to give their best evidence as early in proceedings as possible and does not have to wait until trial to give evidence in court, unless they choose to. This will require significant resources to achieve. As noted above (c.f. paragraph 67), it would mean Police Scotland visually recording at least 50,000 child witness statements a year, requiring large-scale investment in visual recording equipment and officer training.

70. The Group considered that while all child witnesses should be protected with special measures, given the reality of limited resources, the approach used to gather a child witness's evidence must be proportionate and age appropriate. Resources should be allocated in the first instance to improving the approach to taking the evidence of younger children who are alleged to be victims of the most serious offences. This is not to say that such an approach cannot be applied to older children, or children who are alleged to be victims of less serious crime. Rather, the needs of each child witness should be assessed on a case-by-case basis to determine the most appropriate approach to gathering their evidence.

71. The Group recognised that witnesses have a right to choose how they give their evidence and some child witnesses might choose to give evidence in person at trial rather than having their evidence visually recorded in advance of trial. In the vision set out below the Group considered that older child witnesses – those aged 16 and 17 years – should always be permitted to choose how they give their evidence. However, such witnesses must be enabled to make an informed choice about this and in particular the likely consequences of not having their evidence visually recorded at the point when they initially provide it to the investigating officer should be made clear to the witness.

Vision for Child Complainers

72. The Group considered that priority should be given to implementing a new approach to the taking of evidence of child complainers who are alleged to be victims of the most serious types of offences. This means that the approach would be applied predominantly (but not necessarily exclusively) to child complainers in cases being tried in the High Court. It would also apply, on occasion, to those in cases being tried in the sheriff solemn courts. The Group considered that the longer term aim should be to apply the proposed vision to all child witnesses under the age of 18 years. However, the Group recognised both that its proposed vision is resource intensive and that some older child witnesses may be better able to cope with the criminal justice process than much younger children. For these reasons the Group

considered that, in the first instance, the proposed vision should apply to child complainers under the age of 16 years.

73. Until such time as resources allow the proposed vision to be extended to child complainers aged 16 and 17 years, the Group considered that these complainers should have their evidence taken in advance of trial using the vision proposed for vulnerable adult complainers (c.f. paragraphs 105 et seq), unless they choose to appear at trial in person.

74. The Group's future vision aims to develop an approach to gathering the evidence of child complainers in a way that:

- minimises the likelihood of subjecting the child to further harm or trauma;
- takes into account the child's communication needs; and
- allows the child to give all of their best evidence as early as possible after the alleged offence is reported.

75. For some types of offences, the complete evidence of child complainers should be gathered through a "comprehensive forensic interview"[28] (or series of interviews where required) conducted by a trained, expert forensic interviewer. The comprehensive forensic interview(s) ("CFI") should be visually recorded for use in any court proceedings which might follow.

76. The vision should apply to:

- Any child who, under the current approach, is subject to a child protection JII;
- Any child under the age of 16 years who is alleged to be the victim of any of the offences specified in Annex C; and
- Any child under the age of 16 years who is alleged to be the victim of any offence if, in the professional judgment of the investigating officer, it would be in the best interests of the child to gather the child's complete best evidence in this way.

77. In deciding whether to visually record the comprehensive forensic interview(s) with any child who is alleged to be the victim of any offence other than those specified in Annex C, the investigating officer should take into account:

- Any adversity and/or situational vulnerability the child may be experiencing;
- The nature of the alleged offence; and

[28] JIIs and police interviews conducted in line with current Scottish Government Guidance are "forensic" interviews. JIIs are structured in a similar way to interviews conducted in accordance with the NICHD protocol. Whilst there has been criticism of the adherence to guidelines in some JIIs, any individual JII must be assessed on its own merits. See "The quality of joint investigative interviews with children in Scotland", La Rooy et al, 2010 SLT 133; "Joint investigative interviews with children in Scotland", La Rooy et al, 2012 SLT 175; 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, La Rooy et al, 2013 SLT 217.

- Factors such as the relationship between the alleged perpetrator and the complainer.

78. The Group acknowledged that section 271 (1) of the 1995 Act requires alleged victims of domestic abuse to be regarded as vulnerable witnesses. The Group decided not to include domestic abuse in the list of offences specified at Annex C since the term can cover a wide spectrum of behaviour and children are more commonly witnesses in domestic abuse related cases, rather than complainers.

79. However, this does not mean that the Group's vision should not apply in domestic abuse cases. Where a child is a complainer in a domestic abuse case it is probable that they will fall within the scope of the vision for taking the evidence of child complainers due to the nature of the offence alleged to have been committed against them (i.e. the offence will often involve a violent or sexual content) and the relationship between the accused and the alleged victim. In some areas of Scotland children who are witnesses to domestic abuse are subject to a JII on the basis of child protection concerns. These children should have their evidence taken in accordance with the Group's vision. Improvements in the approach to JIIs should lead to greater consistency in the approach taken to children involved in domestic abuse cases, increasing the incidence of JIIs in such cases. Additionally, the factors to be considered by the investigating officer in deciding whether to visually record a child witness's comprehensive forensic interview are likely to result in many domestic abuse cases falling within the scope of the vision.

80. It is critical to recognise that the success of the Group's vision is absolutely dependent on there being a body of highly trained, specialist forensic interviewers equipped with the skills required for collecting the complete best evidence of child complainers in advance of trial. Such a body of people does not exist in Scotland at present, although police officers and social workers trained as joint investigative interviewers have the skills and often the experience required to conduct forensic interviews. However, as is acknowledged in the JII Work-stream Project Report, there is a need to ensure the consistent quality of JIIs, by developing and extending the training of interviewers, improving quality assurance, and for smaller numbers of police and social workers to specialise in JIIs. Similarly, for forensic interviewers, the training and specialism of interviewers is crucial as is the provision or equipment and facilities for visually recording. Therefore, the vision has significant implications for the training of forensic interviewers, as well as for the provision of equipment and facilities for visually recording comprehensive forensic interviews.[29]

[29] The Joint Investigative Interviews Work-stream Group Project Report (SCTS, 2017) contains recommendations aimed at improving the training of joint investigative interviewers, refreshing audio-visual recording equipment and providing interview environments that are more suitable for child witnesses. However, those recommendations aim to address current shortfalls and are based on present numbers of JIIs. The vision set out in this report is likely to increase the volume of children having their evidence visually recorded in advance of trial and increase the amount of evidence that is

81. The vision assumes that for those undertaking forensic interviews with certain child complainers, the existing training will be more in-depth and made consistent across Scotland, creating a pool of highly trained and experienced, specialist forensic interviewers. This is in line with the recommendations of the JII Work-stream Group Project Report.[30] Within the current approach to service provision, the forensic interviewers will be both police officers and social workers for child protection JIIs, and police officers in any case where child protection concerns do not apply. Where forensic interviews are conducted only by police officers in non-child protection cases, the forensic interviewers should be trained to the same standard as those undertaking child protection JIIs.

Purpose of a Comprehensive Forensic Interview

82. When the comprehensive forensic interview of a child is a child protection JII the main purposes of the interview are to:

- Learn the child's account of the circumstances that prompted the enquiry;
- Gather information to permit decision making on whether the child in question, or any other child, is in need of protection;
- Capture all of the child's evidence when it is suggested a crime may have been committed against the child or anyone else;
- Capture all of the child's evidence which may lead to a ground of referral to a Children's Hearing being established.

83. When the comprehensive forensic interview of a child complainer is outwith a child protection context, the purpose of the interview will be to:

- Capture all of the child's evidence.

84. The key features of the Group's vision for collecting the evidence of child complainers in an entirely different way, away from the court setting are as follows:

The Forensic Interview

- A comprehensive interview plan should be developed for each child complainer.
  One of the major aims of the planning stage is to ensure that those conducting the forensic interview are in possession of all available information, which will allow a comprehensive interview plan to be developed. The interview plan is intended to enable all of the information and evidence to be gathered from the child, ideally during one single interview. However, it is acknowledged that this is not always possible. For example, it might take more than one interview to build rapport with the child; or where the allegations are complex or involve a series of incidents; where new information comes to light; or an

visually recorded. Therefore, it is anticipated that realising this vision will require further resources over and above any invested in response to the recommendations of the JII report.

[30] Scottish Courts and Tribunals Service (2017) – *Op. Cit.*

interview might need to be terminated and rescheduled if the child becomes too upset etc.

- In developing an interview plan the investigating police officer should seek the support of an interview advisor.
  A skilled and experienced interview advisor will be able to assist the investigating officer in assessing the most effective approach to gathering the child complainer's evidence. That assessment should take into account:
  - The nature and extent of the child's vulnerability;
  - The extent to which the child's ability to communicate is impaired;
  - The nature of the alleged offence; and
  - The relationship between the child and the alleged perpetrator.
- The forensic interviewer, where possible and appropriate, should test the evidence during the interview(s) by asking questions designed to explore the reaction of the complainer to available information which contradicts aspects of his/her account of events or casts that account in a significantly different light.
- Ideally the comprehensive forensic interview should be carried out in a multi-disciplinary environment. Such a setting would allow police and appropriate professionals in the fields of social work, paediatrics and forensic medicine to confer, plan and collaborate, particularly in the initial stages of an investigation, including interview. Other professionals assessed as required to meet the needs of the child during interview, such as child psychiatrists or speech and language therapists would be available to assist the interview process. Where the child has already accessed support through a third sector or other support organisation it could also be helpful in facilitating the child's participation in the process to have that support worker on hand. Such a multi-disciplinary environment could assist in meeting the wider needs of the child as part of the Child's Plan[31] or child protection plan[32].
- If a multi-disciplinary environment cannot be established, the key elements of the vision should still be followed.
- If the communication needs of the child are such that an intermediary is required for interview, one should be made available.
- In cases where it is necessary to conduct more than one interview in order to gather all of the child's evidence, interviews should be sequential and topical. The child complainer should not be subjected to repeated duplicative interviews.

[31] A Child's Plan is a single planning framework available for children who require extra support that is not generally available to address their needs and improve their well-being.
[32] A **child protection plan** is a plan put together at a child protection case conference detailing the ways in which a child who is at risk of harm is to be kept safe.

The Court Process

- Once an accused appears in court before the sheriff on petition it should be open to the Crown or the defence to make an application to the court, on cause shown, to have further questions asked of the child complainer.
- The application for further questioning should be required to specify what issues the applicant wishes to have covered and why a further interview is the only way to address these issues.
- The court should consider the application and should decide whether the further evidence sought is likely to be admissible and relevant and whether the evidence can be obtained in some other way without the necessity of a further interview. If minded to grant the application, the court should prescribe which issues can and cannot be covered in the further interview. The court will have regard to the extent to which it has/has not been possible to test the child's evidence during interview.
- An expedited appeal procedure should be provided for in respect of the court's decision on the application, which should be in the appeal court with jurisdiction over the proposed proceedings. The appeal procedure should be expedited to ensure that any further interview which is permitted can be conducted without delay.[33]
- The applicant should be required to seek leave to appeal.
- Wherever possible any further interview with a child complainer authorised by the court should be conducted by the same forensic interviewer who conducted the original interview(s). Where it is not possible for the same forensic interviewer to conduct the further interview, it should be conducted by another forensic interviewer who is familiar with the case.
- There should be no opportunity for the Crown or defence lawyers to directly question the child complainer at any of the interviews.
- Where the defence challenge the truth or the content of the visually recorded evidence at trial, the defence should be required to set out fully in the defence statement submitted to the court the basis of the defence and any evidence they intend to challenge. Because there will be no opportunity for defence lawyers to directly question the child complainer there will be no opportunity for the defence case to be put to the witness or for it to be aired before the jury. This increases the importance of the defence statement as a means of alerting the Crown to expected lines of defence. The Group anticipated that the practical application of this element of the proposed vision is likely to require further discussion.
- It should be presumed that the visually recorded forensic interview(s) will constitute the evidence of the child which will be played in court. It will not be

[33] In order to ensure that a child complainer's evidence is collected in full as early as possible in proceedings, consideration may require to be given, in due course, to development of a bespoke mechanism for dealing with vulnerable witness applications and appeal against a decision to refuse further questioning.

necessary for the child to attend court or to be cited to do so, unless there are exceptional circumstances.

- On rare occasions the admissibility of the visually recorded comprehensive forensic interview or part(s) of it might be subject to challenge on the basis of the way in which the interview was conducted. It should be for the court to decide whether all or any part of the interview can be used as the child complainer's complete evidence.
- Where the court decides that any part of a visually recorded forensic interview cannot be used as a child complainer's complete evidence, the interview should still be used as evidence to whatever extent is practicable. In these circumstances, where cross-examination and any further examination are unavoidable, this should be undertaken using procedures for the taking of evidence by commissioner. In the unlikely event that the court decides that the visually recorded forensic interview(s) cannot be used at all, all of the child complainer's evidence should be taken using procedures for taking of evidence by commissioner.
- Where the court decides that a child complainer's visually recorded forensic interview(s) cannot be used and the child's evidence requires to be re-taken using procedures for taking of evidence by commissioner, the defence will not be expected to put the defence case directly to the child.

85. The issue of "putting one's case" arose in *R v Lubemba*[34] where the Court said the following (paragraph 45):

> "It is now generally accepted that if justice is to be done to the vulnerable witness and also to the accused, a radical departure from the traditional style of advocacy will be necessary. Advocates must adapt to the witness, not the other way round. They cannot insist on any supposed right 'to put one's case' or previous inconsistent statements to a vulnerable witness. If there is a right to 'put one's case' (about which we have our doubts) it must be modified for young or vulnerable witnesses. It is perfectly possible to ensure the jury are made aware of the defence case and of significant inconsistencies without intimidating or distressing a witness: see for example paragraph 3E.4 of the Criminal Practice Directions".

86. This followed observations in R v B,[35] that:

> "Aspects of evidence which undermine or are believed to undermine the child's credibility must, of course, be revealed to the jury, but it is not necessarily appropriate for them to form the subject matter of

[34] *R v Lubemba* [2014] EWCA Crim 2064. At: http://www.bailii.org/ew/cases/EWCA/Crim/2014/2064.html
[35] *R v B* [2010] EWCA Crim 4. At: http://www.bailii.org/ew/cases/EWCA/Crim/2010/4.html

detailed cross-examination of the child and 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. Notwithstanding some of the difficulties, when all is said and done, the witness whose cross-examination is in contemplation is a child, sometimes very young, and it should not take very lengthy cross-examination to demonstrate, when it is the case, that the child may indeed be fabricating, or fantasising, or imagining, or reciting a well rehearsed untruthful script, learned by rote, or simply just suggestible, or contaminated by or in collusion with others to make false allegations, or making assertions in language which is beyond his or her level of comprehension, and therefore likely to be derived from another source. 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."

87. The matter is commonly addressed by jury direction given after the jury has heard the child's evidence, explaining that the practice of expecting cross-examination to put all details of the case to the witness has been modified in the case of child witnesses. The Group considered that a similar approach should be adopted in Scotland.

Vision for Child Witnesses

88. The vision set out in paragraphs 61-87 above is intended to apply to child complainers aged less than 16 years who are alleged to be victims of very serious offences. It is an approach that requires intensive resources to be deployed at the early part of a criminal investigation. This involves the child's complete evidence being gathered and visually recorded early in the investigative process by a highly trained, specialist forensic interviewer, with no opportunity for direct questioning by lawyers. The Group considered that in due course, this "Level 1" approach should apply to all child witnesses. Until resources, including the required number of forensic interviewers are available in practice to allow this, however, the Group considered that an interim approach should be applied to child witnesses other than those covered by the proposals in paragraphs 61-87.

89. The vision set out below aims to develop an approach to gathering the evidence of child witnesses in a way that:

- Is proportionate;
- Minimises the likelihood of subjecting the child to further harm or trauma;
- Takes into account the child's communication needs; and
- Allows the child to give their best evidence as early as possible after the alleged offence is reported.

90. The vision applies to:

- Any child under the age of 18 years who is a witness (rather than a complainer) in any case expected to be tried in the solemn courts but to whom the proposals set out in paragraphs 61-87 do not apply, and to complainers aged 16 or 17.

91. Notwithstanding the resourcing issue, the Group recognised that the circumstances of some child witnesses will be such that it would be appropriate for them to have their evidence gathered using the "Level 1" vision developed above. That is, their evidence would be gathered through a comprehensive forensic interview (or series of interviews where required) conducted by a trained, expert forensic interviewer. The forensic interview(s) would be visually recorded for use in any court proceedings which might follow and the witness would not be subject to direct questioning by lawyers for either the prosecution or the defence.

92. Application of this 'Level 1' vision for gathering evidence would be at the discretion of the investigating officer. In deciding whether to gather the evidence of a child witness using the 'Level 1' vision, the investigating officer would take into account:

- The age of the child witness;
- Any adversity and/or situational vulnerability the child witness may be experiencing;
- The nature of the alleged offence; and
- The materiality of the child witness's evidence.

Additional factors would also be taken into consideration where the investigating officer regards them to be relevant. This might include factors such as the relationship between the child witness and the alleged perpetrator, or the relationship between the child witness and the complainer or other witnesses in the case.

93. In all other cases, where the child witness's forensic interview (i.e. JII or police interview) or witness statement has been visually recorded but where the "Level 1" approach is deemed to be disproportionate, the visually recorded forensic interview or statement should be used as the child witness's evidence in chief. Cross-examination and any re-examination should be undertaken using procedures for taking of evidence by commissioner.

94. The same should apply where the child witness's statement has not been visually recorded but is encapsulated in a written statement. That statement should (in redacted form, if necessary), with the permission of the court, constitute the evidence in chief of the child witness. Cross-examination and any re-examination should be undertaken by way of procedures for the taking of evidence by commissioner.

95. Where evidence is to be taken by commissioner, it is important that the commission takes place as early as possible in the proceedings. This would allow the child witness's evidence to be gathered earlier than it would be if the child was to give evidence at trial. It would be important that the parties adhere to the guidance in the Practice Note and give careful consideration to the question of whether an intermediary is required to facilitate the child witness to give evidence. Adherence to the guidance in the Practice Note should also minimise the trauma produced by traditional adversarial approaches to questioning witnesses at trial.

96. In any case where the statement of a child witness has been visually recorded or encapsulated in a written statement, but where the evidence appears to be unlikely to be challenged or to be of limited materiality such that adopting commission procedures may be disproportionate, the prosecutor should aim to:

- proceed with a Statement of Uncontroversial Evidence; or
- apply to the court to allow the child witness's statement (whether visually recorded or written) to be used as the child witness's complete evidence.

Legislation would be required to enable the latter.

97. In the event of unusual circumstances in which a child witness's evidence requires to be given in the conventional manner, other vulnerable witness measures should be used to ensure that the child witness does not have to attend court in person if they do not wish to. In particular, the child witness should be able to appear in court by live television link from a remote location.

Vulnerable Accused Aged Less Than 18 Years

98. The vision set out in this report for child complainers and child witnesses is intended to improve the experience of children who give evidence in the most serious cases being tried in the High Court and in the sheriff solemn courts. In seeking to improve the experiences of child witnesses and facilitate the giving of their best evidence, the Group was conscious of the anomaly created in respect of accused people under the age of 18 years. Should the Group's vision be implemented, child witnesses will be removed, in due course, from the solemn courts. Affording better access to justice and facilitating the giving of best evidence are aspirations that should be applied to all children in the criminal justice system. The Group considered, therefore, that work should be undertaken jointly by the criminal justice organisations to review approaches for dealing with vulnerable accused under the age of 18 years, initially in solemn cases. In particular, attention should be given to the provision of intermediaries to facilitate more effective participation in the criminal justice process of vulnerable accused who are aged less than 18 years. The possibility that young accused may give their evidence by CCTV also appears to be under-utilised.

Vulnerable Adults

99. At present police interviews with or statements taken from vulnerable adult witnesses are not routinely visually recorded. In some instances vulnerable adult

witnesses in certain types of cases might have their police interview(s) recorded at the discretion of the investigating officer. Data are not recorded on the frequency of visual recording of police interviews with adult witnesses. The use of any such recorded interview as evidence in chief is dependent on the prosecutor making a vulnerable witness application to the court for the use of a prior statement, and the court granting that application.

100. Vulnerable adult witnesses can also give their evidence in advance of trial through the use of procedures for taking of evidence by commissioner. Again, this is dependent on the party citing the witness making and the court granting a vulnerable witness application. Data indicate that the use of procedures for the taking of evidence by commissioner with vulnerable adult witnesses is uncommon. In the 12 months from August 2015 to July 2016 just five vulnerable adult witnesses had their evidence taken by commissioner in advance of trial in cases being tried in the High Court.

101. Data on the number of vulnerable adult witnesses who actually give evidence in court are not available. In the region of 12,500 vulnerable witness applications were made in respect of adult witnesses in all courts across Scotland in 2016. Approximately 600 of these were granted in respect of adults cited as witnesses in trials being heard in the High Court. The usual approach to supporting vulnerable adult witnesses to give their evidence is to request the application of standard special measures. The use of screens in court and a supporter to accompany the witness are the measures most commonly requested, but other measures may apply.

102. A proportion of those for whom a vulnerable witness application is made will not go on actually to give evidence in the case for a range of reasons. Data are not available on the reasons why an adult witness for whom a vulnerable witness application is made is regarded as being vulnerable. It is therefore not possible to identify the numbers of adult witnesses who are vulnerable in each of the ways specified in section 271 of the 1995 Act (i.e. by reason of mental disorder, fear, distress or significant risk of harm, or as a result of the nature of the offence alleged to have been committed against them).

103. In respect of certain child complainers, the Group has proposed that all evidence should be gathered through visually recorded comprehensive forensic interviews conducted by highly trained, specialist forensic interviewers, removing direct questioning by lawyers from the process altogether. Realising this vision will require significant investment of resources in visual recording equipment and training of interviewers. The widespread introduction of visual recording of investigative interviews with and/or witness statements given by vulnerable adult witnesses would require a further significant investment of resources. Police Scotland simply does not have sufficient equipment in place at present to undertake and store widespread visual recording. Nor does it have sufficient numbers of officers trained in

conducting visually recorded investigative interviews. Any development of the visual recording of investigative interviews with and/or witness statements given by vulnerable adult witnesses would therefore require to be introduced in a phased way.

104. The vision set out below aims to develop an approach to gathering the evidence of vulnerable adult witnesses in a way that:

- Is proportionate;
- Minimises the likelihood of subjecting the vulnerable witness to further harm or trauma;
- Takes into account the witness's communication needs; and
- Allows the vulnerable witness to give their best evidence as early as possible after the alleged offence is reported.

Vision for Vulnerable Adult Complainers

105. The Group considered that in due course visual recording of evidence should be introduced for:

- vulnerable adult[36] complainers in cases expected to be tried under solemn procedure.

106. The Group considered that it would not be appropriate to apply the "Level 1" vision in respect of vulnerable adult complainers. Nevertheless, the Group recognised that in a very small number of cases (i.e. where an adult complainer is vulnerable in multiple ways) it might be appropriate to apply that approach to vulnerable adults, at the discretion of the investigating police officer, in discussion with a trained interview advisor.

107. Whilst proposals to restrict direct questioning of vulnerable adult witnesses may be considered by some to be controversial, the Group recognised that this should be an option for very vulnerable adult complainers and, therefore, should be subject to further consideration and consultation.

108. The Group's vision for the majority of vulnerable adult complainers is that evidence should be gathered in advance of trial by means of a visually recorded police interview (VRI) and the taking of evidence by commissioner. However, vulnerable adult complainers should be permitted to opt out of giving evidence in this way if they wish to and should instead be permitted to give their evidence using the conventional approach. This should be an informed choice and in particular the likely consequences of not giving visually recorded evidence in advance of trial should be explained to the witness.

109. Where the complainer's ability to communicate is impaired, an intermediary should be present at the interview(s) to facilitate effective communication between

[36] The term 'adult' is used here to mean any person aged 18 years or over.

the complainer and the interviewer. At present there is no registered intermediary scheme in place in Scotland.

110. The Group recognised that this approach will have significant resource implications, not only in terms of visual recording of police interviews but also in terms of accommodating a substantial increase in the volume of commission hearings. While a VRI and commission should be the long term aim for all but the most vulnerable complainers, therefore, a phased approach to introduction should be adopted.

111. Where a vulnerable adult complainer's investigative interview or witness statement has not been visually recorded but is encapsulated in a written statement that statement should (in redacted form, if necessary), with the permission of the court, constitute the evidence in chief of the complainer. Cross-examination and any re-examination should be undertaken by way of procedures for the taking of evidence by commissioner. Again, an intermediary should be involved to facilitate communication where required.

112. Wherever cross-examination and any further examination are undertaken using procedures for the taking of evidence by commissioner the terms of the new Practice Note should be followed, enabling greater judicial control to be exercised over the terms and extent of cross-examination than currently happens. A GRH should take place to address issues raised in the vulnerable witness application. Where an intermediary is required to facilitate communication with the vulnerable complainer they should attend the GRH to advise on the appropriateness of proposed approaches to questioning.

113. In the event of unusual circumstances in which a vulnerable adult complainer's evidence requires to be given in a conventional manner, other vulnerable witness measures should be used to ensure that the vulnerable adult complainer does not have to attend court in person if they do not wish to.

114. While different approaches should be used for gathering the evidence of vulnerable adult complainers according to their particular needs, in all instances:

- The views of the vulnerable complainer must be sought with regard to their preferred approach to giving their evidence;
- It should continue to be a requirement that a vulnerable witness application is submitted to the court by the party citing the witness;
- The vulnerable witness application should seek permission both for evidence in chief to be given by way of prior statement and for evidence to be taken by commissioner; and
- Where evidence requires to be gathered using procedures for taking of evidence by commissioner, commissions should be held as early as possible after service of the petition.

Vision for Vulnerable Adult Witnesses

115. The Group's vision for the majority of other vulnerable adult witnesses is that evidence should be taken in advance of trial by means of a VRI and the taking of evidence by commissioner, unless the witness chooses to give evidence at trial.

116. Where a vulnerable witness's investigative interview or witness statement has not been visually recorded, an application should be submitted to the court to use the witness's written statement (in redacted form, if necessary) as evidence in chief and this should be followed by the taking of evidence by commissioner.

117. Where a vulnerable witness's evidence in chief has been taken as a VRI or as a written statement and it is felt that the taking of evidence by commissioner would be disproportionate, the prosecutor should aim to:

- proceed with a Statement of Uncontroversial Evidence; or
- apply to the court to allow the vulnerable witness's statement (whether visually recorded or written) to be used as the witness's complete evidence

118. In the event of unusual circumstances in which a vulnerable adult witness's evidence requires to be given in the conventional manner, other vulnerable witness measures should be used to ensure that the vulnerable witness does not have to attend court in person if they do not wish to. In particular, the vulnerable witness should be able to appear in court by live television link from a remote location.

119. The Group considered that as its vision is implemented, in any case where a child or vulnerable adult witness is expected to give their evidence by conventional means (i.e. some or all of their evidence will be given at trial), the default position should be that special measures will be applied unless the witness requests otherwise. A vulnerable witness application requesting special measures should be submitted to the court and that the Court should, as soon as practicable, extend the use of GRHs to such cases.

120. A summary of the Group's future vision for taking the evidence of child and vulnerable adult witnesses is contained in Table 4 overleaf.

Table 4: Proposed Vision for Taking the Evidence of Child and Vulnerable Adult Witnesses

	Proposed vision				
In solemn proceedings only	**Level 1** Complete evidence collected through VRI conducted by expert forensic interviewer, with no direct questioning by lawyers	**Level 2** Visually recorded interview / witness statement used as evidence in chief, cross and further examination taken by commissioner	**Level 3** Written statement used as evidence in chief, cross and further examination taken by commissioner	**Level 4** VRI or written statement to be used as Statement of Uncontroversial Evidence or witness's complete evidence (Requires legislation)	**Level 5** Some or all of evidence to be given at trial – special measures must be applied
Complainer aged less than 16 years	Applied in the majority of cases				
Complainer aged 16 or 17 years		Applied in all cases where Level 1 would be applied if the complainer was aged less than 16 years			Applied in unusual circumstances such as where the witness requests to give evidence in person
Child witness aged less than 18 years	Applied occasionally where deemed appropriate by investigating officer	Applied in the majority of cases	Applied occasionally where VRI is deemed to be disproportionate	Applied occasionally where taking of evidence by commissioner is deemed to be disproportionate to materiality of evidence	Applied in unusual circumstances such as where the witness requests to give evidence in person
Vulnerable adult complainer	Applied very occasionally where adult complainer is vulnerable in multiple ways	Applied in the majority of cases	Applied occasionally where VRI is deemed to be disproportionate		Applied in unusual circumstances such as where the witness requests to give evidence in person
Vulnerable adult witness		Applied in the majority of cases	Applied occasionally where VRI is deemed to be disproportionate	Applied occasionally where taking of evidence by commissioner is deemed to be disproportionate to materiality of evidence	Applied in unusual circumstances such as where the witness requests to give evidence in person

121. Central to the Group's vision for improving the criminal justice experience of both child and vulnerable adult witnesses and facilitating them to give better quality evidence is the ability to understand each witness's communication needs. This would require the involvement of qualified intermediaries who are able to advise on the most appropriate approaches to be used in questioning a witness. At present no formal registered intermediaries' scheme exists in Scotland. The Group considered that careful thought should be given to the development of a model for delivering such a service and to the allocation of appropriate resources. Any such scheme should be made available to vulnerable suspects and accused people, as well as to vulnerable witnesses.

122. The Group considered that its future vision for taking the evidence of child and vulnerable adult witnesses will require both significant cultural change and substantial investment of resources. Successful delivery of the vision is dependent on:

- An acceptance amongst practitioners that traditional adversarial approaches are not effective, and are no longer acceptable, for use with young children who are required to give evidence in the most serious of cases. Much positive work intended to develop this acceptance is already underway;
- A willingness amongst practitioners to change long-established practices so that the evidence of vulnerable witnesses can be gathered much earlier in the trial preparation process;
- The availability of highly trained, expert forensic interviewers who are able to become skilled at gathering the complete evidence of child and vulnerable adult witnesses;
- The availability of qualified intermediaries who can facilitate communication with vulnerable witnesses and vulnerable accused;
- Greater capacity to visually record investigative interviews with child and vulnerable adult witnesses; and,
- Greater capacity to take evidence in advance of trial using procedures for the taking of evidence by commissioner.

123. The Group considered that its vision should be implemented in a phased way, commencing with its vision for removing child complainers aged less than 16 years from the court process altogether in the most serious cases, and being extended to older children and other vulnerable witnesses in due course.

124. The Group recommends that a pilot scheme be developed to introduce the above recommendations. In order to move forward with this, as a minimum there will need to be available a number of highly trained, expert forensic interviewers, at least one suitable building, and high quality audio visual recording equipment. Mobile audio visual equipment could be used until further local premises can be found

across the country. The Group recommends that the implementation of this pilot be taken forward on a multi-agency basis.

ANNEX A: GROUP MEMBERS

The Rt Hon Lady Dorrian, Lord Justice Clerk, Chair

The Hon Lord Armstrong

Tim Barraclough, Chief Development and Innovation Officer, SCTS

Detective Chief Superintendent Lesley Boal, Police Scotland

Nicola Boyle, SCTS

Sandy Brindley, Rape Crisis Scotland

Sheriff Alistair Duff, Judicial Institute

Professor Peter Duff, University of Aberdeen

Jennifer Harrower, Crown Office and Procurator Fiscal Service

Louise Johnson, Scottish Women's Aid

Sheriff Martin Jones, Sheriffdom of Glasgow and Strathkelvin

Detective Inspector Graeme Lannigan, Police Scotland

Anthony Lenehan, Faculty of Advocates

Diane Machin, SCTS, work-stream lead

Margaret Main, Scottish Children's Reporters Administration

Nicola Merrin, Victim Support Scotland (to January 2017)

Alan McCloskey, Victim Support Scotland (from January 2017)

Pauline McIntyre, Children and Young People's Commissioner for Scotland

David Parratt, Faculty of Advocates

Sheriff Principal Derek Pyle, Sheriff Principal of Grampian, Highland and Islands

Sheriff Charles Stoddart

Kingsley Thomas, Scottish Legal Aid Board

Douglas Thomson, Law Society of Scotland

Observers

Graham Ackerman, Scottish Government

Lesley Bagha, Scottish Government

Executive support

Rebecca Lawson, SCTS

ANNEX B: NEW PRACTICE NOTE

HIGH COURT OF JUSTICIARY
PRACTICE NOTE

No. 1 of 2017

TAKING OF EVIDENCE OF A VULNERABLE WITNESS BY A COMMISSIONER

Introduction

1. This Practice Note has effect from 8 May 2017. It replaces Practice Note No. 3 of 2005.

2. Statutory provision for the availability of special measures for vulnerable witnesses has been a feature of the criminal courts for more than a decade. In spite of that, the day to day practical application of these measures can sometimes leave much to be desired. This is particularly the case with the taking of the evidence of a vulnerable witness by a commissioner.

3. The most common deficiency in cases where there is a child witness, a deemed vulnerable witness or other vulnerable witness is a failure by the parties (both Crown and defence) to address their minds at a suitably early stage to the question of whether a commission is necessary for that witness. Early conduct of a commission has benefits not only in the earlier capture of the evidence but also in giving more time for addressing issues such as editing and admissibility.

4. Practitioners can find useful information to bear in mind at: http://www.theadvocatesgateway.org/

5. The purpose of this Practice Note therefore is to give guidance as to—

(a) when practitioners should consider whether a commission is required;

(b) what practitioners must do in preparation for seeking authorisation to take the evidence of a vulnerable witness by a commissioner;

(c) what issues the court will expect practitioners to address in an application in relation to taking of evidence by a commissioner.

When practitioners should consider whether a commission is required

6. Parties need to consider proactively at an early stage whether any witness is, or may be, a vulnerable witness. In High Court proceedings, if the Crown intends to seek the special measure of a commission that must be intimated to the defence at the earliest opportunity so that appropriate legal aid cover can be arranged without delay. Similarly, the defence must intimate any such intention to seek a commission as soon as possible.

7. In cases where it is intended to rely on a prior statement as evidence in chief, it is particularly important that the commission should proceed at as early a stage as possible, having regard to the observations of the court in the case of *MacLennan v HM Advocate* 2016 JC 117 at paras 21 and 28.

Preparation for seeking the special measure of taking of evidence by a commissioner

8. In preparing a Vulnerable Witness (VW) notice or application a practitioner is to:

- have regard to the best interests of the witness;
- seek the views of the witness, and/or parent or guardian of the witness, as appropriate, with a view to determining whether taking evidence by commissioner will be the most suitable special measure, or whether another special measure, or a combination of measures, will be better in obtaining the witness's " best evidence";
- take account of any such views expressed by the witness, or a parent or guardian of the witness as appropriate; and
- consider how relevant information relating to the application or any subsequent commission will be communicated to the witness.

9. The VW notice or application is to

- reflect any relevant statutory provisions;
- explain the basis upon which the witness qualifies as a vulnerable witness, and any specific issues relating to the witness;
- state why a commission is considered appropriate for the witness;
- state whether the commission requires to be held in any particular place, or environment, due to the location of the witness or any particular vulnerabilities which the witness may have;
- state whether the witness requires additional special measures;
- state whether the witness will give evidence to the commission by live television link;
- state whether the witness is restricted as to any times of the day, or particular days or dates that he or she can attend a commission as a result of his or her vulnerability;
- state whether the witness is likely to need frequent breaks or any other special requirements, such as disabled access;
- address how any question of identification is going to be dealt with;
- identify any productions or labels that may require to be put to the witness (the use of any productions or labels should be kept to a minimum);
- if any prior statement in any form may be put to a witness, identify the statement or the particular passages therein;
- state the manner in which such statement should be put, and the provision, if any, of the Criminal Procedure (Scotland) Act 1995 ("1995 Act") being relied upon;
- state whether an interpreter is needed;
- state the communication needs of the witness: identifying the level of the witness's comprehension, and whether any communication aids or other reasonable adjustments are required (in certain cases it may assist the court to be provided with any expert report addressing these issues and any other relevant issues mentioned in paragraph 11); and
- estimate the likely length of the examination in chief and cross-examination.

Decision on the application at preliminary hearing

10. If the court appoints the VW notice or application to be disposed of at a hearing the solicitor must, forthwith, inform the Clerk of Justiciary and the Electronic Service Delivery Unit of Scottish Courts and Tribunals Service of the intention to seek authority to have the evidence of a vulnerable witness taken by a commissioner and check the availability of a suitable venue.

11. At the hearing the court will expect to be addressed on all matters set out in the VW notice or application. Parties will be expected to be in a position to assist the court in its consideration of the following matters:

- whether the witness will affirm or take the oath;
- the location of the commission which is the most suitable in the interests of the witness;
- the timing of the commission which is the most suitable in the interests of the witness;
- pre-commission familiarisation with the location;
- where the accused is to observe the commission and how he is to communicate any instructions to his advisors;
- if the commission is to take place within a court building in which the witness and the accused will both be present, what arrangements will be put in place to ensure that they do not come into contact with each other;
- the reasonable adjustments which may be required to enable effective participation by the witness;
- the appropriate form of questions to be asked (the court may consider asking parties to prepare questions in writing);
- the length of examination-in-chief and cross-examination, and whether breaks may be required;
- how requests for unscheduled breaks may be notified and dealt with;
- potential objections, and whether they can be avoided;
- the lines of inquiry to be pursued;
- the scope of any questioning permitted under s275 of the 1995 Act, and how it is to be addressed;
- the scope of any questions relating to prior statements;

- where any documents or label productions are to be put to the witness, how this is to be managed and whether any special equipment or assistance is required;
- whether any special equipment (for example, to show CCTV images to the witness) may be required;
- the scope for any further agreement between the parties which might shorten the length of the commission or the issues to be addressed;
- where there are multiple accused, how repetitious questioning may be avoided;
- the extent to which it is necessary to "put the defence case" to the witness (parties are invited to have regard to the observations of the Court of Appeal in *R v Lubemba* [2015] 1 WLR 1579 and *R v Barker* [2011] Criminal LR 233);
- how that is to be done;
- whether the parties have agreed how this issue may be addressed in due course for the purposes of the jury;
- any specific communication needs of the witness;
- whether any communication aids are required, e.g. "body maps";
- if a statement in whatever form is to be used as the evidence in chief of the witness, whether and what arrangements should be made for the witness to see this in advance of the commission (i.e. how, where, and when);
- whether any such statement requires to be redacted in any way;
- in such a case, whether, and to what extent, there should be any examination in chief of the witness;
- the court may also make directions as to the circumstances in which visually recorded prior statements may be made available to the defence;[37]
- the wearing of wigs and gowns;
- whether the judge/parties should introduce themselves to the witness in advance, how and when this will take place, preferably together;
- the arrangements to be made in due course for parties to view the resultant DVD prior to a post-commission hearing.

12. The court may make directions about these matters, or any other matters which might affect the commission proceedings, or which may be required

[37] HMA v AM & JM [2016] JC 127

for the effective conduct of the commission. If combined special measures are sought, the court will address how this is to work in practice.

13. At the hearing, whether or not a trial has been fixed, the court will consider fixing a post-commission hearing at which the court may address:

- any questions of admissibility which have been reserved at the commission;
- any editing of the video of the commission which may be proposed (parties may request that the clerk allow the recording to be viewed prior to the further hearing to assess the quality of the recording, and the court may specify the conditions under which such viewing may take place);
- the quality of the recording (and, where the quality is poor, whether transcripts are required); and
- how the evidence is to be presented to the jury.

Lord Justice General
Edinburgh
28 March 2017

ANNEX C: OFFENCES

Any child under the age of 16 years who is alleged to be a victim of any of the offences listed below will be eligible to have their complete best evidence captured through a visually recorded comprehensive forensic interview.

- Any offence under Part 1 of the Criminal Law (Consolidation) (Scotland) Act 1995 (Sexual Offences);

- Any offence under the Sexual Offences (Scotland) Act 2009, with the exception of offences under:

    - Section 6 (coercing a person into looking at a sexual image);
    - Section 7 (communicating indecently etc.);

- An offence under Part 1 of the Human Trafficking and Exploitation (Scotland) Act 2015;

- An offence under section 1 of the Prohibition of Female Genital Mutilation (Scotland) Act 2005 (Offence of female genital mutilation);

- An offence under section 9 of the Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011 (Offence of breaching order);

- An offence under section 122 of the Anti-social Behaviour, Crime and Policing Act 2014 (Offence of forced marriage: Scotland);

- Any assault in which the life of a child is endangered; and

- Any assault in which the alleged perpetrator is in a relationship of trust with the complainer.

ANNEX D: ESTIMATE OF COSTS OF TAKING OF EVIDENCE BY COMMISSIONER

1. This assessment of the cost impact of any increase in commissions that might arise from implementation of the new Practice Note focuses on the taking of evidence by commissioner in High Court cases involving child witnesses. The analysis is limited to these cases for the following reasons:

- The Practice Note relates only to the High Court;
- The vast majority of cases in which the evidence of vulnerable witnesses has been taken by commissioner to date have been High Court cases;
- Although information on the number of vulnerable witness applications made and granted is available, it does not necessarily follow that a witness for whom an application is made will go on to give evidence in the case. A one-off data collection exercise undertaken on the Group's behalf produced information on the number of child witnesses who actually gave evidence in High Court trials in a specific time period. Information on the number of vulnerable adult witnesses who actually give evidence is not available;
- Every child witness under the age of 18 years is deemed to be vulnerable on the basis of their age and so is eligible to have their evidence taken by commissioner in advance of trial. Therefore, existing data on child witness notices can be used to estimate potential volumes of applications. It is not possible to make robust assumptions about volume on the basis of existing data on vulnerable witness applications for adults. Information is not available on why each witness is regarded as being vulnerable and so it is not possible to make assumptions about whether it would be appropriate for the witness's evidence to be taken by commissioner.

2. Cost and case volume data were provided by SCTS, COPFS and the Scottish Legal Aid Board (SLAB). Court minutes of cases in which witness's evidence was taken by commissioner were analysed to identify the average duration of commissions and the average number of defence practitioners (defence agents and counsel) involved.

3. It should be noted that the following analysis is based on a small number of cases and on partial information. For example, the start and finish times of commission hearings are not routinely recorded on court minutes and so are not uniformly available. Likewise, full accounts had not been submitted to SLAB for every case involving a commission hearing by the time of the analysis so the legal aid costs are based on a small number of cases which might or might not be representative of the legal aid costs of all cases involving commission hearings. For this reason the cost analysis figures are indicative only and should be treated with caution.

Case Volumes

4. Management information provided by COPFS indicates that in the year from 1 January to 31 December 2016, 402 children under the age of 18 years were cited as witnesses in cases that were indicted to the High Court. Management information collected by SCTS indicates that in 2016 approximately 240 vulnerable witness applications were granted by the High Court in respect of child witnesses. This figure excludes applications for the taking of evidence by commissioner. The applications related to children under the age of 18 years cited as witnesses in cases being tried in the High Court and requested a range of standard and non-standard special measures. Information provided by Justiciary Office indicates that in 2016, 22 commissions took place to gather the evidence of children who had been cited as witnesses in High Court cases.

5. If all of the vulnerable witness applications made in respect of children (approx. 240) had been for the taking of evidence by commissioner, *and* a commission had taken place in each instance, this would represent a substantial increase (around 1000%) in the volume of commissions taking place with child witnesses in 2016.

6. It is possible that a commission would not actually take place in every instance in which an application is granted. Data collected from SCTS court minutes indicate that in the region of 100 children under the age of 18 years gave evidence in High Court trials in 2015-16. Taken together, the data suggest that: a vulnerable witness notice will be submitted in respect of roughly half of all child witnesses who are cited in High Court cases; and, roughly half of child witnesses for whom a vulnerable witness notice is submitted to the High Court will go on actually to give evidence in a High Court trial. If the new Practice Note results in evidence being taken by commissioner for every child under the age of 18 years who is required actually to give evidence in a trial at the High Court, it might be assumed that around 140 commissions with children could take place each year. (This estimate is based on half the number of vulnerable witness applications made to the High Court for child witnesses (n=120), plus the number of children who had their evidence taken by commissioner in 2016 (n=22).) This represents an increase of 536% over current volumes.

7. The reasons why cited witnesses do not always go on to give evidence at trial are many and varied. The case may resolve early by means of a guilty plea or desertion of the case by the Crown, evidence may be agreed or it may become apparent that the witness's evidence is not required to prove the case. At the point at which an application for the taking of evidence by commissioner is granted the prosecutor will be expecting the case to proceed to trial and the evidence of the cited witnesses to be required to prove the case. In some instances it will become clear during the course of case preparation that the evidence of a cited witness is not required. Where this becomes clear early enough in the case preparation process

the commission for which an application has been granted need not take place. Where it does not become clear until close to the point of trial it is likely that the witness's evidence will already have been taken by commissioner. It can be assumed, therefore, that the number of commissions with child witnesses each year will be lower than the total number of granted applications.

Commission Costs

8. Where a witness's evidence is taken by commissioner it is collected in advance of trial. Currently, the fact that the witness's evidence has already been taken does not significantly reduce the duration of the trial. As described in para 39 of the main Report, however, there are likely to be some time savings and efficiencies where GRHs have pared down the length of commissions, and ensured that the questioning is focused and well prepared. It is also arguable that playing the recording during the trial is likely to be more efficient overall than taking live evidence from a witness, with the necessary breaks, and possible interruptions in that. The visually recorded evidence will be played to the jury at trial. The party who cited the witness (and often the opposing party as well) will refer to that evidence during the proceedings. On this basis, the commission hearing at which the evidence is taken can be regarded as an additional hearing, requiring time input over and above that required for trial.

9. Multiple people are involved in hearings at which evidence is taken by commissioner. At a minimum, a commission in a High Court case will involve the following:

- The witness;
- Where the witness is a child, a parent or carer who escorts them to the location of the commission;
- High Court judge;
- Depute Clerk of Justiciary;
- Macer;
- Advocate Depute;
- Defence counsel;
- Visual recording technician;
- Accused.

In addition, the following could also be present at the commission hearing:

- Witness supporter (almost always present for child witnesses);
- Interpreter;
- Junior or noter to support the Advocate Depute;
- Defence lawyer.

Criminal Justice Practitioner Costs

10. A financial cost is associated with each of these individuals for their attendance at a commission. The costs associated with the witness, the witness's parent or carer, the witness supporter and the interpreter have been excluded from the analysis on the basis that they would be incurred regardless of whether the witness has their evidence taken by commissioner or gives their evidence at trial. The costs associated with all of the other individuals involved in a commission would not be incurred if the commission did not take place. The costs for the prosecution and defence of preparing for the commission hearing have been excluded from the analysis on the basis that both parties would require to undertake preparation for taking the witness's evidence if the witness was appearing at trial.

11. The table below sets out the hourly cost of certain of the individuals involved in the conduct of commission hearings.

Table 1: Hourly costs of criminal justice practitioners

Individual	**Hourly Cost**
High Court judge	£292.52*
Depute Clerk of Justiciary	£24.66*
Macer	£12.53*
Advocate Depute	£76.58^
Crown Junior	£76.58^
Crown noter	£23.88^

* 2012-13 rates ^ 2016-17 rates

12. Analysis of commission hearings held with child witnesses in 2016 indicates that the average duration of a commission hearing is approximately 90 minutes. (It should be noted, however, that this average duration is based on a small number of cases in which duration had been noted in court minutes. A specific data recording exercise involving a larger number of cases could identify a different average duration.) Total duration can vary considerably depending on whether all of the child's evidence is being gathered by commissioner or just the cross-examination and further examination. The cost of the individuals identified in table 1 above undertaking a commission of 90 minutes duration are as follows:

- Average practitioner cost of commission hearing with only an Advocate Depute: **£609.43;**Average practitioner cost of commission hearing with Advocate Depute *and* Crown noter: **£645.25; and**Average practitioner cost of commission hearing with Advocate Depute *and* Crown Junior: **£724.30**

13. In addition to the time allocated to undertaking commission hearings, SCTS and COPFS staff are required to allocate time to making the necessary administrative arrangements to allow the commission hearing to take place. Within SCTS all of the administrative arrangements for commission hearings are carried out by a High Court Diary Manager. The tasks include identifying a date on which all of the parties are available, agreeing the location of the commission hearing and

ensuring that the required accommodation with the necessary technical equipment is available on the agreed date. It is estimated that an average of 30 minutes work is required by this person in arranging each commission hearing. This incurs an average cost of **£15.57**.

14. Where the child witness is a Crown witness the work required by COPFS to arrange for the taking of evidence by commissioner is more extensive. For example, evidence must be gathered to demonstrate why it is appropriate for the child witness's evidence to be taken by commissioner; a vulnerable witness notice requesting a commission must be prepared; various reports require to be obtained and assessed; discussions must take place to identify appropriate practical arrangements for taking the child witness's evidence and a suitable date must be identified and agreed. The tasks will be undertaken by either a Principal Depute or a person at Band D grade, depending on the nature of the task. COPFS estimate that making arrangements for each commission requires around four hours of a Principal Depute's time, and around three hours of a Band D person's time. This incurs an average cost of **£145.48** for a Principal Depute and an average cost of **£71.64** for a person at Band D.

Legal Aid Costs

15. The number and seniority of defence lawyers involved in commission hearings varies on a case by case basis. Analysis of commission hearings with child witnesses indicates that an average of 1.75 defence counsel are involved in each commission. Practice varies in relation to whether senior, junior as leader or junior counsel attend the commission hearing. A defence solicitor will also be present at the hearing, ordinarily at the remote location from which the accused observes the hearing. Defence costs incurred as a result of commission hearings will vary according to a range of factors, including the seniority of counsel, the category of case and the way in which fees are attributed in accounts submitted to SLAB. Costs are higher where commission hearings are undertaken by senior counsel and where the offence is of the most serious type.

16. Fee data provided by SLAB indicate that the average amount of solemn criminal legal aid paid in respect of a commission hearing is **£3,214.05**. This includes the cost of attendance at the commission hearing itself, together with ancillary costs directly attributable to the conduct of the commission (such as client consultations or discussions with expert witnesses – although it is arguable that some of these costs would be incurred anyway in preparation for conventional trial) and VAT. It should be noted, however, that this average cost is based on a small number of recent cases in which full accounts had been submitted and paid. Analysis of a larger number of fully paid cases could produce a different average cost.

Audio-visual Recording Costs

17. In addition to the costs associated with the individuals involved in the taking of evidence by commissioner, a flat rate cost of **£1,500** is incurred for the audio visual recording of the commission hearing. This flat rate is charged per day, regardless of how long the commission hearing lasts or of how many witnesses have their evidence taken by commissioner at the hearing. The rate includes the cost of providing a DVD copy of the hearing to the court and the cost of any editing required post-commission hearing. Where the witness having their evidence taken by commissioner is a Crown witness, the audio-visual recording cost is paid by COPFS. The audio-visual recording is undertaken by a commercial company on a 'per commission' basis.

Accommodation Costs

18. The majority of commission hearings that take place in High Court cases require the use of two rooms. At present it is common practice for the commission to be held in the vulnerable witness room in Parliament House in Edinburgh. The child witness and all of the other parties involved in the commission, with the exception of the accused and his/her solicitor will attend this location. The accused and his/her solicitor will view the commission over a live television link, ordinarily from a vulnerable witness room in the High Court Lawnmarket building. The cost of accommodation has been excluded from the analysis on the basis that the accommodation already exists and no specific financial cost is incurred in allocating it for use for a commission hearing. Any cost associated with the use of existing accommodation takes the form of increased waiting periods for other business.

19. It should be noted, however, that on occasion accommodation costs will be incurred in conducting commissions. This can happen where the commission hearing takes place in a location other than a court building, or where the child witness appears at the commission hearing by live television link from a remote non-court location. The accommodation cost incurred will depend on the venue used for the commission hearing. Implementation of the new Practice Note can be expected to lead to an increase in the number of commissions being held in locations other than Parliament House in Edinburgh. This will increase the overall cost of commissions.

Total Cost of Commission Hearings

20. Using the costs outlined above, the total average cost of a 90 minute hearing for the taking of evidence by commissioner is set out in table 2 below.

Table 2 – Average Cost of a 90 Minute Commission Hearing in a High Court Case

	Practitioner Costs[38]	Legal Aid Costs	Recording Costs	Total
Advocate Depute only	£842.12	£3,214.05	£1,500	**£5,556.17**
AD and Crown noter	£877.94	£3,214.05	£1,500	**£5,591.99**
AD and Crown Junior	£956.99	£3,214.05	£1,500	**£5,671.04**

21. There is a potential additional cost in that practice in COPFS means that the Advocate Depute who conducts the commission hearing is often not the same Advocate Depute who undertook the preliminary hearing in the case and may not be the same Advocate Depute who conducts the trial. This means that the Advocate Depute conducting the commission has to undertake preparation work to familiarise themselves with the case, which is over and above the preparation work required for the preliminary hearing and the trial. The time spent on this preparation incurs a cost of £76.58 an hour.

22. Using an average cost of £5,560 per commission (this being the average cost of a commission conducted by an Advocate Depute only, rounded to the nearest £10), table 3 below sets out the average minimum cost of varying numbers of commission hearings.

Table 3 – Average Cost of Varying Numbers of Commission Hearings

Cases	Number	Cost
All commission hearings held with child witnesses in 2016	22	£122,320
All child witnesses who actually gave evidence in High Court trials in 2016	100	£556,000
All child witnesses for whom a vulnerable witness application was granted by the High Court in 2016	262[39]	£1,456,720
Half of child witnesses for whom a vulnerable witness application was granted by the High Court in 2016	**131**	**£728,360**
Two thirds of child witnesses for whom a vulnerable witness application was granted by the High Court in 2016	174	£967,440
Three quarters of child witnesses for whom a vulnerable witness application was granted by the High Court in 2016	196	£1,089,760

[38] Practitioner costs comprise the cost of: High Court Judge, Depute Clerk of Justiciary, Macer; Advocate Depute alone or Advocate Depute plus one other; time spent on administrative arrangements by SCTS High Court Diary Manager, COPFS Principal Depute and COPFS Band D person.

[39] This number includes the 22 cases in which child witness evidence was taken by commissioner in 2016.

23. The 22 commission hearings held with child witnesses in 2016 are estimated to have cost approximately £122,320. If, following the taking effect of the new Practice Note, the evidence of every child who appears in the High Court is taken by commissioner, the average cost of those hearings can be expected to be in the region of **£556,000** per year. However, it is arguable that some of these costs may have been incurred anyway in preparation for conventional trial. Further, in some cases, a commission taking place may lead to an earlier guilty plea, and the cost of the trial is therefore saved. If it is assumed that the evidence of half of all children for whom a vulnerable witness application is granted is taken by commissioner, the average cost of conducting those commission hearings might be expected to be approximately **£728,360** per year.

24. It must be noted that these estimates are based on current models of service delivery. It might be expected that the model of service delivery will change as the new Practice Note comes into effect and beds in. There are opportunities to improve practice, to reduce costs and better meet the needs of witnesses, for example through GRHs or use of live tv link to allow a witness to give evidence from a location that is suitable to them. The new Practice Note places a requirement on the party submitting the vulnerable witness notice to identify the practical arrangements that best meet the needs of the witness. This will mean that witnesses who live in locations out with the central belt of Scotland should not be required to travel to Edinburgh to have their evidence taken by commissioner (c.f. paragraph 37 above).

25. The Group considered (c.f. paragraph 55 above) that the current approach to procuring the visual recording of evidence taken by commissioner should be reviewed. This is currently done on a fixed “charge per commission basis”. A different approach is likely to emerge from any such review as savings can be made through different procurement approaches, such as a fixed term contract or the provision of an in-house recording service would change the cost profile of commissions. The benefits of a different procurement approach could extend to child protection and civil proceedings where a vulnerable witness is required to give evidence.

26. The new Practice Note is expected to change a number of aspects of the approach to taking evidence by commissioner. In particular, more detailed applications are expected to follow and more detailed discussions will be required at the preliminary hearing at which the application is discussed. The preliminary hearing is expected to include a GRH at which the approach to and extent of questioning will be discussed and agreed. Initially, at least, it can be anticipated that the Practice Note will lead to an increase in the duration of preliminary hearings at which applications for taking of evidence by commissioner are granted and this will add to the overall cost of conducting commission hearings. On the other hand, the result of the Practice Note should be to reduce the duration of commissions.

27. Likewise, the Practice Note might lead to an increase in the number of post-commission hearings that require to be scheduled to discuss editing and/or redaction of elements of the recorded evidence, although it may be that in many cases this can be done as part of a routine procedural hearing.