

**HIGH COURT OF JUSTICIARY
PRACTICE NOTE**

No. 3 of 2005

**TAKING OF EVIDENCE OF A VULNERABLE WITNESS BY A
COMMISSIONER**

Introduction

1. This practice note will come into effect on 30th November 2005.
2. Certain amendments to the Criminal Procedure (Scotland) Act 1995^(a) (“the 1995 Act”) were introduced by the Vulnerable Witnesses (Scotland) Act 2004^(b) (“the 2004 Act”). As a result, the 1995 Act now provides for the court to allow certain vulnerable witnesses to give evidence using special measures. One of these special measures is for their evidence to be taken by a commissioner^(c). Appropriate amendments have also been made to the Act of Adjournal (Criminal Procedure Rules) 1996 (“CPR”)^(d). These were introduced by the Act of Adjournal (Criminal Procedure Rules Amendment No. 3) (Vulnerable Witnesses (Scotland) Act 2004) 2005^(e) and Act of Adjournal (Criminal Procedure Amendment No.6) (Vulnerable Witnesses (Scotland) Act 2004) (Evidence on Commission) 2005^(f). The 2004 Act only applies at present to child witnesses in solemn proceedings in which the report of the case has been received by the procurator fiscal after 1 April 2005. It will be implemented in due course to apply to vulnerable witnesses in all criminal proceedings.
3. The purpose of this practice note is to give guidance as to—
 - (a) what practitioners must do in preparation for seeking the authorisation of the special measure of taking the evidence of a vulnerable witness by a commissioner;
 - (b) what issues the court will expect practitioners to address in a child witness notice or vulnerable witness application in relation to the special measure of taking evidence by a commissioner;
 - (c) how the commission will be conducted;
 - (d) how any issues arising from the commission will be dealt with.

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

4. A party citing or intending to cite a child witness shall lodge with the court a child witness notice^(g). A party citing or intending to cite a person, other than a child

^(a) 1995 c.46.

^(b) 2004 asp 3.

^(c) 1995 Act, section 271H(1)(a).

^(d) S.I. 1996/513.

^(e) S.S.I. 2005/188.

^(f) S.S.I. 2005/ .

^(g) 1995 Act, section 271A(2).

witness, who the party considers to be a vulnerable witness under section 271C(1) of the 1995 Act, shall lodge with the court a vulnerable witness application^(a).

5. A child witness notice or vulnerable witness application must set out what special measures the party citing the vulnerable witness considers to be the most appropriate for the purpose of taking the evidence of that witness.

6. Where a child witness notice or vulnerable witness application seeks the authority of the court to take the evidence of the witness by a commissioner the party citing the witness should consider several matters beforehand.

7. The court will expect that in preparing a child witness notice or vulnerable witness application a practitioner will —

(a) contact the Electronic Service Delivery Unit within the Scottish Court Service^(b) to advise of the intention to seek authority to have the evidence of a vulnerable witness taken by a commissioner and check the availability of suitable venues;

(b) consider whether any particular commissioner or type of commissioner would be the most appropriate in the particular circumstances of the case (for example, a judge of the High Court);

(c) consider if there is any particular place that a commission requires to be held due to the location of the witness or any particular vulnerabilities he or she may have, including whether the commission may be within a court building or requires to be in a location remote from a court building;

(d) consider if 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;

(e) consider whether the commission requires to be held with any special conditions such as the witness giving evidence to the commission by way of CCTV link from another location;

(f) consider whether the witness is likely to need frequent breaks or any other special requirements, such as disabled access;

(g) consider how any question of identification is going to be dealt with;

(h) identify any productions or labels that will require to be put to the witness;

(i) identify whether an interpreter is needed;

(j) consider if it is likely that there will be any objections to particular parts of the witness's evidence.

8. The court will expect that the child witness notice or vulnerable witness application will give full details of any of the matters that are identified in paragraph 7.

9. At any preliminary hearing at which the special measure of taking evidence by a commissioner is authorised or, if the special measure has already been authorised, it is intimated to the court that a commission is to take place, the court will consider fixing

^(a) 1995 Act, section 271C(2).

^(b) This is currently situated in the High Court of Justiciary, Saltmarket, Glasgow, G1 5NA, DX 501556 Glasgow Saltmarket, telephone 0141 559 4590, fax 0141 559 4585, email esdu@scotcourts.gov.uk.

a further diet^(a). This further diet could allow the court to deal with any matters that might arise from the commission (for example, questions of admissibility that may have been reserved, the quality of the recording of the commission proceedings and the need for any editing of the recording).

9. The court will also take note of any other issue raised in the written record of preparation^(b) that might affect the commission proceedings and make any orders or give such directions as may be necessary for the purpose of arranging the commission effectively (for example dealing with any application on behalf of the accused to be present in the room where the commission proceedings are taking place^(c)).

Conduct of the commission

10. The commissioner has the authority of the court to take evidence from a specified witness or witnesses. He or she has the authority to require the parties to show respect for the proceedings and the power to control the proceedings to allow the commission to be completed effectively. If the conduct of any party to the proceedings prevents the commission being conducted effectively, the commissioner will report this to the court. If the commissioner is a judge of the High Court, he or she has all the powers to control the conduct of proceedings that he or she would otherwise have while sitting as a judge.

11. The commissioner will determine any particular matters necessary for the effective conduct of the commission proceedings (for example, whether any adjournments are necessary for the comfort of the witness or to allow the accused to consult with their representatives).

Further hearing after commission

12. At any further hearing that has been fixed to determine matters arising from the commission the court will-

(a) determine any question of admissibility of evidence that may have been reserved at the commission;

(b) make directions in respect of any evidence recorded during the commission proceedings that is to be edited or otherwise removed from the recording to be played to the jury at the trial diet;

(c) consider any submissions from parties in respect of the quality of the recording or any requests for a transcript of any part of the recordings that may be of poor quality (parties may request that the clerk allow the recording to be viewed prior to the further hearing to assess the quality of the recording);

(d) make any direction necessary to allow parties to view the final version of the recording subsequent to any removal of parts of the recording that are not to be played to the jury during the trial.

13. The court expects that if parties intend to make submissions on the edited version of the recording that is to be played to the jury at the trial, this should be intimated to the clerk prior to the trial diet.

^(a) 1995 Act, section 72(9).

^(b) 1995 Act, section 72E(2)(a).

^(c) 1995 Act, section 271I (3)(a).

Introduction of recording during the trial

14. The recording of the commission proceedings will be played to the jury at the time in the trial the witness giving evidence to the commissioner would otherwise have been called to give evidence during the trial proceedings.

Review of Practice Note

15. This Practice Note will be kept under review, and its terms may be modified from time to time in light of experience.

9th November 2005

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