

**Evaluation Report No. 2:**

***– Practice Note 1 of 2017 (Evidence by Commissioner)***

*Quantifying the end outcomes for the applications lodged in 2017*

*Version 1.0*

*Issued: December 2018*

**INTRODUCTION**

The High Court of Justiciary Practice Note (1 of 2017) on the taking of evidence of a vulnerable witness by a Commissioner came into effect on 8 May 2017, and is included as appendix 1. That new Practice Note arose as a consequence of the work of the Evidence and Procedure working group, led by Lady Dorrian, on the pre-recording of evidence from children and other vulnerable witnesses.

This *Evaluation Report* is part of a series being undertaken to help monitor the operational impact of that Practice Note:

*Evaluation Report Number 1 (published Oct 2018)* – confirmed the guidance issued was addressing the gaps identified by the working group.

*Evaluation Report No. 2 (this paper)* – establishes a quantified baseline to help inform future performance monitoring.

**The Methodology**

Where a vulnerable witness is citedto appearin criminal proceedings the parties may apply to use the non-standard “special measure” of taking *Evidence by Commissioner*. This paper sets out the generic steps involved as witness’s progress through that criminal court procedure and documents the end outcomes at each stage for the applications lodged with the High Court over a defined sample period - the 2017 calendar year.

Readers should note that “outcomes” can only be identified once all of the criminal cases where an application was made have either proceeded to trial, or have otherwise been disposed of. In practice that means an outcome focused view can only be generated once the case progression cycle is complete and all of the relevant trials have taken place.

**The Baseline (from the 2017 calendar year)**

For the 2017 calendar year a total of 50 applications were received for a witness to provide evidence on commission in High Court cases.

For each subsequent stage in this procedure the outcomes were:

* 66% / 33 of the applications made were called *(at a procedural hearing)*;
* 58% / 29 witnesses did have their evidence recorded *(at a commission hearing)*;
* 50% / 25 witnesses had their pre-recorded evidence played at trial; and

The ultimate outcome is that, for those 25 witnesses who did have their evidence played at trial, involvement with the criminal justice system was concluded an average of 57 days (8 weeks) earlier than would otherwise have been the case.

A provisional update for 2018

By way of comparison, a total of 133 applications have now been lodged with the High Court in the first 10 months of the 2018 calendar year and that growth will largely be attributable to the impetus gained through issuing the new Practice Note.

**PART 1 - THE PROCEDURE FOR TAKING EVIDENCE BY COMMISSIONER**

The current procedure for the court to take *Evidence by Commissioner* has four key stages which we are summarising as follows:

* APPLICATION MADE – Where relevant vulnerabilities have been recognised in a witness the “party citing the witness” will contact the court to make a tentative booking for an *Evidence by Commissioner* hearing. Once availability has been canvassed a formal *Application[[1]](#footnote-1)* will then be prepared and lodged with the court who register that formal application and notify the applicant of:
	+ The date for the application to call in court at a ‘procedural hearing’; and
	+ The date, time and venue for the witness to attend a ‘commission hearing’.
* APPROACH AGREED – At the ‘procedural hearing’ the prosecution and defence are expected to have prepared themselves in line with [Practice Note 1 of 2017](http://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/practice-notes/criminal-courts/criminal-courts---practice-note---number-1-of-2017.pdf?sfvrsn=4) (refer appendix 1) and should be able to advise the court as to how to facilitate that witness providing their best evidence. The nature of the questions to be asked and the manner in which they should be asked are then agreed by the court.
* EVIDENCE TAKEN – At the scheduled ‘commission hearing’ the witness will usually appear in person, or occasionally by live TV link, and will have been offered a familiarisation visit in advance of their appearance. In line with the ground rules set by the court at the ‘procedural hearing’ the commissioner then facilitates the witness being questioned by the prosecution and the defence. The video recording of that witness’s evidence and cross examination is supplied to the SCTS, along with copies which may be made available to the prosecution and the defence if required.
* RECORDING PLAYED – At the trial diet the pre-recorded evidence from the commission hearing may, at the discretion of the parties, be played to the presiding judge and the jurors *(in lieu of having that vulnerable witness appear in person)*. The master copy of the pre-recorded evidence will then be retained by the SCTS, whilst any other copies made are returned to the SCTS for destruction. In due course the master copy will also be destroyed in line with the principles set out in the SCTS Records Management Plan.

Case Progression

The evidence of any given witness may be sought relative to one charge only, or relative to the entire case against the accused. Along with the routine case progression decisions that need to be made by prosecutors and defence agents that means that over time a subset of witnesses will drop out as cases step through each of the key stages within this procedure:



**PART 2 - THE OUTCOMES (AT EACH STAGE IN THE PROCEDURE)**

*STAGE 1 - APPLICATIONS MADE*

Applications Registered by the High Court

During the 2017 calendar year a total of 50 applications were made to the High Court. The average applications made per month was 4 and:

* The range of applications made varied:
	+ From a minimum of 1 application *(on 5 occasions)*;
	+ To a maximum of 13 applications *(on 1 occasion).*



The comparable figures for applications lodged over the first 10 months of 2018 are materially higher. There were133 applications made to the High Court over the year to date with the average per month increasing to 13 and:

* The range of applications varied:
	+ From a minimum of 5 applications *(on 1 occasion)*;
	+ To a maximum of 18 applications *(on 2 occasions).*

The type of applications made:

Of the 50 applications made to the High Court in the 2017 calendar year:

* 72% (36 applications) were for child witnesses; and
* 28% (14 applications) were for vulnerable adults.



The comparable figures over the first 10 months of 2018 are a total of 133 applications made to the High Court in the year to date of which:

* 79% (105 applications) were for child witnesses; and
* 21% (28 applications) were for vulnerable adult witnesses.

The party lodging the application

Of the 50 applications made to the High Court in the 2017 calendar year:

* 100% (50 applications) were lodged by the Crown; and
* 0% (0 applications) were lodged by the defence.

*STAGE 2 - APPROACH AGREED*

Of the 50 applications that were made in 2017:

* 33 were called as planned at their scheduled ‘procedural hearing’ *(in order to agree the approach for securing a witnesses best evidence)*; and
* 17 had been brought to an end for the following reasons:
	+ For 10 cases (20%) – a guilty plea was tendered
	+ For 4 cases (8%) – the crown did not proceed with charge / case
	+ For 3 cases (6%) – the application was not moved

*STAGE 3 - EVIDENCE TAKEN*

Of the 33 applications that were called at a ‘commission hearing’ in 2017:

* 29 witnesses did have their evidence taken by a commissioner: and
* 4 had been brought to an end for the following reasons:
	+ *For 1 case (2%) – the witness withdrew in advance*
	+ *For 1 case (2%) – the witness failed to appear on the day*
	+ *For 2 cases (4%) – the crown did not proceed with charge / case*

Mode of Appearance – for witnesses

Of those 29 witnesses who did have evidence taken at a commission hearing:

* 26 (90%) appeared in person; and
* 3 (10%) appeared by live TV link from another location.

Incidence of - Multiple Witnesses per Case

In this sample period the 33 witness applications scheduled were called regarding 25 cases:

|  |  |  |  |
| --- | --- | --- | --- |
|  The Pattern of Applications  | WitnessCount | CaseCount | *% Mix**(cases)* |
| Applications - from 1 witness per case | 18 | 18 | *72%* |
| Applications - from 2 witness’s per case | 12 | 6 | *24%* |
| Applications - from 3 witness’s per case[[2]](#footnote-2) | 3 | 1 | *4%* |
|  | 33 | 25 | *100%* |

In those cases that do present with multiple witnesses the Crown may need to consider two differing scenarios when making applications – the witnesses may be a family or other group that wish to stay together for mutual support *(in which case they can be scheduled on the same day)*, or there may be a need to keep those witnesses apart for security reasons *(in which case they may need to be scheduled on different days).*

In this sample period all 7 cases with multiple witnesses fell in that first group and were scheduled on the same day (enabling court time to be used effectively).

Incidence of - Multiple accused per case

In this sample period there were 2 applications (out of 33) that had multiple accused:

|  |  |  |
| --- | --- | --- |
| The Pattern of Applications  | CaseCount | *%**Mix* |
| Applications – in cases with 1 accused | 31 | *92%* |
| Applications - in cases with 2 accused | 1 | *3%* |
| Applications - in cases with 3 accused | 1 | *3%* |
|  | 33 | *100%* |

Whilst the incidence of multi accused cases is very low they can have operational impacts that the court would generally consider at the preliminary hearing:

*Multiple Lawyers* - if multiple additional lawyers do need to be present then a small hearing venue can quickly become overcrowded which inevitably adds to the potential trauma for a witness. The court may need to consider whether redirecting such cases to a larger venue is a practical response to that overcrowding, or whether the needs of those multiple legal representatives can be met in other ways.

*Separation of the Accused* - An accused person will normally view a commission hearing via live TV link, and standard operating practice is for multiple accused to be taken to the one suitable court location to view the same video feed[[3]](#footnote-3). Security reasons may dictate a need for separation of the accused in some cases and where that risk is identified then additional security guards will need to be provided to maintain safety and security.

Mode of Appearance – for the accused

In this sample period there were:

* 23 witness applications (70%) where the accused were on bail when they viewed that witnesses evidence; and
* 6 witness applications (18%) where the accused would have been transferred from prison for that viewing:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| The Pattern of Applications  | CaseCount | Did not proceed | Accused on bail | Accused in Custody |
| Applications – in cases with 1 accused | 31 | 3 | 22 | 6 |
| Applications - in cases with 2 accused | 1 | 1 |  |  |
| Applications - in cases with 3 accused | 1 |  | 1 |  |
|  | 33 | 4 | 23 | 6 |
|  | *100%* | *12%* | *70%* | *18%* |

Location of Commissions

For the 29 witnesses that did proceed to have their evidence recorded at a ‘commission hearing’, the courts had deployed a total of 11 judicial office holders to preside as commissioners:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Judge Presiding  | Number of Judges | Number ofSitting Days | Number ofWitnesses / RecordingsMade | Location |
| Lord Armstrong | 1 | 1 | 1 | Livingston HC |
| Lord Arthurson | 1 | 2 | 3 | Glasgow HC |
| Lord Burns | 1 | 4 | 5 | Parliament House (3 days)Thurso (1 day) *(North Highland College)*  |
| Lady Carmichael | 1 | 2 | 3 | Parliament House  |
| Lord Ericht | 1 | 3 | 5 | Parliament House  |
| Lord Kinclaven | 1 | 1 | 1 | Perth *(Almondbank House)* |
| Lord Pentland | 1 | 1 | 1 | Parliament House  |
| Lady Scott | 1 | 2 | 4 | Parliament House  |
| Lady Stacey | 1 | 1 | 1 | Glasgow HC |
| Lady Wise | 1 | 1 | 1 | Parliament House  |
| Lord Woolman | 1 | 2 | 3 | Parliament House  |
|  | 11 | 20 | 29 |  |

In terms of location the operational preference is to use court venues so that the courts can have assurance over the suitability of the waiting room and hearing room used, along with the wider ability to maintain safety and security at a reasonable level throughout a court building. If a non court venue is proposed by the party citing the witness then the court will need to be assured that: the venue is fit for purpose, that all participants can be kept safe and secure, and that it can reduce trauma for that witness.

*STAGE 4 - RECORDING PLAYED*

For the 29 commission hearings where a recording was made in 2017:

* 25 of those recordings did go on to be played at a relevant trial diet; and
* 4 of those recordings were not used at trial for the following reasons:
	+ *For 1 case (2%) – a guilty plea was tendered (at trial )*
	+ *For 3 cases (6%) – the crown did not proceed with charge / case*

**PART 3 – QUANTIFYING THE BENEFITS REALISED**

A key benefit arising from the greater use of pre-recorded evidence is the ability for witnesses to conclude their involvement with the criminal justice system earlier than would otherwise be the case. The 25 witnesses that did have their pre-recorded evidence played at trial were able to conclude their involvement an average of 57 days (8 weeks) before trial.

For each individual witness that reduced involvement varied across a range:

* + From a minimum of 18 days *(2 weeks);*
	+ To a maximum of 117 days *(16 weeks).*



**APPENDIX 1 – THE 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—
	1. when practitioners should consider whether a commission is required;
	2. what practitioners must do in preparation for seeking authorisation to take the evidence of a vulnerable witness by a commissioner;
	3. 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**

1. 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.
2. 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**

1. 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.
1. 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**

1. 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.
2. 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;a
* 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.

a HMA v AM & JM [2016] JC 127

1. The court may make directions about these matters, or any other matters which might affect the commission proceedings, or which may be required for the effective conduct of the commission. If combined special measures are sought, the court will address how this is to work in practice.
2. 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.

*CJM Sutherland*

Lord Justice General

Edinburgh 28 March 2017

**APPENDIX 2 – DATA QUALITY**

Data sources

The end to end data within this report is sourced from a mixture of:

* The applications recorded by court officials *(sourced from the* *Vulnerable Witness Application - the special measures reporting tool);*
* The case progression dates (*sourced from COPII* - *the SCTS criminal case management system);*
* The general information narrated within the court minute (*sourced from COPII* - *the SCTS criminal case management system);*
* The feedback report from each commission held *(sourced from copies of those reports lodged in the generic email box maintained by MIAT); and*
* Manual spreadsheets maintained by the High Court of Judiciary

Continuous Improvement

For future versions of this report the SCTS may want to update its information systems to allow the following data to be obtained more seamlessly:

|  |  |
| --- | --- |
| *Stage in procedure* | *Additional data that could be routinely captured* |
| APPLICATIONS MADE | Objections lodged within 7 days of a VW Application being received *(if any)* |
| APPROACH AGREED | Applications refused by the judiciary *(if any)* |
| EVIDENCE TAKEN | Did the witness appear by live TV link, and from what locationDid the accused appear by live TV link, and from what location |
| The judge attending |
| The camera operator attending |
| Did the witness have a supporter  |
| Did the witness need an interpreter |
| The venue used, and was the quality satisfactory? *(and if not why not)* |
| The duration of the recordings made *(for each witness)*Was the quality of the recording satisfactory? *(and if not why not)* |
| Was the recording edited before trial& the reasons why e.g. inadmissible evidence |
| RECORDINGS PLAYED | Was the quality of the playback satisfactory? *(and if not why not)* |

**APPENDIX 3 – THE OUTCOMES (for applications lodged in 2017)**

For *Evidence by Commissioner* applications lodged in 2017, the eventual outcomes at each key stage in the procedure were:



1. *Applications are made under section 271 of the Criminal Procedure (Scotland) Act 1995* [↑](#footnote-ref-1)
2. *In this case all 3 witnesses were called on the same day, 2 had their evidence recorded and 1 failed to appear.* [↑](#footnote-ref-2)
3. *A theoretical technology solution would be multiple video feeds, but the logistics of taking multiple accused to multiple locations to view those feeds is seen as unworkable in practice.* [↑](#footnote-ref-3)