



Law Society
of Scotland

Consultation Response

Pre-Recording Evidence of Child and Other Vulnerable Witnesses

25 September 2017



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Criminal Law Committee welcomes the opportunity to consider and respond to the Scottish Government's consultation, *Pre-Recording Evidence of Child and Other Vulnerable Witnesses*. The Committee has the following comments to put forward for consideration.

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

We believe that the presumption that child and other vulnerable witnesses should have their evidence taken in advance of trial is a suitable longer-term aim for the criminal justice system. The High Court of Justiciary Practice Note No.1 of 2017, *Taking of Evidence of a Vulnerable Witness by Commissioner*¹, indicates the way forward and we have welcomed this approach.

Working towards this presumption in the longer term will raise a number of issues requiring resolution in the short and medium term, an understanding of the practical challenges of this transition and the resources to allow this change to be successful. This change will introduce a more inquisitorial approach to the broadly adversarial nature of the criminal trial, will move effort and resource from the trial to the investigatory process, potentially change the professional obligations for defence solicitors and other participants in the criminal justice process and see a significant cultural change in the ways in which child and vulnerable witnesses are treated.

There are challenges in achieving this longer-term aim. The speed of proceedings, at least at the initial stages, will have to increase and difficulties around delayed disclosure resolved. Without the latter, in particular, it is difficult for the defence to determine how to approach a case and bring forward or challenge evidence. As evidence would be recorded at the earliest practical stage, this raises the challenge that

¹ <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>

many cases will not proceed to trial; equally, under current arrangements, the time taken between charge and trial can be a significant proportion of a child witness' life. It is also assumed that pre-recording evidence is less stressful to children and vulnerable witnesses, yet this process can also remain distressing.

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

The use of prior statements as evidence in chief would raise some concerns, for instance, whether there would be access to these statements in advance (and if so, this may cause issues from a defence perspective). The use of evidence by a commissioner as a standard special measure could also have significant resource implications.

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

We believe that a suitable approach may be to pilot this approach with child witnesses in High Court cases, rather than categorising by particular ages or by a particular type of offence. This approach would allow for piloting and improvement in advance of implementing across wider categories of witnesses and proceedings.

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

We believe that the child witness's wishes should be taken into account when determining whether to give evidence during the trial are taken into account. We are not aware of particular issues around the current operation of section 271B of the Criminal Procedure (Scotland) Act 1995 (as amended). Decisions by the court in which cases to overrule the wishes of the child witness may prove challenging. Though presumptions around particular ages of child witness or particular types of crime may be simpler, we suggest that the wishes of each witness and the case in which they are involved be considered individually. This may need expert witness involvement, for instance, child psychologists, which has resource implications for the criminal justice system.

Question 5 - Should the right to choose to give evidence in court be maintained for

all witnesses or limited to those above a certain age, eg. children aged 12 or above?

We believe that age can be arbitrary and that the wishes of each child witness be considered individually.

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

We believe that a child accused should be able to give pre-recorded evidence in advance of trial. However, we believe that this raises a number of issues that mean that this right may not be frequently used. In practice, the decision on whether an accused would give evidence is often taken at the close of the Crown case.

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

The pre-recording of evidence by a child accused raises issues around Articles 5 and 6 of the European Convention on Human Rights. Pre-recorded evidence from an accused could not practically cover all issues raised by the prosecution, and in pre-recording (unless done in the absence of the Crown), would disclose information to the prosecution. In addition, there would need to be a second commission at the end of the Crown case to allow for cross-examination of the accused to take place.

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

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

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

Though the taking of evidence by commissioner should take place at the earliest stage practicable to ensure best evidence, there are issues in doing so before the service of the indictment. If it is unclear what the charges will ultimately be, it may potentially be unfair to defence (and potentially, prosecution). It also risks multiple commissions and indeed co-operation between participants as, for instance, the holding of a commission does not need to be agreed by the defence.

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

We believe that this approach would be effective, saving objections at a later stage (bearing in mind that the commissioner may not be the trial judge) and developing a common approach.

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

The timing and relevancy of the ground rules hearing will be crucial: early enough to be useful and late enough to allow for adequate preparation. There will need to have been full disclosure and the charges must be clear. Otherwise, it would be difficult for the judge to decide whether to permit questions, and there is the risk of multiple commissions or disjointed evidence.

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

We believe that it is rare for a commissioner to also preside at the trial currently. Indeed, not every commissioner is a judge, though in terms of High Court practice, this is invariably the case. We see benefits to such an approach, though we believe that the resource demands of moving towards the longer-term aim of a presumption could be significant.

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

A commissioner is appointed by interlocutor and has no input into the terms of that interlocutor. We believe that greater clarity around the role of commissioner would be helpful, who they can be (for instance, judge or other legally qualified person), what training they receive, what standards are applied nationally and a range of other factors. The number of commissions is currently relatively small, 22 in the last year. Around 120 child witnesses were cited in the High Court for the same period. Extending these provisions to Sheriff Court proceedings will, however, increase the number of potential commissions significantly. There may

also be issues around the role of summary sheriffs, who are currently permitted to carry out only procedural work in such circumstances.

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

If issues are resolved around the authority of a commissioner, then there could be benefits to this approach.

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

We do not have any further comments to add at this stage, but if we can offer any further assistance to the Scottish Government in considering these issues, the Criminal Law Committee would be keen to do so.



For further information, please contact:

Andrew Alexander

External Relations

Law Society of Scotland

DD: 0131 226 8886

andrewalexander@lawscot.org.uk