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Background

The Children's Hearings System is Scotland's distinct system of child protection and youth justice. Among its fundamental principles are:

- whether concerns relate to their welfare or behaviour, the needs of children or young people in trouble should be met through a single holistic and integrated system
- a preventative approach, involving early identification and diagnosis of problems, is essential
- the welfare of the child remains at the centre of all decision making and the child's best interests are paramount throughout
- the child's engagement and participation is crucial to good decision making

SCRA operates the Reporter service which sits at the heart of the system. SCRA employs Children's Reporters who are located throughout Scotland, working in close partnership with panel members and other professionals such as social work, education, the police, the health service and the courts system.

SCRA's vision is that vulnerable children and young people in Scotland are safe, protected and offered positive futures. We will seek to achieve this by adhering to the following key values:

- The voice of the child must be heard
- Our hopes and dreams for the children of Scotland are what unite us
- Children and young people's experiences and opinions guide us
- We are approachable and open
- We bring the best of the past with us into the future to meet new challenges.

Response

SCRA welcomes the opportunity to respond to this Consultation on Pre-Recording Evidence of Child and Other Vulnerable Witnesses.

SCRA's response to this consultation is underpinned by the following principles.

1. The traditional form of examination in chief and cross examination does not produce the most reliable evidence from children and other vulnerable witnesses; and this process is often traumatic or potentially abusive to the witnesses involved [1].
2. A well-conducted and reliably recorded prior statement taken closer in time to events will often be the most reliable evidence [2]. It is (or should be) universally acknowledged that the ability - particularly the ability of children – to recall events deteriorates with the passage of time.
3. In criminal proceedings, a prior statement can form all or part of the witness's evidence in chief. In civil proceedings, such a prior statement can be introduced as hearsay evidence [3] or can be adopted by the witness and thus form part of their evidence in chief.
4. Court proceedings must be fair to witnesses, to the accused and, in civil proceedings, to all parties. If fairness requires that, in addition to use of the prior statement, the child or vulnerable person must be further questioned, this can be provided for by allowing the Crown, a party or the accused to request that the court authorise an interviewer to put questions to the witness on a party's behalf. This is what is provided for in the Barnahus system, and is Article 6 compliant even in an adversarial system [4].
5. If the Barnahus system is not available, and a witness must be further questioned, such questioning must take place as soon as possible, in order to reduce trauma to the witness and to obtain the most reliable evidence.
6. In the situation outlined in paragraph 5, there must be a ground rules hearing or similar discussion carried out by judges (and preferably also) lawyers trained and experienced in good practice regarding vulnerable witnesses. Research has shown that in the absence of the "ground rules" that these discussions normally set down, questioning techniques are not adapted by even experienced legal practitioners. This means that the questions asked are potentially irrelevant [5], confusing [6], do not produce the most reliable evidence, and continue to be unnecessarily traumatic [7].

Whilst this consultation relates to criminal trials, children's hearings proof proceedings face many of the same issues in relation to both the use of pre-recorded evidence and the potential for traditional approaches to traumatise witnesses. More generally we think that such proceedings – with their focus on the safety and welfare of Scotland's children – should

be considered just as important as criminal trials. Therefore, we ask that children's hearings proof proceedings benefit from similar changes to any made in the criminal sphere.

Children are referred to a children's hearing for the most serious child protection or welfare reasons including, for example, being a victim of physical, sexual or emotional abuse; having a close connection to a person who is a perpetrator of domestic abuse; experiencing a lack of parental care that is likely to result in unnecessary suffering or significant impairment to health or development; the child's conduct has had, or is likely to have, a serious adverse effect on the health, safety or development of the child or another person; or the child has committed an offence.

Where the child, young person, or parents (or other relevant persons) do not accept the reasons why the child or young person has been referred to a hearing ("the statement of grounds"), the Children's Reporter will need to lead evidence in the Sheriff Court in relation to the factual matters underpinning the referral to the hearing, e.g. to prove that the child has been abused, or neglected in the manner set out in the grounds. In most proofs, civil rules of evidence and procedure apply. However, where the reason for referral to a hearing is an offence by the child, criminal rules of evidence and procedure apply.

Often, in our proofs, the same or similar evidence will be used in relation to a possible criminal trial as is used before the Sheriff to prove the statement of grounds. Any joint investigative interview of the victim, or other children, can be crucial. In cases of child abuse, there may be no other evidence other than what the child or children have said. Even though the standard of proof for children's hearings proofs (except where the child is alleged to have committed an offence) is the balance of probabilities, any deficiencies in gathering evidence for the criminal trial could result in a failure to be able to appropriately protect the child or other children.

Often children's reporters will rely on a joint investigative interview, or other prior statements (such as a police only interview) as evidence in a proof. However, sometimes, as well as the JII, the reporter or other parties will think it is necessary to ask children further questions as part of the court process. If that is the case, despite efforts to expedite the procedure, sometimes it can be many months before the proof is heard in court. During this time, children's memories deteriorate, and children and vulnerable witnesses are exposed to the same re-traumatisation through their participation in the proof proceedings as in the criminal justice process.

The experience of a vulnerable witness is the same whether it is in civil or criminal proceedings. It would be unthinkable that child witnesses were less protected from re-traumatisation in children's hearing court proceedings than they were in a criminal trial.

Our experience also tells us that when a child or other vulnerable witness is questioned in court, special measures for vulnerable witnesses and guidance associated with that, have not resulted in a wholesale culture and practice change in court proceedings. Children's reporters come across various examples of poor practice, including:

- failure by a party citing a vulnerable witness to timeously consider applying for vulnerable witness special measures;
- seeking to ask inappropriate and unnecessary questions of child and other vulnerable witnesses [8];
- challenging the use of prior statements as part of a witness's evidence in chief, even where the witness is available for further questioning, and being successful in that challenge (though more usually, the Reporter will rely on statements as hearsay rather than as evidence in chief);
- unwillingness by Sheriffs and parties to engage in "ground rules hearing" type discussions, at the request of the Children's Reporter;
- unwillingness of some sheriffs to case manage and restrict irrelevant or over-rigorous cross-examination.

Reporters' experiences ought not to be viewed with surprise as these chime with 30 plus years of research in both England and Scotland [9], data from criminal trials, and from the evaluation of the section 28 pilot in England [10].

Whilst pre-recording any additional examination in chief or cross examination brings many benefits, we know [11] that this is still stressful, traumatic and difficult for vulnerable witnesses, and there are still delays which ultimately affect reliability.

Therefore, whilst SCRA is supportive of the proposals to strengthen the current legislation in relation to vulnerable witnesses by greater use of prior statements and taking evidence by commissioner, we believe that there is an opportunity to move to the "gold standard" of a Barnahus-type system, whereby a high quality interview is used as evidence in chief, any further questioning is authorised by the court and carried out by an interviewer.

However, this may take time to achieve, or may never be fully affordable for all vulnerable witnesses, therefore the culture and practice in courts must be improved, so that any vulnerable witness who does have to give evidence as part of the court process does not experience delay and is not exposed to inappropriate and unnecessary questioning.

Change is urgently required. Barnahus has been in place in Iceland for nearly 20 years. The recommendations which resulted in the section 28 pilot were recommended by Judge Pigot almost 30 years ago. Special measures have been in place in Scotland since 2004, but have not prevented vulnerable witnesses from continuing to be traumatised. We here in Scotland are at the beginning of our journey to improve the picture for child and other vulnerable victims and witnesses. We should now be seeking to put in place the very best system that we can; giving us the most reliable evidence with the least trauma to vulnerable witnesses.

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?

Yes.

We are supportive of a presumption that a child or other vulnerable witnesses should have all their evidence taken in advance of trial, i.e. a presumption that the special measures used in these cases are a prior statement and/or evidence taken by a commissioner). **This presumption should extend to all civil and criminal cases, including children’s hearing proof proceedings.**

The evaluation of and research into the section 28 pilots [12] in England show that the benefits of pre-recording questioning of vulnerable witnesses (when implemented correctly) brings benefits beyond that even initially anticipated. This pilot scheme involves the use of ABE interviews as evidence in chief and expedited, pre-recorded cross examination.

The benefits include:

- Making it easier for vulnerable witnesses to recall events, producing more reliable evidence, and fairer for all involved.
- Making the experience less traumatic for witnesses.
- Questions asked of witnesses are more focussed and relevant (due to the scrutiny of Grounds Rules Hearings).
- Cross examination takes place for a shorter period.
- Trial durations of shorter length.
- Fewer “cracked” trials and more guilty pleas before trial.

To make a success of the presumption that a prior statement should be used, it is essential that such prior statements are of a high quality. The benefits of a high quality prior statement are:

- The sooner the evidence is captured, the more reliable it will be.
- A high quality prior statement can be given high weight by the court.
- A high quality statement may mean there is no need for any additional examination in chief and/or cross examination, reducing trauma and creating efficiencies.
- Where there is a need for additional examination in chief or cross examination, a good quality prior statement will assist to focus and restrict additional questioning to only that which is necessary in the interests of justice, reducing trauma and creating efficiencies.

Children’s reporters often rely on a visually recorded joint investigative interview carried out in accordance with Scottish Government guidance in line with internationally agreed best standards for forensic interviewing. Many of these are of high quality, but there requires to be further investment to:

- ensure a consistently high quality of interview through enhanced training, quality assurance and specialism of the police officers and social workers who conduct joint investigative interviews or other interviews of vulnerable witnesses,
- ensure the visual and sound recording are consistently of excellent quality, and
- make available multi-disciplinary, child-friendly, environments in which to conduct such interviews.

Whether or not a good quality prior statement is available, the presumption in criminal proceedings ought to be that a vulnerable witness will give evidence via the special measure of evidence taken by commissioner as soon as possible.

In children's hearings proof proceedings, where any party intends to call the vulnerable witness, the presumption of evidence taken by commissioner should similarly apply. (Often the Reporter will intend to rely solely on hearsay in the form of the prior statement, such as a JII, and not call the witness.)

Witnesses must be given the opportunity to ask to give evidence directly at the trial or at the children's proof proceedings. The court must be the final decision maker as to whether a witness **of any age** ought to be present in court. The court may consider that this is not appropriate given the witness's vulnerability, or that it is unnecessary in the interests of justice for the vulnerable witness to be further questioned. However, there must be a mechanism to ensure the witness is properly and independently informed about what being in court will involve and the risks.

Whilst we are supportive of the presumption that evidence will be taken in advance of trial in that this is an improvement on the current arrangement, our preference is for wholesale reform of the approach to the evidence of vulnerable witnesses in our Justice System. As outlined in the introduction, SCRA favours the introduction of a Barnahus-type system with the right of a party to request that the court authorise a further interview of the child to be conducted along the same lines as the initial interview. We are supportive of the work by the Scottish Government to adapt Barnahus to Scotland, including their active consideration of piloting a Barnahus type multi-disciplinary service.

Until a Barnahus type system is properly introduced in Scotland, the approach which will capture the most reliable evidence and cause the least trauma to vulnerable witnesses requires that once court proceedings (criminal or children's hearings proof) have commenced:

- a) Any further questioning of a vulnerable witness must take place as quickly as possible;
- b) A judge or sheriff must determine whether further questioning of a child or vulnerable witness is necessary [13]. If so, the form and content of questions must be controlled by the judge or sheriff by means of a well-conducted ground rules hearing.

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?

Yes

However, including prior statements and evidence by commissioner as “standard special measures” is not sufficient alone to result in a presumption that the special measures used will be a prior statement and/or evidence by commissioner.

There may need to be a different way of framing this, such as a specific presumption that where a vulnerable witness is to give evidence, it will be presumed that the witness will have the special measures of prior statement and evidence taken by commissioner, unless cause is shown to the court why this should not be so.

If a special measure is a “standard special measure”, this only means that if the vulnerable witness notice specifies this special measure, it will be granted by the court. This leaves the choice of the special measure with the party applying for the special measure. There are currently other standard special measures i.e. the use of a live tv link, screen or supporter. So, a party could specify a supporter in the vulnerable witness notice and a supporter would be the only special measure granted by the court.

Therefore, there would have to be further amendment such as a specific presumption outlined above or removing live tv link, supporter, and screen as “standard special measures” in section 271A(14) **and in section 12(3) of the 2004 Act**. That said, a supporter might usefully be included as a standard special measure, but only where it is used in conjunction with the special measure of taking evidence by commissioner.

Our view is that, even for the standard special measure of evidence by commissioner, there requires to be a Ground Rules Hearing.

In our view, there must be greater alignment between criminal and civil proceedings, so any change made to section 271A(14) needs also to be translated to section 12(3) of the Vulnerable Witnesses (Scotland) Act 2004 (“the 2004 Act”), in respect of civil proceedings. Indeed, it is our view that all civil and criminal vulnerable witness provisions should be reviewed and aligned. There are currently a number of inexplicable discrepancies [14].

The special measure of prior statement is not required in civil proceedings as hearsay is admissible by virtue of section 2 of the Civil Evidence (Scotland) Act 1988. Hence, section 22A of the 2004 Act only applies to proofs in relation to the section 67(2)(j) ground (offence by child referred to the hearing). So, section 12(3) should include a prior statement as a standard special measure only in relation to section 67(2)(j) grounds, whereas evidence taken by commissioner should be the presumed special measure in proofs in relation to all section 67 grounds. However, it is essential that



any changes do not result in undermining the use of hearsay. Reporters will often use statements simply as hearsay or sometimes as part of the evidence in chief of the witness (by the witness adopting it).

Along with the presumptions, there must be an ability of the witness to choose to give evidence directly at the trial or at the proof. This means that there must be a mechanism to obtain the witness's view in every case. See response to Q4.

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, eg:

- **Should the initial focus of any presumption be on all child witnesses, or on child complainers or on those under a certain age?**
- **Should the initial focus be on all solemn cases, cases in the High Court or cases involving only certain types of offences, eg. sexual offences; serious violent offences; etc.**

We believe that there should be some piloting or phasing in of the presumption so that the impact of these changes can be assessed, barriers to success identified and challenged, and improvement methodology can be utilised before wider roll out. This is to give these reforms the best chance to succeed. Any evaluation of the challenges and benefits of introducing these presumptions, and any decisions taken, must give great weight to the long term benefits of reducing trauma on the child or vulnerable witness, obtaining more reliable evidence, and making the court process more efficient – and any structural, or cultural challenges must be viewed in this context.

Further, in our view, the presumption should apply not only in criminal trials but in civil proceedings, such as children's hearings proof proceedings.

In relation to prior statements, it is difficult to see how an initial focus on solemn cases would work in practice, as at the point a prior statement is recorded, it may not be clear whether the case will proceed on a summary or solemn basis. Further, we believe there should be greater alignment between all civil and criminal cases – focussing on one type of criminal case to the exclusion of other proceedings would be counterproductive to that. Looking at this issue through the lens of reducing trauma to child or vulnerable witnesses, it makes no difference to the witness if the trauma occurs in solemn proceedings or in children's hearings proof proceedings.

In relation to evidence taken by commissioner, in England, section 28 pilots are available to those witnesses assessed to be the most vulnerable. Ideally, the same approach should be taken here. However, this introduces an element of subjectivity and reliance on the most vulnerable witnesses being identified quickly and appropriately. Therefore, it may be better to simply apply objective criteria, such as:



- Any person under the age of 16 who is subject to a child protection JJI;
- Any person under the age of 18 who is alleged to be the victim of or witness to certain offences, such as:
 - Any offence under Part 1 of the Criminal Law (Consolidation) (Scotland) Act 1995
 - Any offence under the Sexual Offences (Scotland) Act 2009
 - 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
 - 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 or there is significant physical or emotional harm to a child
 - Any assault in which the alleged perpetrator is in a relationship of trust with the complainer.
 - An offence involving the commission of domestic abuse (for example an offence in terms of the Domestic Abuse Bill)

In course of time, all witnesses considered to be vulnerable by virtue of section 271(1) of the 1995 Act and section 11 of the 2004 Act ought to benefit from the presumptions. In the meantime, Section 11 requires to be extended in line with section 271(1) to include victims or witnesses to sexual offences, to those with a personal relationship with a perpetrator of domestic abuse or stalking, and to offences involving human trafficking. NB it is not clear to us why section 271(1)(c) does not contain a wider list of sexual offences, such as certain offences under the Sexual Offences (Scotland) Act 2009.

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 ?

Yes.

If the presumption of prior statement and evidence by commission applies to those under the age of 18 and ultimately all vulnerable witnesses, then all vulnerable witnesses (not just those under 12) will need to have the opportunity to express the wish to give evidence at the trial.

However, the key issue here is that any vulnerable witness is properly, fully and independently informed of their options and the risks and benefits of each option.



Where a witness is properly informed, we would anticipate very few witnesses taking the option of giving evidence in the trial or proof. There needs to be consideration of an independent victim information service (perhaps an extension of the current victim support service), or an intermediary service – one or other must be available to **all vulnerable witnesses in civil and criminal proceedings. Currently Victim Support Scotland and its Witness Service are only available to victims and witnesses in a criminal trial. This is a significant gap.**

Even where a vulnerable witness expresses the view that he or she wishes to give evidence at the trial, the court must still determine whether that is necessary or appropriate. There should be a ground rules hearing type hearing to discuss the relevance and necessity of any questions sought to be put to the witness.

Where a vulnerable witness **does** have to give evidence in court, either at a criminal trial or at a proof, it is important that the witness is dealt with appropriately, and that practice improves from where we currently are. In our view, that means enforcing a requirement that special measures are considered timeously, that the views of the witness is sought, that best practice around court familiarisation is carried out, that the treatment of the vulnerable witness on the day of giving evidence is appropriate and sensitive, and questioning is only carried out where necessary and in an appropriate manner.

Introducing a ground rules hearing in **every** case in advance of a child or other vulnerable witness being questioned in court would be a major step in achieving this. The ground rules hearing would consider all the matters that are set out in the High Court Practice Note on Evidence Taken by Commissioner. However, there would also have to be provisions in civil and criminal procedural rules requiring a vulnerable witness application to be made within a number of weeks of proceedings beginning (any later than that requiring cause shown) and a requirement to take the views of the vulnerable witness on which special measure would be appropriate.

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?

All witnesses should have right to express a wish to give evidence in the trial or proof, but this will only work appropriately if any vulnerable witness is properly, fully and independently informed of their options and the risks and benefits of each option, as outlined in relation to question 4 above.

The Court should have the authority to decide that, for any witness, giving evidence in the trial is not appropriate, despite the witness's wishes. See Q4



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

Yes

However, this should not be the presumption, given the additional considerations that apply.

Any evidence taken by commissioner of an accused child would need to be kept entirely separate from that of a vulnerable victim or witness i.e. separate date or location.

Question 7 - Are there are 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?

Yes

In broad terms, the evidence of a witness or child accused should be approached in the same way as the evidence of a witness or accused would be approached without the pre-recording. However given the accused has certain rights (for example, right not to self-incriminate) it may be that different issues around questions to be asked will arise at Grounds Rules Hearings than would arise in relation to a witness.

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

Yes.

We believe that in many or indeed most cases it will be sufficiently clear what requires to be proven even before the indictment has been served.

The delay in relation to implementation of the section 28 pilot in England was in relation to perceived system barriers such as the belief that disclosure was unlikely to be completed until just before the trial. This perceived problem was overcome in practice through tight timetabling enforced by judicial case management, and we believe that similar solutions can be employed in Scotland [15].

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?

Barriers could include:

1. Failure to identify vulnerable witnesses quickly enough;
2. Lack of knowledge in relation to appropriate questioning of children;



3. Late disclosure of evidence;
4. Lack of preparation for appropriate questioning of witness;
5. Unfamiliarity with how to arrange evidence taken by commissioner in practice;
6. Court time/listing challenges in relation to ground rules hearings and in relation to the taking of evidence;
7. Insufficient resources to expedite prosecution preparation;
8. Quality and availability of equipment and knowledge of how to use this to best effect.

The same or similar barriers would apply in children's hearings proof proceedings.

Many of these barriers have been encountered or were anticipated in the English section 28 pilot. Research and the Process Evaluation (referred to earlier) have shown how these barriers were overcome or could be overcome. Despite the barriers, the section 28 pilot demonstrates the huge benefits that can be achieved, both in terms of a better service for witnesses and more efficient courts. Further, as changes bedded in, barriers lessened. We can learn from the experience in England.

A small operational working group should meet in advance of implementation to identify barriers and ways to reduce them in advance of implementation. In the pilot or phasing in, improvement methodology should be used to challenge and react to barriers as they arise. SCRA would be happy to take part in this.

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?

In terms of effectiveness of evidence taken by commissioner, introducing legislative presumptions is not enough. Legislation has to be accompanied by rigorous case management and judicial control, and heightened awareness of inappropriate questioning. This is achieved in England through pan professional training, delivered by barristers and judges, court rules, toolkits and Ground Rules Hearing. These are all essential to the effectiveness of evidence taken by commissioner

Evidence by commissioner might be more effective and cost efficient if recording facilities were provided in-house by SCTS as opposed to private contract. There also needs to be training and guidance on how to conduct evidence by commissioner in practice, particularly where a prior statement is being used (e.g. no need for witness to sit through playing of recording of JII).

It would be helpful to have local SCTS "experts" to advise on technology and administrative issues.

It is not clear what is meant by the word "proportionate" in this context. We cannot envisage any Article 6 difficulties with this approach. If it is a reference to costs, then



the costs incurred in relation to evidence by commissioner, for example preparation to question a vulnerable witness, would or should have been incurred in relation to a witness giving evidence at the trial.

The only additional expense is the cost of recording (if any) and the time to play the recording during the trial. Initially, more time may be taken in relation to ground rules hearings until these become “business as usual”.

However, any real additional costs and structural barriers to change must be weighed against the impact of reducing trauma to the witness, increasing reliability of evidence, reducing the time of cross examination, raising awareness of inappropriate questioning and making courts more efficient.

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

Yes.

However, for a ground rules hearing to be successful, it must be conducted before a judge who has had specialist training and experience in advocacy regarding vulnerable witnesses, such as the pan professional training that takes place in England. This should include everyone involved including judges, advocates, solicitors and children’s reporters. Research indicates that lack of pan professional training can result in confusing and inappropriate questions being proposed and approved at a ground rules hearing.

However, there are already toolkits available on how to appropriately question a vulnerable witness, and we can learn from the experience in other countries to develop a training programme so that this change can be implemented.

In our view, introduction of well-conducted ground rules hearings, described as the key to success in the English pilot, could be achieved relatively quickly in Scotland.

In fact, ultimately, a ground rules hearing should be a requirement in every civil and criminal case where a vulnerable witness is to be questioned, whether the evidence is pre-recorded **or** given at the trial or proof. It is important that vulnerable witnesses who do not benefit from pre-recording for whatever reason (e.g. not identified in time, or choose to give evidence) do not get a 2nd class service, and that any questioning of a vulnerable witness, particularly in court during a trial or proof is appropriate and necessary.

The Ground Rules Hearing should require questions to be submitted in writing in advance which has been successful in the English pilot. The Ground Rules Hearing should deal with any additional questions in chief as well as cross-examination. Any re-examination questions also require to be judicially approved, with a brief adjournment for a short ground rules hearing before re-examination begins.



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

The ground rules hearing should take place as soon as possible. Proposals for any further questioning of the witness should be submitted in writing in advance of the ground rules hearing. The timing of the ground rules hearing will have to allow sufficient time for submission of these questions and also accommodate the ability to effect the practical arrangements for the vulnerable witness in time for the commission, including appropriate preparation of the witness.

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

No.

We cannot see any particular reason why the same Judge/Sheriff would have to act as Commissioner and also preside at the trial. It may be better for the vulnerable witness for the evidence by commissioner to take place locally, and judicial continuity would likely be a barrier to this. Nor do we think the same judge requires to be present at the Ground Rules Hearing and the recording of the commission, provided the decisions at the Ground Rules Hearing (and the wording of the questions) are properly recorded.

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

Yes.

But only in exceptional circumstances.

The example given in the preamble to this question is a late application for an additional special measure such as using a prior statement as the child's evidence in chief. However, this would be presumed to be a standard special measure. Therefore, it is not clear to us why any late application for a special measure would be required or how this would work in practice.

The only special measure that we can think might be necessary at late notice is a supporter.

However, we should be encouraging special measures to be thought about and discussed with the witness well in advance. We should be discouraging any last minute "challenges" to the special measures already agreed.

Any variation or addition to current arrangements should only be made in exceptional circumstances, on cause shown.



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

Yes.

However, the main focus of the Ground Rules Hearing will have been agreeing the questions to be asked during a pre-recorded cross examination. Therefore, questioning beyond what has been agreed should only be allowed in exceptional circumstances and under no circumstances on topics which were clearly “outlawed” at the Ground Rules hearing.

The questions submitted in writing, as in England, should set out alternatives depending on the witness’s response. This has been described as very effective. We should expect a similar level of success in Scotland.

If there is an answer which is completely unanticipated and a question which has not been pre-agreed may need be asked, there should be a brief pause whilst this is discussed. For this reason, the Commissioner will need to have the power to decide whether to allow this question. We should anticipate that such a situation would be very rare.

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

The evaluation and research [16] into the value of the section 28 pilot shows that successfully implementing pre-recording evidence in advance of trial cannot be achieved by legislative change alone. This has to be accompanied by rigorous case management and judicial control, and heightened awareness of inappropriate questioning.

In England:

- There is free pan-professional training on vulnerable witness advocacy (delivered by judges and experienced barristers),
- the Advocacy Gateway Toolkits are explicitly recognised as best practice,
- Advocates must confirm they have read the Advocate’s Gateway toolkit on questioning vulnerable witnesses in advance of the GRH and provide their questions to the judge in advance.
- Civil and criminal rules and practice directions contain specific and detailed requirements in relation to vulnerable witnesses, including a ground rules hearing in every case.
- There is an intermediary service for witnesses with communication difficulties.



It is likely that all of this will be required in Scotland to ensure that practice changes in the intended direction.

Further, it is our view that in evaluating different options to take forward, the Scottish Government should utilise an options appraisal method, with agreed criteria including: reducing trauma to witnesses, making courts more efficient, reducing the time taken on cross examination, making evidence more reliable, and reducing “cracked” trials. In addition, a child equality impact assessment should be carried out – to ensure that children’s needs are kept at the centre. If possible, children should be involved in the evaluation of the pilot to ensure that their views are heard.

Whilst this consultation relates to criminal trials, children’s hearings proof proceedings face are affected by the same issues in relation to both the use of pre-recorded evidence and the potential for traditional approaches to traumatise witnesses. Therefore, we ask that children’s hearings proof proceedings benefit from similar changes to any made in the criminal sphere.

SCRA would be happy to work with other agencies to develop practical delivery of these presumptions, to delivery of ground rules hearings and ultimately a Barnahus type system.

SCRA September 2017

1. 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>, paragraph 2.1-2.4, 2.79, 3.7 and 2.102; 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
2. Scottish Court Service (2015) paragraph 2.66; Maclennan v HM Advocate 2016 SLT 339 para 27 “There can be little force in a general objection which seeks to prevent a recorded interview taken in the initial stages of a police investigation being used as proof of fact in the case of a very young child complainer. That material is likely to be the most accurate account of events, at least if the questioning is such that does not suggest the answers.”
3. Civil Evidence (Scotland) Act, section 2
4. Iceland has an adversarial system and was the originator of the Barnahus system
5. See JS v Children’s Reporter 2017 SC 31, at para 26
6. Andrews and Lamb (2016); 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.archbold-update.co.uk/PDF/2016/Archbold%20Issue%208%20PRESS.pdf> ‘Intermediaries



observe that even experienced advocates can revert to complex wording when unprepared.’, and ‘Even in advance of roll-out, some judges around the country are asking lawyers to submit cross-examination questions for review when dealing with a vulnerable witness or defendant. However, many advocates and some judges (whose own unscripted questions may confuse the witness) appear insufficiently equipped for this task. For example, a judge preapproved this complex question for a five-year-old: “If I said that K told you that if you said S did something to you, she would get some money. Do you agree?” ‘

7. See 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 - in particular pages 49-53
8. Including a seeming lack of awareness of the provisions in sections 173-175 of the Children’s Hearings (Scotland) Act 2011 which prevents questioning in relation to sexual history or character in section 67 grounds involving sexual matters, without prior application to the court, or a readiness to permit such questioning. This accords with research in criminal trials – see Burman, M: Evidencing sexual assault: Women in the witness box, *Probat. J.*, (2009) Vol 56(4): 1–20: At (<https://www.rapecrisisscotland.org.uk/resources/Evidencing-Sexual-Assault-Burman.pdf>)
9. Scottish Court Service (2015); Andrews and Lamb (2016); Emily Henderson, Reforming the cross-examination of children: the need for a new commission on the testimony of vulnerable witnesses *Arch. Rev.* 2013, 10, 6-9
10. Ministry of Justice (2016)
11. Ministry of Justice (2016); Plotnikoff and Woolfson (2016)
12. *Ibid*
13. Questions relating to irrelevant or collateral matters or questions which are unlikely to assist the court such as “generalised accusations of lying, or by a fishing expedition in which the child is taken slowly through the story yet again in the hope that something will turn up, or by a cross-examination which is designed to intimidate the child and pave the way for accusations of inconsistency” In *Re W (Children) (Family Proceedings: Evidence)* [2010] UKSC 12
14. (1) The standard special measures are different as between civil and criminal proceedings:
 - tv link from within or outwith the court building is a standard special measure in criminal proceedings but in civil proceedings it is only standard from within the court building (contrast sections 271A(14) and 271J of 1995 Act with section 12(3)(a) of 2004 Act)
 - the use of a supporter is only a standard special measure in civil proceedings if it is in conjunction with a screen or tv link from within the building, whereas in criminal proceedings, the use of a supporter is a stand-alone standard special measure (contrast 271A(14) and section 271L of the 1995 Act with section 12(3)(a) of 2004 Act)
- (2) there is currently no prohibition on personal conduct of questioning in children’s hearings proof proceedings whereas there is in certain criminal



proceedings (see sections 288C and 288E of the 1995 Act, this is despite the fact that section 185 of the Children's Hearings (Scotland) Act 2011 introduced subsection 32(1)(ed) in the Sheriff Courts (Scotland) Act 1971, presumably now section 104 Courts Reform (Scotland) Act 2014, which specifically provided for rules to be enacted to prohibit such questioning – no such rules have been enacted)

(3) a witness in a children's hearing proof in relation to a section 67(2)(j) ground cannot refresh his or her memory by referring to a prior statement whereas a witness in a criminal trial can do so (section 262(3) of the 1995 Act excludes the application of section 261A from a proof in relation to a section 67(2)(j) ground – though it is not clear that this is intended as there does not appear to be any logic to the exclusion).

15. Plotnikoff and Woolfson (2016)

Ministry of Justice (2016); Plotnikoff and Woolfs

