Evidence and Procedure Review – Next Steps

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Evidence and Procedure Review - Next Steps

Introduction

1. This Report follows on from the Evidence and Procedure Review Report published by the Scottish Court Service (as it then was) on 13 March 2015[1], and should be read in conjunction with that Report. The Review was chaired by Lord Carloway (then Lord Justice Clerk), who in 2013 had called for "clear-sky thinking" to help modernise trial procedures still rooted in the Victorian era[2]. The Review was intended to initiate that thinking by exploring the best way to ascertain the truth in the context of the criminal trial, given the technology now available. In particular, it researched what contribution might be made by the greater use of pre-recorded evidence, focusing on practice and experience in other jurisdictions.

2. The Review had occurred because a number of factors came together at much the same time to produce a compelling case for change. The first of these factors was the fact that change in technology had radically altered – and was continuing to alter – the way in which individuals, businesses and other organisations conduct their affairs in all aspects of life. The world was and is changing rapidly, and with it so too are people's expectations of public services. The Review pointed out that, in an era in which people and businesses communicate instantly by electronic messaging and social media, they will expect public services to adopt similar methods, rather than cling to paper and postal-based practices or to a continued reliance on summoning parties to meet face-to-face when speedier and more convenient alternatives are reasonably available. It was not just a case of the justice system keeping up with public expectation. As with so many aspects of both commercial and public sector services, there was an increasing awareness that new technology could provide the means for transforming the quality of the service provided. For the justice system, technology could, in the words of Lady Dorrian, provide:

> *"…an opportunity to make justice more accessible to a wider number of people, to make evidence more reliable and more readily available, and to make processes and procedures more efficient. This is not just about fixing the problems of the current system, tinkering with what we have; it should be about taking advantage of new technologies to design a justice system that will meet the requirements of society in years to come."*[3]

3. The second critical factor was the need to address the current inefficiencies within the criminal justice system. There was concern that, despite changes to summary procedures and

[1] 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

[2] Lord Carloway, *Scots Criminal Evidence and Procedure – Meeting the Challenges and Expectations of Modern Society and Legal Thinking*, Criminal Law Conference, Murrayfield 9 May 2013 available at http://www.scotland-judiciary.org.uk/26/1045/Lord-Justice-Clerks-speech-at-the-Criminal-Law-Conference

[3] Lady Dorrian, *'Digital Justice Strategy: A view from the courts'* Edinburgh, 20 August 2014 available at http://www.scotland-judiciary.org.uk/26/1301/Speech-by-Lady-Dorrian-at-the-launch-of-The-Digital-Strategy-for-Justice-in-Scotland

practices introduced in the Criminal Proceedings etc. (Reform) (Scotland) Act 2007, current trial procedures are still not able to cope as well as they might with the volume and nature of cases. Audit Scotland highlighted these inefficiencies in its 2011 report *An overview of Scotland's Criminal Justice System*, which identified that in 2009-10 37% of cases repeated at least one stage of the court process, at a cost of at least £10m; that late decisions not to proceed cost a further £30m; and that "late" guilty pleas cost £47m[4]. In its follow-up report in 2015, *Efficiency of Prosecuting Criminal Cases through the Sheriff Courts*, Audit Scotland identified that churn and inefficiency is still a problem, with 39% per cent of all appearances at intermediate diet, and 38% of all appearances at trial diet, being subject to churn and delays[5]. This report also highlighted the continuing high incidence of the late resolution of cases just prior to trial.

4. The Evidence and Procedure Review Report identified a number of factors that create churn in the system. These included the failure of witnesses to turn up on an appointed trial day, with close to 6000 summary trials being adjourned each year because of the failure of a witness to attend when required. Other factors include failures to obtain, view or disclose relevant evidence in advance of an intermediate diet or preliminary hearing. These delays bring costs, not only in the need to reschedule or repeat hearings, but also in the knock-on effects of disruption and inconvenience for those witnesses and jury members who have turned up as required. There is some concern at the amount of police resource that is diverted from front-line duties by the time spent by police witnesses waiting at Court to give evidence.

5. Given that the underlying purpose of the Review was to help enhance the system's ability to ascertain the truth, it was also driven by a concern about the quality of evidence. It is quite normal under current procedures for a witness at trial to be asked to provide an account of events that took place months or sometimes years earlier. The Report made it clear that the Review team, like the Law Commission in England and Wales, felt that the weakness of a reliance in such oral testimony was that it requires us:

> *"...to accept two remarkable scientific propositions: first, that memory improves with time; and secondly, that stress enhances a person's powers of recall."*[6]

6. The question had to be asked whether, now that there are means by which a witness' testimony can be reliably recorded much closer to the event, the best available evidence may not be that given at trial long after the relevant events have actually occurred. Furthermore, the Review noted that the idea that testimony given at or soon after the alleged offence is of evidential value was being given some force by the increased use of prior statements as a means of leading evidence from the principal witnesses. There are risks with a reliance on using such statements in this way. In the words of Lord Coulsfield:

> *"The complaint has been made that too often the result is that the trial takes the form of a one-sided memory-test, where any discrepancy between the* witness's words at

[4] Audit Scotland, *An overview of Scotland's Criminal Justice System*, Sept 2011, p30
[5] Audit Scotland, *Efficiency of Prosecuting Criminal Cases Through the Sheriff Courts* Sept 2015 paras 45-54
[6] The Law Commission, *Evidence in Criminal Proceedings: Hearsay and Related Topics* (LC245), para 10.31

> *court and the words in their statement may be the subject of meticulous cross-examination. Sometimes this may be valid and important, but in many cases it seems of dubious value for the pursuit of justice."*[7]

7. One further and related area of concern which motivated the Review was the perception that significant improvements could still be made to the way in which we take the evidence of children and other vulnerable witnesses, building on recent changes to legislation. Recent cases featuring young children had revealed that such witnesses were being questioned for long periods and in ways that were both unlikely to elicit the best quality of evidence from them, and likely to cause them further distress.

8. The Evidence and Procedure Review was conducted under the auspices of a steering group chaired by Lord Carloway, then Lord Justice Clerk. The Review team conducted research into the extensive academic literature on the issues raised. Members of the Group also took part in study visits to other jurisdictions, such as England and Wales, the Netherlands and Norway and held discussions with practitioners and academics with relevant expertise in these matters both in Scotland and elsewhere. The Review focused on exploring experience in other jurisdictions in relation to pre-recorded evidence, as a way to stimulate some "clear-sky" thinking in relation to trial procedures. It studied, observed and discussed practice in both common law and civil law jurisdictions to discover what ideas might be brought back to Scotland for further discussion and development.

9. The Review's Report called for Scotland to harness the opportunities that new technologies bring to improve the quality and accessibility of justice. It used the research to suggest ideas that could help transform the conduct of criminal trials, in particular in relation to the evidence of children and vulnerable witnesses, and also in relation to witness statements in general. In relation to children and vulnerable witnesses, it outlined in some detail how some other jurisdictions have adopted or are piloting different approaches. In particular, it detailed the development of procedures for pre-recording both the evidence-in-chief and cross-examination of young and vulnerable witnesses in Australia and in England and Wales (under s28 of the Youth Justice and Criminal Evidence Act 1999). This approach is known as the "Full Pigot" after it was recommended in the 1989 *Report of the Advisory Group on Video Evidence*, chaired by HHJ Thomas Pigot QC. The Review report also detailed the "Barnehus" system used in Norway, where a child witness undergoes a forensic interview by a single interviewer in a purpose-built facility, under the guidance of a judge and with the mediated participation of the relevant legal representatives.

10. The Lord Justice Clerk made it clear at the time of its publication that the Report was "not a fully developed, fully costed and evaluated set of policy proposals, and was never intended to be" [8]. It was intended to flag up possible areas for the Government's consideration and to point towards the opportunities for reforming the system if the will and necessary resources are there. The Report recognised that before any such proposals could be developed, it would be necessary to test the

[7] *Review of the Law and Practice of Disclosure in Criminal Proceedings in Scotland* (2007) at para 5.42
[8] http://www.scotcourts.gov.uk/docs/default-source/SCS-Communications/evidence-and-procedure-review-launch.pdf?sfvrsn=2

propositions in the report with those who know and understand how the legal system works here in Scotland.

11. The Justice Board, which is the forum that brings together all the main justice agencies such as Police Scotland, the Crown Office and Procurator Fiscal Service (COPFS), the Scottish Legal Aid Board, the Prison Service, Children's Reporters Administration, Courts and Tribunals and the Scottish Government, agreed that there should be a process of initial discussions involving all those with a stake in the criminal justice system. A small project team based in SCTS conducted a series of workshops, seminars and discussion groups. In the development of these sessions, the team took advice and guidance from a reference group consisting of representatives from justice agencies, the legal professions, third sector organisations and academia. The Reference Group also provided a forum for discussing the themes emerging from the various workshops.

12. At its initial meeting, the Reference Group considered how best to structure these discussions and suggested that it would be sensible to focus them on Chapter 2 of the Report, which looked at the experience of children and vulnerable witnesses. The Group considered that this area presented the most likely opportunity for early progress, given the broad underlying support for measures to improve the experience of victims and witnesses, the fact that there is policy impetus behind at both a European and a national level, and the fact that there were clear examples of good practice in other jurisdictions from which lessons could be drawn. The focus of discussions was, therefore, on the issues raised in Chapter 2 of the Report and on the implications of implementing either a "Full Pigot" style procedure in Scotland, or something more akin to the Norwegian Barnehus model. The programme which ran over the course of the Summer included:

- workshops open to all those with an interest;
- lunchtime seminars at some Sheriff Courts, aimed particularly at defence agents, COPFS and Court staff; and
- sector or organisation specific sessions, with the police, social work practitioners, the legal profession, and organisations representing the interests of victims and witnesses. The project team were particularly grateful to Rape Crisis Scotland for arranging a session with a small number of women who had directly experienced the criminal trial process as complainers.

13. The project director also attended relevant conferences, including two in London which were particularly useful in giving further information about the s28 pilots in England and Wales, and in developing approaches to make best use of technology in court procedures[9].

14. This did not, however, mean that the further issues raised in Chapters 3 and 4 of the Report were not considered further. A different approach was, however, taken to this. In some of the early discussions with stakeholders where the more widespread use of pre-recorded evidence was considered to a certain extent, it quickly became clear that this presented a complex network of inter-related issues.

[9] Advocacy Training Council, *Addressing Vulnerability in Justice Systems* and Govnet *Modernising Justice*, both London, June 2015

15. It was difficult to separate the concept of pre-recorded statements in general, as a technologically-driven innovation, from the broader issue of digital evidence. If witness statements were to be digitally provided, then why not other forms of evidence, such as productions, photographs and all other forms of documentation? It was recognised that if there were a move in general to provide evidence in digital form, this could potentially transform the nature and dynamic of the criminal trial process and the infrastructure and systems required to support it; it may also require a fundamental change to police procedures in the investigative stage. On the other hand, switching immediately to the use of pre-recorded witness evidence for 140,000 summary cases each year may be overwhelming, and there would be significant cross-sector implications around the supply and storage of the necessary digital media and technology. The full implications of this would need to be thought through in terms of the criminal justice system as a whole.

16. With these principles in mind, there was some further internal work done under the auspices of the Justice Digital Strategy to consider the implications of making full use of digital technology, including but not limited to pre-recorded witness statements, particularly in respect of summary procedures. The aim of this exercise was to scope out a very high-level conceptual model of potential summary justice procedures in the light of the technology that will be available in the near future. This was a continuation of the "clear-sky thinking" that informed the original Evidence and Procedure Review process, and built on some of the ideas in the Report. It also was designed to take into account some of the thinking on modernising criminal justice systems that was emerging in other jurisdictions, most notably in England and Wales following the Leveson report[10], of which Sir Brian Leveson himself said:

> *"My starting point was to underline that for the last 50 years we have successively bolted on new procedures to an old fashioned framework and to recognise that this hotchpotch of new and old is simply not an effective long-term solution for the problems that we face in the digital age that is the 21st century."*[11]

17. This Report:

- describes the further development of the thinking contained in the latter chapters of the Report, particularly in relation to summary cases;
- outlines the findings from the discussions that took place in relation to children and vulnerable witnesses; and
- makes recommendations based on both streams of work.

18. Part A of this Report describes some of the further developmental thinking that has taken place within the justice agencies about the scope for digitising summary justice procedures in the light of the principles outlined in the original Review. Part B focuses on the main topics that were discussed in depth in the various discussions over the summer, relating to the treatment of children and vulnerable witnesses. It reaches a number of recommendations in relation to potential improvements that can be made in solemn cases.

[10] The Rt Hon Sir Brian Leveson, *Review of Efficiency in Criminal Proceedings*, January 2015
[11] Speech by Sir Brian Leveson to Westminster Legal Policy Forum Seminar, October 2015

Part A

Wider modernisation issues - an agenda for change

19. As described above, further work was undertaken as part of the Justice Digital Strategy to apply some of the "clear-sky thinking" that informed the Evidence and Procedure Review to the use of technology in criminal procedures. Given that one of the motivating factors behind the original review was the concern that "churn" is still endemic within the summary justice system in particular, the work was focused on developing an initial conceptual model for the modernisation of the summary justice system. It should be emphasised that this initial work was only to provide a high-level concept which, if it appeared to have potential merit, could then be fleshed out further and tested, before a fully workable set of proposals could be developed.

20. In this conceptual model there were two main elements, considered further below:

- as the underpinning basis for transforming summary justice procedures, there should be an approach that allowed for most evidence to be created, stored and managed digitally; this would unlock the potential for increasing the speed, efficiency and quality of the decision-making process; and

- with such a digital evidence store in place, this would allow for much more of court procedure to be conducted administratively and digitally through a rigorously applied case management process, with only issues in dispute needing to call in court before a Sheriff.[12]

Digital Evidence

21. The Justice Digital Strategy, published in 2014, raised the prospect of a "digital evidence vault to securely store all documents, audio, pictures and video content"[13]. At the time that the Strategy was published, this concept was still in its earliest stages of development. There was, however, a growing recognition that a system in which all the relevant material attached to a case might be accessible and manageable digitally could lead to very significant improvements in the efficiency and effectiveness of the system. The critical feature of this would be the common storage of evidence in a format that would allow a systematic approach to managing evidence at each stage of a case. To date the justice system has applied a piecemeal approach to the implementation of digital evidence gathering and storage. Justice organisations, which for important constitutional reasons require to maintain clear boundaries between their respective operations, have developed their own systems largely independently of one another and handle evidence in different ways.

22. This piecemeal approach is in some ways understandable. Different areas of technology have developed faster than others (such as the relatively recent explosion in handheld devices able to

[12] Consideration was given only to summary procedures in this process, although there will clearly be potential benefits of digital evidence storage for solemn cases as well.
[13] *A Digital Strategy for Justice*, August 2014. http://www.gov.scot/Publications/2014/08/5429

record high quality video compared to older fixed position CCTV which are of a much lower quality). Criminal procedure and the law regarding the handling of digital evidence has had trouble keeping pace with technology. The description below of how photographs are used in trials is a good example of the way in which current arrangements do not make best use of available technology[14].

Photographs

Police Scotland currently captures some evidence digitally, for example photographs of a crime scene. These photographs are stored digitally by Police Scotland but printed off into bulky "photobooks" and passed to COPFS to consider along with the rest of the evidence and Standard Police Report ahead of making a prosecution decision. If there is to be a prosecution, COPFS will then scan the photobook onto an IT server to allow the pictures to be viewed digitally by Defence agents as part of the Disclosure regime. If required for a trial, the photobook will then be passed to SCTS, who arrange for the photos to be projected on a screen in the courtroom by a court official pointing a camera at the relevant pages of the photobook.

23. There is reason to believe that the wide scale adoption of digital evidence, and the simplification of rules surrounding this, would significantly benefit the practical administration of justice, providing efficiencies and savings to organisations in the system. It might also provide the basis for earlier decision-making, including early pleas, and help to reduce churn and the unnecessary citation of witnesses. These issues are explored further below. And, as discussed in the original Evidence and Procedure Review Report, there is a strong reason to believe that the digital capturing of evidence (particularly witness evidence) would, in the vast majority of instances, not only make processes more efficient, it would also provide a better quality of evidence. Audio-visually recorded statements would also be more compelling than written statements – which are currently used often in trials – as they capture the actual words spoken by the witness, rather than a police officer's account, and the manner in which the statement was given.

24. It is acknowledged that other forms of physical evidence, such as productions, photographs and documents would be digital reproductions, rather than the originals, and therefore may not represent the traditional view of what constitutes "best evidence". But digital reproduction is increasingly a feature of everyday business, and should be acceptable as best evidence provided there is a robust means of certification and authentication.

25. It is of course understood that the development of a full specification for a system to store and manage digital evidence and other relevant information requires a great deal more detailed work. This work will need to be informed by the developing ideas about how criminal justice procedures will change in the medium term, to ensure that any facility that is introduced will be able to support those new procedures and the requirements they generate.

[14] It must, however, be acknowledged that work is under way between Police Scotland and COPFS to move to electronic transmission of photographs.

System Efficiencies

26. A system using digitised evidence would hopefully provide access to evidence to those who need it, when they need it. This potential efficiency can be highlighted in three areas:

1) Earlier Access to Evidence – A key foundation to an efficient system is early decision-making. Seeing evidence early (not just seeing the police report) allows prosecutors to make decisions in relation to which charges to proceed with, whether to instruct the police to make further investigations, or indeed whether to proceed with a prosecution at all. In 2013-14, 9685[15] people had their Not Guilty plea accepted or the case against them abandoned by COPFS after court proceedings had commenced. Having access to evidence earlier may allow these decisions to be taken sooner by COPFS, potentially before any court process has begun.

2) Early Sharing of Evidence – One of the most common comments during the summer workshops concerned the difficulties in securing early sharing of the evidence with the parties. A system that fully employs digital evidence should allow all parties to see evidence much earlier, allowing for cases to be prepared at an earlier stage and with greater certainty as to the evidence that will be presented at trial. This should allow for a range of efficiencies, including the earlier and more widespread agreement of uncontroversial evidence, and the earlier resolution of cases, either by means of an accepted not guilty plea or earlier guilty pleas[16].

3) Efficiencies in the Storage and Sharing of Evidence – Currently evidence is duplicated around the justice system and held in different places and in different formats by the various justice organisations. A system employing digital evidence could significantly reduce both duplication of work, and storage costs if a shared digital repository for evidence was used.

27. The combination of earlier plea rates and the fact that witness and other evidence will be available prior to trial should lead to reduced court loadings, less churn and fewer witness citations.

A New Case Management Process for Summary Proceedings

28. The second element of the conceptual model involves the use of digitally captured evidence in a case management system that aims to reduce the reliance on pre-trial hearings that require the physical presence of the participants. The original Evidence and Procedure Review Report described a potential model for the use of pre-recorded witness statements that involved a higher degree of active judicial case management. It would be possible to apply these principles more generally to

[15] Criminal Proceedings in Scotland 2013-14, Table 2a

[16] It is arguable that the combination of capturing of evidence digitally (particularly a digitally recorded witness statement), earlier case marking, and earlier disclosure is likely to contribute to earlier guilty pleas. In Aberdeen, a pilot of Body Worn Video (BWV) by Police Scotland officers has been underway for several years. Between 1st April 2013 – 30 June 2014, 91% of cases reported where BWV formed part of the evidence resulted in a guilty plea before commencement of trial. Nationally, the guilty plea rate before commencement of trial (for financial year 2013-14) was only 45%, with 24% of guilty pleas coming at the trial diet itself. Due to this 91% plea rate it is estimated 697 police officers and 453 civilian witnesses did not have to attend court.

secure a much more effective means of managing court business that still meets the highest standards of fairness.

29. At the very least, experience in other jurisdictions suggests that considerable efficiencies can be secured through the automation of many procedures currently carried out by traditional means.[17] At the most basic level, case management systems can provide a more reliable means of document sharing, scheduling and timetabling. The possibilities for improving the quality and flow of business through the criminal justice system reach beyond the mere modernisation of existing procedures. The exploratory work undertaken suggested that it would be possible to take advantage of modern technology to amend pre-trial processes quite significantly in order to bring about a far more effective and streamlined justice system, in which hearings occurred only when they are required to address substantive issues in order to ensure any ensuing trial proceeds smoothly and fairly.

30. This last point is critical - the purpose of introducing a new, digitally enabled case management system should be to allow for the earliest consideration by all parties of the evidence that is being brought in the case, with a focus on those matters on which the case will be determined. In other words, an accused should only stand trial where it is clear that there is body of evidence which can and will be led to support a prosecution case, where the defence has been given sufficient opportunity to consider that evidence, and has determined that it wishes to take issue with the case against the accused. An accused's right to have examined the witnesses against him or her is essential for a fair trial, and the effective delivery of that right relies on full early disclosure and a clear focus on those issues which are in dispute. Any new case management process should be designed to promote that early disclosure, allow proper and full consideration of the evidence in advance of trial, and to enable the trial itself to be conducted only on those matters that require further examination. Evidence that is not in dispute should be agreed in advance, and only those witnesses whose testimony sheds light on the matters in dispute should be called.

What might a new case management process look like?

31. The features of a summary justice system enabled by digital evidence and digital case management might include:

1. Once a prosecution has been initiated, the traditional method of allocating intermediate and trial dates upon receiving a Not Guilty plea should be avoided. In a case where the first court appearance is from custody, only the matter of the accused's liberty (assuming a not guilty plea is maintained) should be decided upon.

2. Instead of allocating diets, a case would immediately enter the digital case management process where a series of time-limits would be issued dictating when key events should occur. For example:

[17] See, for example, the description of the paperless approach taken in Minnesota, as described by Judge Peter Cahill at Govnet's Modernising Justice conference, London June 2015: https://www.youtube.com/watch?v=tUnei29XNXk

- Setting a date by which Disclosure should take place.
- Setting a date by which prosecution and defence must agree evidence and which issues are in dispute.

3. This process would have judicial/administrative oversight and rely on the digital consideration of relevant documents and evidence. Once issues in dispute are agreed, only then would a trial diet be issued and witnesses cited.

4. Where matters cannot be dealt with via this digital case management process, or when time limits are not met, then a traditional pre-trial court hearing should be set. Pleas of guilty could quickly be dealt with in such a system, where instead of having to wait for a pre-allocated diet weeks ahead to tender the guilty plea, it could be done digitally at any point with a sentence imposed via the same digital method in a short time period (of course where the severity of the offence dictates that the sentence should be imposed in court, e.g. if custody is a consideration, then a traditional sentencing hearing can be arranged).

5. A modern digital case management process may also be able to offer other benefits such as a "track your case" style system for witnesses or accused persons who will be able to keep track of the digital case process easily, for example via smart phones. This interactive digital process may also include a "make a plea online" element for unrepresented accused, allowing pleas currently dealt with by post to be fully digitised.

6. The legal aid process and fee structures could be changed to support the effective operation of the new case management system

32. While it is difficult to predict the extent to which a more robust case management process might work faster than the current system, it would certainly provide a significant reduction to the number of witnesses cited to appear at trial. This will bring not just financial savings to the justice system, and wider economy, but also considerable benefits in avoiding the burden on victims and witnesses who may have already been through a traumatic ordeal to have to revisit that several months later as part of a courtroom experience; and also on the accused, where the prolongation of procedures may not be in their interest. Dealing with the majority of issues in a digital case management process would also significantly reduce the duration of trials that did proceed (with fewer witnesses needing to appear at trial, as not all witness evidence would be in dispute). These shorter trials could allow for much greater flexibility in court scheduling.

33. As part of the initial work, two diagrams were developed to provide a map of what a new system would look like (Diagram 1, below), and demonstrate the potential for efficiencies within the system (Diagram 2) (figures refer to Sheriff Court numbers only). It is important to note that the numbers contained within Diagram 2 are **not** predictions of the efficiencies that will occur, but rather indications of the extent to which there may be scope for making inroads to the numbers of hearings

that are required, and the number of witnesses who are required to attend. The numbers have been derived from the figures which informed the 2015 Audit Scotland Report.

34. During the year 2013-14 there were around 15,000 cases commenced from custody (out of 72,000 cases called) in Sheriff Courts nationwide, and of the 52,000 trials scheduled in the year, just 9,000 proceeded on the originally scheduled day with evidence led (rather than being deserted, or adjourned, or there being a late guilty plea). In other words, if a perfectly operating, digitally enabled case management system could function in a way that a) only required first callings where custody was an issue (as opposed to just requiring a plea to set the trial date) and b) through ensuring that the evidence was properly gathered and prepared in advance, uncontroversial evidence agreed and only those witnesses called whose testimony had bearing on the remaining matters in dispute, then there could be a substantial reduction in the number of trials and the number of witnesses required to attend trial. It is of course not expected that every trial would run absolutely smoothly. There will always be circumstances which necessitate an adjustment to the timetable of a case. But these figures do suggest that an appropriate change in practices and procedures, which focuses the criminal trial on the critical evidence and witnesses, could lead to a positive transformation in the administration of justice.

Conclusion and recommendations

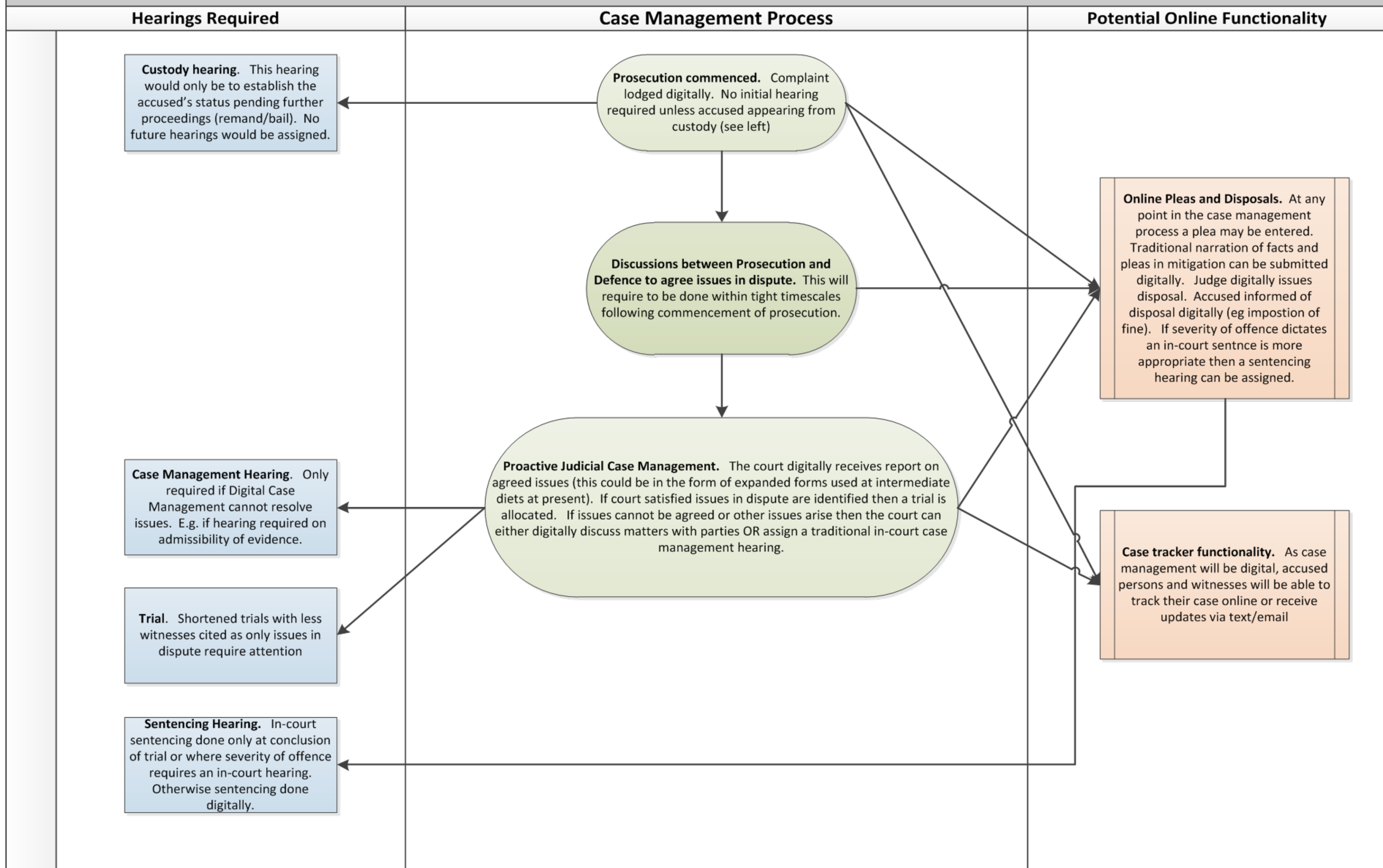
35. There are increasing imperatives to look for better, more efficient ways of conducting criminal trials, particularly in the summary justice system. Not only is it proving difficult to improve radically the performance of the current system, with continuing concerns about churn and delays, but the pace of change within society threatens to leave justice procedures behind. The current climate of public sector financing means that it is not possible merely to push more funding into the system to try to ease the problems; in any case, as Sir Brian Leveson suggested in relation to England and Wales, the further extension of the current outmoded system is unlikely to produce the best results either in terms of efficiency or, more importantly, in terms of the quality of justice.

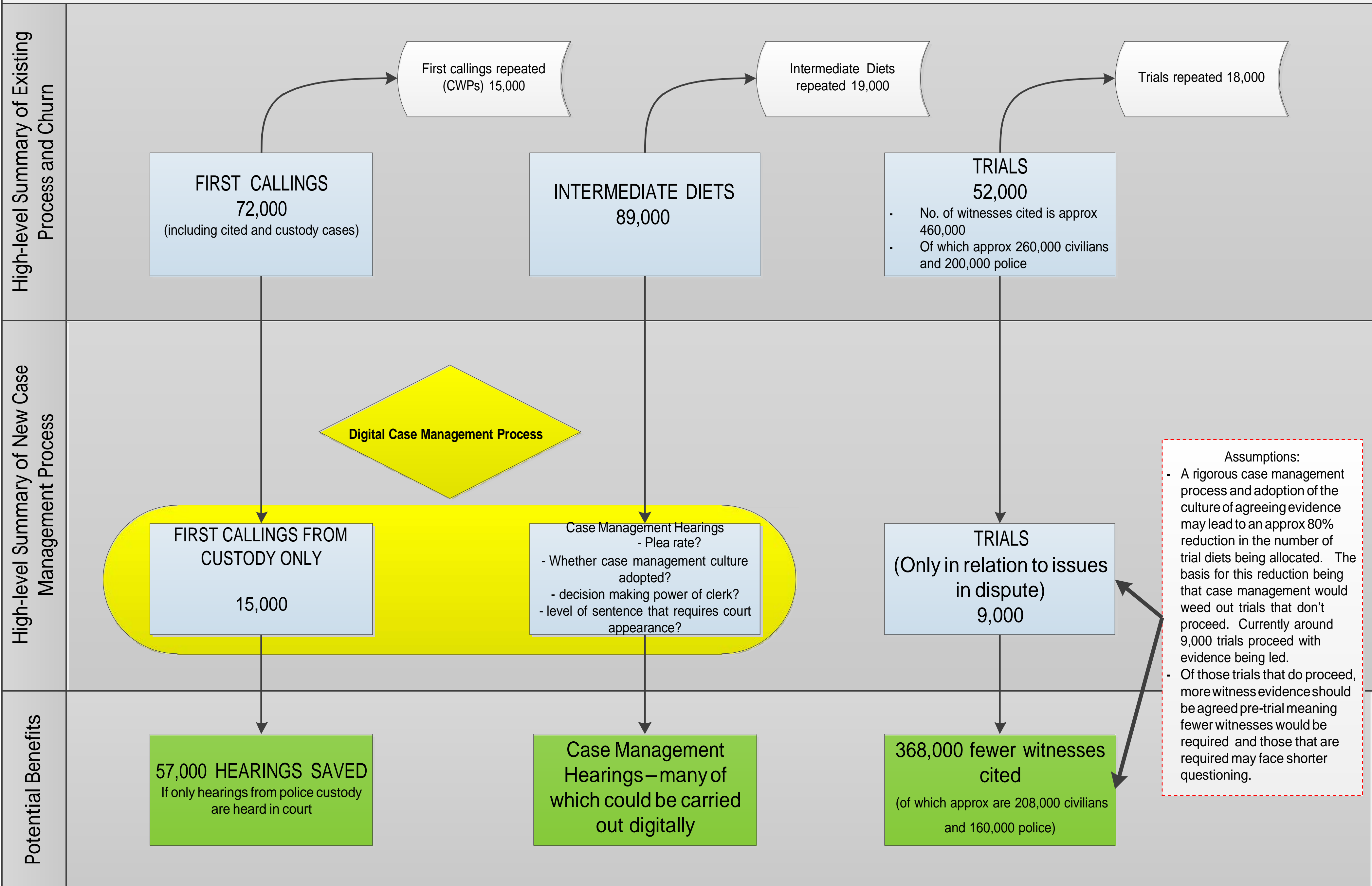
36. **It is therefore recommended that there should be a significant re-design of summary criminal procedures, in a way that takes full advantage of the new technologies that are available.** The high-level conceptual model that has emerged from the Justice Digital Strategy workstream is a potentially powerful starting point. The recommendations springing from this work would therefore be:

- **As a matter of some urgency, and as envisaged in the Justice Digital Strategy, work is undertaken to develop detailed requirements for a Digital Evidence Vault or other means of storing and managing evidence and information relevant to criminal cases.** This work needs to take into account the possibility that criminal procedures will become more focused on the early, digitally enabled management of cases to reduce reliance on live pre-trial hearings required, and to manage the number of witnesses who are cited so that only those who are properly required to give evidence do so.

- **Alongside this work, there should be further development of proposals to reform criminal procedures to allow for a more streamlined, digitally-enabled justice process.** This work will

need to look at what changes to legislation, procedures and practice may be required to allow for a system in which cases are managed actively by the judiciary and administratively prior to trial, where appearances are reduced by the ability to submit a plea online, and where trials proceed only where the Court is confident that all parties are properly prepared and that witnesses are not being cited unnecessarily. This must be done with a clear view of the requirements of a fair trial under Scots law and under the European Convention on Human Rights.


What a Digital Case Management Process Might Look Like
Hearings Required
Case Management Process
Potential Online Functionality
Custody hearing. This hearing would only be to establish the accused's status pending further proceedings (remand/bail). No future hearings would be assigned.
Prosecution commenced. Complaint lodged digitally. No initial hearing required unless accused appearing from custody (see left)
Discussions between Prosecution and Defence to agree issues in dispute. This will require to be done within tight timescales following commencement of prosecution.
Online Pleas and Disposals. At any point in the case management process a plea may be entered. Traditional narration of facts and pleas in mitigation can be submitted digitally. Judge digitally issues disposal. Accused informed of disposal digitally (eg impostion of fine). If severity of offence dictates an in-court sentnce is more appropriate then a sentencing hearing can be assigned.
Case Management Hearing. Only required if Digital Case Management cannot resolve issues. E.g. if hearing required on admissibility of evidence.
Proactive Judicial Case Management. The court digitally receives report on agreed issues (this could be in the form of expanded forms used at intermediate diets at present). If court satisfied issues in dispute are identified then a trial is allocated. If issues cannot be agreed or other issues arise then the court can either digitally discuss matters with parties OR assign a traditional in-court case management hearing.
Case tracker functionality. As case management will be digital, accused persons and witnesses will be able to track their case online or receive updates via text/email
Trial. Shortened trials with less witnesses cited as only issues in dispute require attention
Sentencing Hearing. In-court sentencing done only at conclusion of trial or where severity of offence requires an in-court hearing. Otherwise sentencing done digitally.



Potential Benefits of a Digital Case Management Process Compared to the Existing Court Process (APPROXIMATE FIGURES FOR SHERIFF COURT ONLY)
High-level Summary of Existing Process and Churn
First callings repeated (CWPs) 15,000
Intermediate Diets repeated 19,000
Trials repeated 18,000
FIRST CALLINGS 72,000 (including cited and custody cases)
INTERMEDIATE DIETS 89,000
TRIALS 52,000
- No. of witnesses cited is approx 460,000
- Of which approx 260,000 civilians and 200,000 police
High-level Summary of New Case Management Process
Digital Case Management Process
FIRST CALLINGS FROM CUSTODY ONLY 15,000
Case Management Hearings
- Plea rate?
- Whether case management culture adopted?
- decision making power of clerk?
- level of sentence that requires court appearance?
TRIALS (Only in relation to issues in dispute) 9,000
Assumptions:
- A rigorous case management process and adoption of the culture of agreeing evidence may lead to an approx 80% reduction in the number of trial diets being allocated. The basis for this reduction being that case management would weed out trials that don't proceed. Currently around 9,000 trials proceed with evidence being led.
- Of those trials that do proceed, more witness evidence should be agreed pre-trial meaning fewer witnesses would be required and those that are required may face shorter questioning.
Potential Benefits
57,000 HEARINGS SAVED If only hearings from police custody are heard in court
Case Management Hearings – many of which could be carried out digitally
368,000 fewer witnesses cited (of which approx are 208,000 civilians and 160,000 police)

Part B

Children and vulnerable witnesses

General comments

37. It became very apparent early on in discussions that, notwithstanding the recent legislative changes in relation to victims and witnesses, the treatment of vulnerable participants in the justice system was still a live topic. It was also clear that this is a complex area, with a great deal of ground to cover in further developing the initial propositions contained in Chapter 2 of the original Evidence and Procedure Review Report. That Report had highlighted practice in other jurisdictions which may prove to be helpful in developing new approaches to adopt in Scotland. It was, however, a matter of general agreement that in doing so it would not be appropriate merely to transpose another jurisdiction's system wholesale into Scotland.

38. Across the discussion groups, there was a broad consensus that any future reforms should be informed by a clear set of principles which make it clear what the purpose of proposed reforms should be. This would not only help to assess the suitability of proposed changes, but also to counter any suspicions that reforms are being proposed for ulterior motives. The kinds of motives that were raised in discussion as being inappropriate were: a desire to increase conviction rates, an attempt to reduce the role of the defence in order to reduce legal aid payments, or cost-cutting more generally with a disregard for the requirements of a fair trial. A set of guiding principles for the Review were developed, with the assistance of the Reference Group, taking as their starting point those outlined in the Lord Justice Clerk's speech at the events launching the consultation process in May 2015[18]. The principles that were agreed by the Reference Group are as follows:

"Changes to the rules of evidence and procedure should aim to:

- Improve the quality (e.g. accuracy, reliability, and completeness) of the evidence that is considered at trial, to aid the ascertainment of the truth;
- Be consistent with the precepts of a fair trial, in compliance with the European Convention on Human Rights;
- Help improve access to justice;
- Improve the experience of witnesses in general, including the ease and convenience with which they can give evidence, and the quality of the environment in which they do so ;
- Protect witnesses from further traumatisation, distress or harm;
- In the case of children, be designed to operate in the bests interest of the child, in line with national policy;

[18] http://www.scotcourts.gov.uk/docs/default-source/SCS-Communications/evidence-and-procedure-review-launch.pdf?sfvrsn=2

- Promote greater clarity and simplicity in the rules of evidence;
- Promote greater efficiency in trial procedures;
- Support the transparency of the criminal trial process; and
- Ensure that the justice system remains relevant and trusted within modern society.

And in developing proposals for change, it will be important to ensure that:

- Proper account is taken of the full range of initiatives, programmes and policy developments related to justice reform, with areas for collaboration identified, and potential clashes or contradictions avoided ;
- The proposals build on and develop further the considerable work already under way to improve procedures, particularly in relation to victims and witnesses; and
- Opportunities are identified and taken to make use of existing powers and procedures in a more effective way, with the aim to furthering the aims above, as a precursor to the longer term reforms that may require changes to the legislation or procedural rules."

39. There was, particularly at those sessions held at Sheriff Courts, some discussion of the need for further reform at this stage. There were contrasting views on this. On the one hand, a number of those participating strongly welcomed the thrust towards a more modern approach to criminal trial procedures. They recognised in particular that attitudes towards the way in which complainers and other witness are treated were (rightly) changing rapidly, and this was being reflected in public policy-making. There was a general sense that the Review had helpfully identified areas where there was still scope for considerable improvement, in the interests of fairness for all those involved in the criminal trial process. This was reinforced for some by the continuing churn and delays experienced in the criminal justice system, particularly at summary level – as recently attested to in the September 2015 Audit Scotland report[19].

40. On the other hand, there was some evidence of what might be termed "reform fatigue" with a suite of changes to both criminal and civil court structures and procedures, in the light of a number of judicially-led reviews (such as those led by Lords Gill, Carloway, Bonomy and Sheriff Principal Bowen) and the subsequent legislation, including the Criminal Justice Bill passed by Parliament on 08 December 2015, and the Victims and Witnesses (Scotland) Act 2014. Some argued that resource and effort required to be put into making the current suite of reforms work more effectively before imposing yet more disruption to the system. The trend of reform in recent years, combined with the changing Legal Aid regime, put significant pressure on court practitioners who might not welcome the prospect of further radical change to court procedures.

41. In a similar vein, there was some discussion as to the way in which a new approach to pre-recorded evidence might be introduced. There was support from a number of sources for the use of a phased approach. Some of the proposals being considered would require a fundamental

[19] See note 4 above

reworking on business practices within the justice agencies, including the police, alongside the need for significant investment in infrastructure and training. Careful thought needed to be given to the extent to which new procedures could first be piloted (as has occurred in relation to the pre-recording of cross-examination in England and Wales) and then rolled out in a structured and planned way.

The case for change

42. There was discussion of the extent to which current measures to support vulnerable witnesses are adequate. The original Report highlighted the fact that some other jurisdictions had gone further in providing protection for young witnesses, and in certain cases, vulnerable adult witnesses. This begged the question whether we were doing all we could in Scotland to ensure that the witness experience was as conducive to securing the best evidence from them as possible.

43. There seemed to be widespread support for the idea that more could be done, particularly for young witnesses. The Report suggested that the current availability of evidence taken by a Commissioner is currently not applied consistently or to an established set of protocols, and this was borne out by the evidence of those who had experience of the process. Data from SCTS and from COPFS indicate that there are several cases each year in which the Crown applies for evidence to be taken by a Commissioner. We heard from some practitioners that there had been examples, where evidence on commission had been scheduled, of it not taking place either because the technology failed, or because the set-up appeared on the day not to be suitable for the purpose; and, even where it did take place, there were times when the conduct of the Commission was not ideal. This supports the view that there needs to be a systematic approach underpinned by a reliable and readily available infrastructure.

44. There was striking evidence from those who had been complainers in sexual offences cases that the current suite of special measures is not adequate to prevent disruptive effects on their ability to give evidence. Their stories reinforced the view that the experience of giving evidence in court can be highly intimidating to someone who is not familiar with such an environment. This applies both to the formalised setting and to the fact that witnesses feel at a disadvantage compared to articulate and confident legal practitioners. If this is combined with the process of recounting traumatic events, there is clearly the risk both that the evidence given is not as complete as it should be, and that the experience might re-traumatise the witness.

45. In these circumstances, it is important to consider how well existing protections mitigate those risks. The complainers suggested that, for example, the use of screens was only partially effective – one complainer described how the accused, who was ultimately convicted of subjecting her to years of sexual abuse when she was a child, tried to affect her evidence by sighing audibly, tutting and attempting to peer around the screen.

46. In some sessions with groups representing victims and witnesses, the discussions extended beyond the issue of the way in which evidence is captured and presented, and encompassed the broad range of support that should be available to complainers and other witnesses. In particular, there was a strong feeling that not enough is done at present to keep a witness informed about the

progress of a case, and the role that they will be expected to play at the different stages. Some talked about the feeling of being cut off from the process, and only being summoned to participate at the convenience of the legal process. The issue of the support available to victims and witnesses while waiting for the various stages of the criminal trial process lies out with the scope of the Review, but it is worth raising this as part of the overall picture of their experience of the system. The provision of more consistent, long-term support throughout the trial process, either by social work officials (where there is often an organisation split between immediate response teams and long term support works), or by third sector support organisations, does of course imply a substantial increase in resources.

Options for change

47. One of the critical questions that needs to be considered here is the extent to which a new approach might or might not involve the re-design of the criminal trial process itself, or at least the child or vulnerable witness' participation in it. The Review Report had outlined two broad approaches[20] – one which was an amendment of existing adversarial procedures, following the Australian and English example; and the other which was a more radical departure towards a more inquisitorial pre-trial process, as deployed in Norway and in many other jurisdictions in continental Europe. The former approach preserves the well-established concepts of examination-in-chief and cross-examination, but adjusts the way in which they are carried out; the latter requires a more fundamental cultural shift towards a single examination of the witness by a trained third party under judicial supervision, and with indirect rather than direct questioning by the parties' legal representatives.

48. Both approaches were considered in some depth at the workshops. The issues raised in relation to the "full Pigot" approach in Australia and in England were:

- Concern that there remained a significant time lag between the initial interview and the subsequent pre-trial cross-examination, which meant that the healing process was delayed.
- The extent to which the trial judge vetted the cross-examination questions in advance did not fit with Scottish traditions of a fair trial, in which the accused's representative should be able to ask witnesses any questions in whatever form was necessary in the context of the on-going trial.
- It was not clear how the emergence of new evidence or new issues in the period after the pre-trial cross-examination were dealt with.
- The role of intermediaries was not well understood – they seemed to be a significant additional resource, when it should be relatively straightforward to adjust questioning to suit the witness.

49. In relation to the Norwegian example, comments included:

[20] See *Evidence and Procedure Review Report* Ch 2.

- It was clear that the facilities provided and wraparound service would be very helpful in providing the right environment for interviewing children but that this would obviously come at a significant cost.
- There was some scepticism that the single interview approach, mediated through the forensic interviewer, could adequately cover the accused's right to challenge the evidence against him or her meaningfully. Questions arose as to the extent to which the client could properly instruct his or her legal representative in the absence of full disclosure of all evidence.
- It was noted that the training required of the forensic police interviewer was considerably more extensive than that provided for police officers and social workers conducting Joint Investigative Interviews in Scotland.

50. In the light of these models and the observations made on their characteristics, consideration was given to the extent to which these approaches could and should be translated into a Scottish context, to provide a better way of eliciting evidence from young and vulnerable witnesses.

Definitions and scope

51. There was extensive discussion of the scope of and eligibility for measures designed to improve the experience of children and vulnerable witnesses. This was identified as important for a number of reasons – first, that the variety of ways in which a witness could be deemed vulnerable meant that there needed to be a flexible approach to providing support to meet the needs that source from the vulnerability. Second, it was widely recognised that introducing and expanding the pre-recording of evidence would entail a considerable increase in resource, time and investment. Some therefore argued that it may not be appropriate immediately to make pre-recording automatically available to all those considered to be vulnerable. A staged or phased approach may be required in order to make the transition manageable. Third, it was understood that the identification of categories of witnesses as vulnerable could bring with it access to a broad range of resources in addition to those required directly to aid an individual's participation in the justice process.

52. In terms of the definition of vulnerability, there was general agreement that the definition introduced into section 271(1) of the Criminal Procedure (Scotland) Act 1995 by section 10(a) of the Victims and Witnesses Scotland Act 2014 was a good starting point:

> "(1) For the purposes of this Act, a person who is giving or is to give evidence at, or for the purposes of, a hearing in relevant criminal proceedings is a vulnerable witness if—
>
> (a) the person is under the age of 18 on the date of commencement of the proceedings in which the hearing is being or is to be held,
>
> (b) there is a significant risk that the quality of the evidence to be given by the person will be diminished by reason of—
>
> (i) mental disorder (within the meaning of section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003), or

(ii) fear or distress in connection with giving evidence at the hearing,

(c) the offence is alleged to have been committed against the person in proceedings for—

(i) an offence listed in any of paragraphs 36 to 59ZL of Schedule 3 to the Sexual Offences Act 2003,
(ii) an offence under section 22 of the Criminal Justice (Scotland) Act 2003 (traffic in prostitution etc.),
(iii) an offence under section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (trafficking people for exploitation),
(iv) an offence the commission of which involves domestic abuse, or
(v) an offence of stalking, or

(d) there is considered to be a significant risk of harm to the person by reason only of the fact that the person is giving or is to give evidence in the proceedings."

53. This definition covers differing types of vulnerability in terms of age; vulnerability due to pre-existing conditions that impair a witness' ability to process questions or to communicate; the nature of the offence and circumstances in which where the relationship between the witness and the accused might mean that giving evidence present particular challenges for the witness. There were, as might be expected, some concerns raised about this definition, with arguments both that it is potentially too broad, allowing protections for witnesses who appear to be perfectly capable of giving evidence and being subject to cross-examination; and that it does not adequately cover the full range of vulnerabilities that may affect witnesses' ability to engage with the justice process. In particular, it does not appear explicitly to cover those who may have communication difficulties as a result of physical, rather than mental, disorders – such as those with a cleft palate, or even those affected by cerebral palsy or victims of a stroke. It would be important to have an approach that was flexible enough to take into account the diversity of witnesses who might need additional measures.

54. Given the fact that this definition has only recently been legislated for, following extensive consideration and debate prior to and during the legislative process, it may be too disruptive to re-open it, although the issue of physical sources of communication difficulties may need to be addressed. It can provide the framework within which the applicability of further measures to protect witnesses and secure the best quality of evidence from them. Consideration will need to be given to whether the use of a pre-recorded statement as evidence in chief, and the pre-recording of cross-examination should be available to such witnesses by right or whether, as at present, an application would require to be made. If the aim of reforms is to achieve a step change in the way children and vulnerable witnesses are treated within the criminal justice system, then it would be appropriate that there should be a presumption that the evidence and cross-examination will be pre-recorded, subject to the right of the witness to choose to give evidence in person. That choice would, however, have to be fully informed. Feedback through those organisations who support witnesses suggests that although there may be some initial attraction for some witnesses of "having their day in court", the experience itself is often far more challenging than expected.

55. It was suggested that the use of the term "vulnerable" was in itself not helpful, as it might suggest a judgement on a witness' credibility or character.

Pre-trial processes: The initial interviews

Identifying vulnerability

56. There were a number of questions around the capacity of the Police and the Crown to be able to identify vulnerability. Both witness support agencies and the Police themselves made the point that the identification of vulnerability in witnesses is not always straightforward. This was particularly true in relation to vulnerable adults, where assessments of vulnerability and the implications for the witness participation in interviews and court proceedings often require specialist knowledge. Feedback from those working to support adults with cognitive impairment suggests that there is scope for greater understanding in the justice system of the impact of a learning disability or autism on social and sexual relations, and how best to access professional advice. There is scope for considering how to ensure police are able to access suitable advice and assistance in dealing with witnesses who may require additional support, and how that is fed through in to the Court process.

57. It is, of course, clear where the age of the witness is the key factor, or where the nature of the offence is likely to give rise to the vulnerability. There is a greater challenge where the needs of the witness may not be immediately apparent or requires some professional expertise in recognising those needs and how best to provide for them (for example, with a witness who is autistic).

Joint Investigative Interviews

58. During the course of the discussions some participants strongly expressed the view that it will be essential to ensure that the initial joint investigative interview is consistently of a high standard, and follows a methodology that produces the best possible outcome in terms both of the witness' experience and the quality of the evidence elicited. The Report had identified both that the Norwegian forensic interview was based on the NICHD interview protocol[21], and that there was internationally recognised expertise within Scotland on this issue.

59. There were sessions with those involved in joint investigative interviewing, both from social work and from Police Scotland. These revealed that there are clearly areas of good practice in joint investigative interviewing, but there are differing approaches in different parts of the country. The current Scottish government guidelines do not explicitly recommend use of the NICHD protocol, and there was some confusion over whether the protocol was or was not an appropriate method. Those advocating the use of the protocol pointed to the extensive and robust research that was available that demonstrated its validity. Their argument was that the increase in comprehensiveness and quality of evidence from children that the NICHD approach would bring would make the subsequent stages of the trial process easier. It was also noted that other jurisdictions also deploy the Protocol successfully, with Finland being a leading example.

[21] The National Institute of Child Health and Human Development (NICHD) Protocol: Interview Guide, available at http://nichdprotocol.com/the-nichd-protocol/

60. There was considerable interest in the Norwegian Barnehus model in terms of the environment that such centres provide for the child witness. The concept of a purpose-built multi-agency centre which provides a "wraparound" service was highly attractive. This is of course not unique to Norway - the project team visited a multi-agency centre in Dundee which provides a similar range of services. In the words of one English commentator there is a strong argument for:

> *"…the establishment of Young Witness Advocacy Centres, where children and young people between 4 and 18 years and their families would have a wraparound support pathway from identification of the crime to the post-trial period. Specialist key workers would operate from a single child-centred hub, alongside multi-agency professionals including the CPS, police, social care, intermediaries and therapists, coordinating individual support plans. The Centres would be equipped with the technology for pre-trial cross-examination, and trial testimony through remote live link. The notable success of the one-stop Norwegian Children's Houses in reducing secondary traumatisation for children makes a powerful case for its translation into the English CJS. Other aspects of the Norwegian system, such as forensic medical examination suites and on-going family therapy, should be considered."*[22]

61. It is acknowledged that such centres do require considerable investment. Current Government policy in relation to child protection and child well-being does, however, encourage the development of a multi-agency approach. Facilities are being developed across Scotland, usually by local and health authorities, which could perform such a role. It will be important that the design of such centres incorporate – as many already do – suitable facilities to gather evidence that could be used in criminal procedures. For adult complainants, the development of such facilities across Scotland is less well advanced, although there are examples such as the Archway Sexual Assault Referral Centre in Glasgow [23], and multi-agency facilities at Livingston and Edinburgh.

Initial interviews – general comments

62. One of the issues raised was whether there would be a conflict of purpose where a police interview with a witness is being carried out both for the purpose of furthering the investigation into an alleged offence and for the purpose of capturing evidence to be presented in court. There was a reasonable degree of confidence that this should not present any major difficulties, and that interviewing practices in relation to children already took this into account.

63. It was noted that it would be important, in a system where pre-recorded evidence was taken, to ensure that the initial interviews took place at the right time and that repeat interviews took place where necessary. There was some evidence that, particularly in relation to offences of sexual assault that are reported immediately, there needs to be a gap of at least 24 hours before the witness can properly and fully give their account of what happened. It is also the case that an initial

[22] Laura Hoyano, *Reforming the adversarial trial for vulnerable witnesses and defendants* Crim. L.R. 2015, 2, 107-129

[23] See also *Evaluation of Support to Report Pilot Advocacy Service*¸ Scottish Centre for Crime and Justice Research, 2015

interview may not be sufficient to elicit a full account, and that a further interview is necessary to seek further details. There will always need to be the flexibility to arrange the timing and number of interviews to suit the circumstances.

Trial Process

Questioning and Cross-examination

64. There was extensive discussion of the way in which cross-examination is conducted and the scope for constraining or controlling this in respect of witnesses who may not be able to cope with traditional methods of cross-examination. It was recognised throughout that the accused has the right, under Article 6.3(d) of the European Convention on Human Rights to examine or have examined any witnesses against him. Both the English and Norwegian approaches, however, proceeded on the premise that it was legitimate to place limits on when, how long for and how such examination takes place. There was not, in other words, an unfettered right to ask any question of any witness in whatever form the defence might wish to phrase that question. This was an issue that sharply divided opinion. There was, on the one hand, considerable resistance, particularly from the legal professions to the idea that cross-examination could be constrained any further than it already was (e.g. under section 274 of the Criminal Procedure (Scotland) Act 1995). On the other, those representing the interests of witnesses and the witnesses themselves were keen to draw on the lessons from other jurisdictions and academic research, which tended to show that traditional adversarial techniques were highly unsuitable for eliciting meaningful, reliable and complete evidence from vulnerable witnesses, and often added to the distress and trauma for the witness. In the words of one academic commentator:

> *"Thirty-odd years of empirical research have demonstrated that conventional cross-examination, with its preponderance of suggestive and confusing questioning tactics, is a veritable 'how not to' guide for obtaining best – that is to say, full and accurate – evidence from vulnerable witnesses."*[24]

65. In taking any reform in this area forward, it will be necessary to consider very carefully how measures to change the way in which evidence is taken can continue to respect the accused's right to examination of witnesses. The right to a fair trial must remain at the heart of the criminal justice process, and it will be essential for any future procedure to be designed with this in mind and with the participation of all those involved in the process. The success of the pilot phases of the s28 procedure in England and Wales (the "Full Pigot") was predicated on the participation of the local Bar in their design and supervision.

66. If the approach taken is to introduce something similar to the "Full Pigot", with pre-recording of cross-examination within a recognisably adversarial process, it will be necessary to address whether the mechanisms deployed under the s28 process in England and Wales are needed here. In particular, a decision will require to be made whether a prior "ground rules" hearing will be

[24] Henderson: *Communicative competence? Judges, advocates and intermediaries discuss communication issues in the cross-examination of vulnerable witnesses* 2015 Crim LR 659

necessary to ensure that the examination of the vulnerable witness is conducted in an appropriate manner, and whether the Court should seek the assistance of an intermediary in the setting of those ground rules. It is worth mentioning that "ground rules" hearings also occur where a child or vulnerable witness will be appearing in Court at trial, and not just in the circumstances of pre-recording their cross-examination.

67. The fundamental issue here is whether it is legitimate for the Court to place controls on the cross-examination of witnesses. In England and Wales, defence Counsel are required both to certify that they have read and understood the relevant toolkit from the Advocates Gateway, and then to submit their questions in advance of, or at, the ground rules hearing in order for the Court to ensure that those questions are relevant, phrased appropriately and are not likely to confuse, or distress the witness. Furthermore, the Court may impose time constraints on the questioning, and can prevent the defence from putting its case to a witness[25]. These are all concepts which are largely alien to practice in Scotland. Some of those involved in the discussion sessions found it difficult to accept the notion that the "unfettered right to ask any question of any witness" should be curtailed or compromised, even in relation to children and vulnerable witnesses[26].

68. At the same time, there was widespread support among those representing the interests of witnesses that the current system does not seem well designed to facilitate the giving of evidence by those who have difficulty communicating, who may be intimidated by the trial process and environment or whose experience of the offending behaviour may mean that it is traumatic to recall. It has already been a matter of judicial comment that the right to cross-examination *"does not extend to insulting or intimidating a witness…… It also requires to be balanced against the right of a witness to be afforded some respect for her dignity and privacy (see Criminal Procedure (Scotland) Act 1995, s 275(2)(b)(i)). The court must be prepared, where appropriate, to interfere when cross-examination strays beyond proper bounds, both in terms of the nature of the questioning and the length of time for which a complainer can be expected to withstand sustained attack."*[27]

Intermediaries

69. There was further investigation into the practice in England and Wales of using intermediaries to assist the Court in devising the best way for witnesses with vulnerabilities to give evidence. There is substantial evidence that vulnerabilities in relation to communication can have a major impact on a witness' ability to give evidence, particularly in a system in which witnesses are examined or cross-examined by legal practitioners[28]. Given this, the use of intermediaries in England and Wales is seen as a valuable tool by the judiciary and by lawyers, as well as the witnesses themselves. We heard evidence from a number of legal practitioners and the judiciary in England and Wales that, once they were benefiting from the advice of intermediaries and the toolkits

[25] See *R v Lubemba* [2014] EWCA Crim 2064
[26] See also Wheatcroft, Caruso, Krumrey-Quinn: *Rethinking Leading: The Directive, Non-Directive Divide,* [2015] 5 Crim. L.R 340
[27] *Begg v HMA* [2015] HCJAC 69, LJC (Carloway) at 39
[28] The experience in England and Wales of the use of intermediaries and the value they add to the justice system is captured in Joyce Plotnikoff and Richard Woolfson *Intermediaries in the Criminal Justice System* Policy Press, 2015

produced by the Advocates Gateway[29], they were surprised by the extent to which practices they had previously thought were sufficient to accommodate difficulties faced by witnesses were in fact failing to adduce the best evidence[30].

70. This is not to say that it will be straightforward to introduce a system of registered intermediaries. There are clearly issues in England and Wales around the supply of registered intermediaries, as the volume of demand is ever increasing. There are considerations about the extent to which intermediaries may be available to the accused as well as to prosecution witnesses. Some concern was raised at the workshop sessions about the potential cost of using intermediaries. Information received from the Ministry of Justice suggests that if an intermediary were to be fully involved throughout a trial process – i.e. writing up an assessment for the police, attending the police interview and writing a court report, attending a ground rules hearing and attending the trial itself, this might cost in the region of £1150. There are also costs to Government associated with the provision of a register of intermediaries and matching service, currently run In England by the National Crime Agency. These are in the region of £250k per annum.

71. It was suggested during the course of the discussions that it would also be worth exploring what lessons might be learnt from the current operation of the system of appropriate adults in relation to Police interviews of suspects – a role often undertaken by registered intermediaries in England and Wales. As with many of the proposals in this paper, the resource implications will need to be investigated thoroughly. There is, however, a strong suspicion that without some form of support or guidance of the kind that intermediaries can provide, children and other vulnerable witnesses are not getting the best and most appropriate opportunity to provide their best evidence.

Conclusion and Recommendations

72. The evidence that the benefits in terms both of protecting the witness against potential further trauma, and in improving the quality of their evidence can no longer be ignored. It is worth remarking that it took a significant case in the Court of Appeal, combined with significant support at the highest levels of the judiciary, to trigger the far-reaching changes that have occurred in England and Wales. There is no reason, however, why Scotland should wait for its own landmark case before applying the lessons learnt (although the original Review report did identify some cases that indicated change was necessary[31]).

73. As indicated in the original Review report, and as argued by a number of those participating in the discussions, there are a number of options for improving the way in which children and vulnerable witnesses participate in the criminal justice system. Some of these options may not require primary legislation, but rather a coordinated and planned effort to get a more systematic approach within the current legislative framework. Where changes can be introduced administratively, these should be pursued as quickly as possible.

[29] http://www.theadvocatesgateway.org/
[30] For an introduction to how questioning might be modified, see Plotnikoff and Woolfson, op cit, chapter 10.
[31] *Evidence and Procedure Review Report*, Scottish Court Service, paras 1.22, 2,15

74. **The principal recommendation is that, 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**.

75. The features of that approach should be as follows:

1. The eligibility for such measures should follow the framework set out in section 271(1) of the Criminal Procedure (Scotland) Act 1995 (as amended by s10(a) of the Victims and Witnesses Scotland Act 2014). Consideration should be given to whether the definition adequately covers those whose ability to communicate is impaired by a physical condition. This allows for certain witnesses to have an automatic entitlement to certain special measures, and for others to be able to apply for such measures. This format should apply to the presentation of the evidence-in-chief in recorded form; and such witnesses should be able, on application, to undergo cross-examination as early as possible in advance of trial. There should be scope to introduce such a system in a phased way that allows for the appropriate piloting of this approach, and to ensure that there is not an insupportable surge in demand on the justice system's limited resources. It may therefore be appropriate to limit the first stage of this approach to children under a certain age, although some flexibility should be allowed to account for exceptional circumstances.

2. Sufficient protocols in place, supported by the appropriate levels of training to ensure that, as far as possible, there is early identification of a witness's particular needs and access to the support required to meet the needs of vulnerability. As described above, the issue of "vulnerability" is a complex one, and there will need to be further work, involving the police, social work and third sector bodies to consider what protocols or other guidance will need to be in place to ensure an appropriate approach is taken.

3. Every effort should be made to secure the most appropriate environment for the taking of witness statements in recorded form with a view to their being used as evidence in chief. The Review's experience of the Norwegian model, multi-agency facilities in Scotland and discussions more widely, suggest that a multi-agency hub environment is likely to provide the best means of providing the support to a witness who has been traumatised or otherwise affected by their experience. The availability of "wraparound" services is likely to minimise the risk of further traumatisation. It will be important to consider how best to apply a similar multi-agency approach for adult witnesses as to children. The nature of the services required may vary according to the nature of the case. The key will be to access the right combination of support services, which may be provided by the third sector as well as public agencies.

4. Interviews that will form the evidence-in-chief should take place according to most effective techniques. As stated above, there should be a presumption that evidence in chief will be

provided by a pre-recorded interview as close as possible to the report of the alleged incident itself (although subject to an understanding of the witness' readiness or capacity to give such evidence). For child witnesses, there is a very strong case that the current guidelines for interviewing children, which were issued in 2011[32], should be revised explicitly to require the use of the NICHD protocol. The academic research that demonstrates that using the protocol produces the best quality of evidence is very powerful[33]. It is recognised that there will be a significant challenge in implementing the required training and on-going support to secure a consistent approach across Scotland.

5. Further work will be required to develop the appropriate procedures, but these should endeavour to minimise the gap between the giving of the initial evidence and the cross-examination; this may mean that, whenever possible, an application for pre-recorded procedures to be made at the petition stage. This will also require a rigorous approach to early disclosure.

6. There needs to be a clear, structured process for the pre-recording of cross-examination in advance of trial. This means that, as a matter of priority, consideration should be given to how best to improve on the current practice in relation to taking evidence by a Commissioner. At present, the decision to apply for evidence to be taken by a Commissioner is taken on a case by case basis by the Crown and the number of cases in which this is happening is increasing. There appears to be no established protocol between the Crown and the Scottish Courts and Tribunals Service relating to the conduct of such hearings or agreed technical specifications for the recording infrastructure. As far as the Review is aware there is no clear set of criteria by which the Crown decides whether or not to apply for the taking of Evidence by a Commissioner. It may be sensible for the Crown to establish guidelines on the criteria to be applied in deciding whether a witness should have their evidence taken by a Commissioner.

7. In the longer term, there needs to be a new framework within which a new approach could be managed. Urgent consideration should be given to the options for such a longer term strategy to secure, as quickly as reasonably achievable, a change in the way that children and young people are questioned and cross-examined. Options include:
a) administratively to convert the "Commissioner" process into a Scottish version of the "Full Pigot". Under this approach, it would be possible to make use of the current provisions in sections 271I and 271M of the Criminal Procedure (Scotland) Act 1995, although this would still require applications to be made for the use of the prior statement as evidence in chief and for taking evidence by a Commissioner;
b) to legislate for a "Full Pigot" approach, which would remove the presumption against

[32] Scottish Government, Guidance on Joint Investigative Interviewing of Child Witnesses in Scotland (2011)
[33] E.g. Pipe, M., Y. Orbach, M. Lamb, C. Abbott, and H. Stewart, Do Best Practice Interviews with Child Sexual Abuse Victims Influence Case Outcomes?, Final report for the National Institute of Justice, Washington, DC: National Institute of Justice, November 2008, and Lamb, M., Y. Orbach, I. Hershkowitz, P. Esplin, and D. Horowitz, *Structured Forensic Interview Protocols Improve the Quality and Informativeness of Investigative Interviews with Children: A Review of Research Using the NICHD Investigative Interview Protocol.* Child Abuse & Neglect 31 (2007): 1201-1231.

hearsay in the case of pre-recorded evidence, and take a similar approach to the terms of section 27 and section 28 of the YJCEA 1999; or
c) to legislate for a more fundamental shift to a Norwegian-style forensic examination.

8. If a "Full Pigot" approach is to be adopted, the presumption would be that cross-examination would occur in advance of trial, and would be pre-recorded. Within the framework of the current adversarial trial system, such a strategy should include: the introduction of "ground rules" hearings in cases involving children and other vulnerable witnesses, supported by a network of intermediaries (see below) to assist the Court in ensuring that questioning is appropriately framed to secure the best quality of evidence from the witness.

9. Serious consideration should be given to introducing the special measure of appointed intermediaries. It would be important to ensure that the role of intermediary is well defined, as an officer of the court responsible purely to facilitate the communication between the court and the witness. Further work will be required to scope out how a registered intermediary service might be established, the availability of suitably qualified professionals to participate in such a service, and the training that would be required for them and for other participants in the justice system to make such an approach work. There is considerable experience and expertise available in Scotland, the rest of the UK and further abroad which can be drawn upon in order to achieve this.

10. This will also require a widespread programme of education, training and guidance for the judiciary and legal practitioners involved in such trials, along the lines of that provided by the Advocacy Training Council and the Advocates Gateway in England and Wales. It will be important for the process of developing the necessary training to involve the Faculty of Advocates, Law Society and Judicial Institute.

11. The development of such a new approach cannot be divorced from the consideration of the legal aid provisions which would be required to support legal representatives participating in the system.

76. As was suggested in the Report in March, the success of the Full Pigot procedures rely on active and robust judicial case management, to ensure the preparedness of both parties and their adherence to agreed modes of questioning. This may mean the further development of a Practice note, similar to that issued earlier this year in relation to Sheriff Court solemn procedure[34], and appropriate support to the judiciary to encourage the active intervention that will be required.

[34] Criminal Courts Practice Note, No 3 of 2015, Sheriff Court Solemn Procedure

Report conclusion

77. This Report is offered as a further contribution to the development of propositions that should help transform the criminal justice system. Its aim is to point towards ways in which the quality of justice can be improved, through the use of the best available evidence adduced and deployed in a way that is fair to all parties; and in which criminal cases are managed both effectively and efficiently, focusing expeditiously and transparently on those issues which require to be addressed in the ascertainment of the truth. The ideas advanced in the recommendations above will require substantial further work, involving all those with an interest in the operation of the system, to arrive at practical proposals for positive, transformational change. The Scottish Courts and Tribunals Service is keen to play its part in taking forward that further work, and looks forward to collaborating with justice agencies, practitioners, third sector organisations and others in helping to create a criminal justice system fit for the 21st Century.