EVIDENCE AND PROCEDURE REVIEW LAUNCH

1. Introduction

I am very pleased to welcome you here to this event to start the next stage in developing the ideas put forward in the Report of the Evidence and Procedure Review. I would like to start by making a few general comments about the Review and the Report, before turning more specifically to the thinking that underpins this work, the main issues which the Report addresses, and where we go from here.

I am assuming that you have, if not read the whole Report of the Review, at least dipped into its findings. According to one newspaper columnist "It is the kind of lengthy document that only the most committed law student or civil servant would take time to peruse"; of course, with commitment comes reward.

It would be helpful to begin by setting out what the Review actually was and what it was not, in order to avoid any misunderstandings about its status, conduct and purpose. It was a research exercise carried out internally by the Scottish Court Service. It quite deliberately focused on exploring what is happening in other jurisdictions in relation to pre-recorded evidence, as a way to stimulate some "clear-sky" thinking in relation to trial procedures. In compiling the Report, we didn't consult with justice agencies or practitioners or others with an interest within Scotland. Instead, we studied, observed and discussed practice in both common law

and civil law jurisdictions to discover what ideas we might bring back to Scotland for further discussion and development.

The Report of the Review is therefore not a fully developed, fully costed and evaluated set of policy proposals, and was never intended to be. The preparation of such documents is a process most properly conducted by Government, in consultation with all those involved in the justice system. This Report is simply 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.

Now is the time to start testing out the propositions in the report with those who know and understand how the legal system works here in Scotland. The Justice Board, which is the forum that brings together all the main justice agencies such as Police Scotland, the Crown Office, Legal Aid Board, the Prison Service, Children's Reporters Administration, Courts and Tribunals and the Scottish Government, has agreed that these ideas should be developed further. It has put its weight behind a process to see proposals being worked up. The Cabinet Secretary for Justice has expressed a keen interest in this work.

2. Thinking underpinning the Review's propositions

Turning to the substance of the Review, it is essential to understand the motivation behind it. As the Report makes clear in its opening paragraph, the principal impetus for the work was to identify the best possible methods for ascertaining the truth in modern criminal trials. We proceeded in anticipation that the use of modern technology, particularly in the recording of witnesses' evidence, could have a major contribution to make to the way in which the justice system achieves its overarching task of searching for the truth. In other words, the Review was first and foremost concerned with quality – the quality of the evidence, and the quality of the experiences of those taking part in the trial. It was not primarily driven by considerations of economy or efficiency; although there may be aspects of these to be taken into account.

Technology must be able to provide some opportunities for improvement in this task of truth finding in a fast changing world. However, we recognised that some current criminal procedures and practices were not serving that task or the general administration of justice well. We cannot allow things to continue as they are. This is true especially in relation to the way that children and vulnerable witnesses are treated. However, we also had, and have, serious concerns about delays in first instance business generally; notably the incidence of procedural churn, especially in summary business and the increasing tendency for criminal trials to

focus on the accuracy or otherwise of what are often relatively short written statements taken by the police for the purpose of their investigation, relative to their consistency with the oral testimony being given in Court months and sometimes years after the event.

The purpose of the Review was to work up some propositions around the opportunities that recording evidence might bring, so that these can be tested with all those working in the criminal justice system. It was about exploring some critically important questions:

- what is the best way, in the modern technological world, to ascertain the truth in the context of the criminal trial?
- how can the system ensure, so far as practicable and with the use of technology, that the testimony of witnesses is as reliable, accurate and complete as it can be?
- how can unnecessary delays be eliminated, so as to preserve a fair, transparent and just system which provides for a trial within a reasonable time? and
- how can we make sure that young and vulnerable witnesses are safeguarded against further trauma?

3. Main Principles

And in developing answers to those questions, it is important to bear in mind what it is any reform should be trying to achieve. Throughout the Review process we knew that, in identifying possible innovations in, or changes to, the rules of evidence and procedure, we needed to keep at the forefront of our minds the main principles that should inform such changes. These were that any proposition should aim to:

- Improve the quality (ie the accuracy, reliability, and completeness) of the evidence at trial, to aid the ascertainment of the truth
- Be consistent with the principles of a fair trial, in compliance with Article 6 of 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 modern thinking
- Promote greater clarity and simplicity in the rules of evidence

- Promote greater efficiency in trial procedures
- Support the transparency of the criminal trial process
- Ensure that the justice system remains trusted and respected within modern society, and avoids being seen as out of touch or old-fashioned in certain respects

4. Key Propositions in the Review

The propositions we came to can be divided broadly into two main areas – those relating to Children and Vulnerable witnesses, and those relating to witnesses more generally.

First, Scotland is not at the forefront of law and practice in relation to the treatment of child and vulnerable witnesses. There is much more that could be done both to protect them against the distressing and potentially damaging effects of giving evidence and to ensure that the quality of their evidence as presented to judges and juries is the best possible and in the most appropriate format.

There are choices to be made, *viz*: whether we adapt our current trial procedures to accommodate a systematic approach to the pre-recording evidence in chief and cross-examination, as in England and Australia (the "full Pigot"; eg Achieving Best Evidence interviews in England and Wales plus cross examination in

advance of trial after the setting of "ground rules" and training with the "tool kit"); or whether to take a more radical step towards the approach used in Norway. What is clear to us is that the current practice, which is ad hoc, if not at times haphazard, should not continue as it is. Our recommendations are to explore these options and to improve facilities for children and the training of those involved with them.

Secondly, the broader question of what, in general, is "best evidence" needs to be re-appraised. The opportunities to secure clear, high quality pre-recorded evidence from witnesses at or shortly after an alleged offence are clear. It would be very surprising if there were not substantial benefits to be gained in the quality of evidence, and in the quality of trials too, from the proper use of recording technology. The Report refers to the fact that many witnesses' evidence is not in dispute or, at least, not challenged by cross examination. That begs the question of why we require them, as we do in their thousands, to appear personally at court at all.

The Report examines the history and current application of the rule against hearsay and the telling comments about its provenance being dependent on a view that the memory improves over time and the stress enhances the accuracy of recall! The traditional perception of hearsay as an unreliable recording of what a witness has said in the past is hardly a problem if it is electronically recorded.

The report looks at the right of cross-examination and how it should be preserved. I would like to make it clear that, contrary to the tenor of some of the reports of public reactions when it was published, the Review does not advocate a diminution of the right of cross-examination to the detriment of the rights of the accused. The Review fully acknowledges that the requirement for a fair trial means that there is a right for an accused to examine or have examined any witness against him, except in particular and exceptional circumstances. What the Review does do is provoke consideration of what it is that cross-examination should be trying to achieve, and how it might best be conducted to reveal the truth and to support the effective and efficient administration of justice. Our observations of practice in England suggested that certain approaches would help the practice of cross-examination to be far more focused and effective than it is in current practice.

The recommendations are to provide for the general admission of audio and video statements as proof of fact (replacing the current written statement procedure) and the revision of the rules on cross examination. The suggestion is that new rules are required on the use of recorded statements as proof of fact and on cross examination; all of this requiring advances in technology provision.

The Review goes through some of the issues that need to be addressed to ensure that the fairness of the trial would be preserved. It points the way to a new, modern approach. Ultimately, we may see a model of trial, especially in summary

cases, which involves much less oral testimony but in which the Crown evidence is available in advance; there is no need to predict what it might be. It will be in recorded form.

There are of course potential efficiencies to be had where evidence in chief is captured from the outset. But the Review is not just about efficiency; it is about the quality of justice and a recognition that that quality can be improved by changing the way we think about the trial process.

5. Key unanswered questions

The Review does not present fully developed proposals, but prompts consideration of some major propositions. Nothing is fixed. It advances a prima facie case that there are significant benefits to be gained by making far greater use of pre-recorded evidence; but this proposition needs to undergo scrutiny and development. It does, I fully acknowledge, raise as many, if not more, questions than it answers – and these are the questions that we would hope can be considered and explored over the next few months.

For example, in relation to children and vulnerable witnesses, what are the comparative advantages and disadvantages of the two models put forward? The "Full Pigot" seems to be being successfully introduced in England. There are, however, still significant gaps of weeks or months between the initial recorded

interview, which serves as the evidence in chief, and the subsequent recording of the cross-examination. In contrast, the Norwegian approach provides a single opportunity for the full examination of the witness early on, in an environment highly conducive to eliciting good evidence; but would that entail too radical a departure from current cultures and practice?

What is true in both cases is that the quality of the process is essential – in particular, the quality of those asking the questions of the child witness in examination and cross-examination. This raises real issues around what training and accreditation may be required for police officers, social workers, legal practitioners and the judiciary, and the implications of this.

In terms of the generality of witness statements, further thought needs to be given to the different ways in which audio-visual recordings can be made, and the types of witness for whom pre-recorded testimony would be most appropriate. It is clear from some of the reaction to the Report's publication that we need to be clearer on how cross-examination would operate in a system with pre-recorded evidence, and the extent to which there could or should be active judicial case management in that process. We know from the English experience that the early disclosure of the recorded evidence in chief is essential for the success of this approach, as it allows for preparation by both sides to occur at a much earlier stage.

There will be major questions about the infrastructure and resources needed to put any new systems into practice. We heard from a number of jurisdictions that the quality of the technology used has a major impact on the effectiveness of recorded evidence, and its acceptability for judges and juries. If it is good enough, then the process works well. But this will not come without significant investment.

6. What will happen next

These are just examples of some of the issues that should be explored in the next stage of the process, which Tim Barraclough will describe shortly. In the end, it will up to the Government to decide how far it wants to legislate in this area, and what reforms it wishes to pursue. What we would like to promote now is a process whereby those decisions are based on the best possible information and the engagement of everyone with an interest.

I am keen that this should be an informed and considered exploration of the issues raised, and the legal, practical and cost implications of making change. We are still very much in the early stages of development. I do, however, encourage all of you here this afternoon, and your colleagues and contacts in the justice world, to take part in this next stage. We have the opportunity to contribute to proposals that will benefit not just victims and witnesses, but everyone involved in the administration of justice in Scotland.