

Third International Advocacy Conference, Nottingham, 21 June

“Vulnerable Witnesses in Scotland – A Revolution in the Making?”

Lord Matthews

It is a very great pleasure to be with you here today. Nottingham has proven to be a very happy hunting ground for many Scots before, John McGovern, Kenny Burns, John Robertson, Archie Gemmill and John O’Hare to name but five.

At the equivalent Conference two years ago, my colleague, the Lord Justice Clerk, Lady Dorrian, said this:

“In Scotland we have embarked upon a critically important journey to a better outcome for vulnerable witnesses. We have recognised that our current methods, while always improving, do not meet the highest mark, and we need to develop our own, Scottish, solutions to the challenge.I would hope that, in time, those in other jurisdictions will seek to come to Scotland for their own inspiration”.

I’m pleased to say that, in the two years since that speech, we have made very significant progress on that critically important journey. We have developed some bold, practical Scottish solutions, particularly in the way we provide for children and vulnerable witnesses to give their evidence in criminal trials.

Whether we are ready to invite those who seek inspiration on these matters to visit Scotland is perhaps less certain. As you all know, the Scots are well known for their reticence; we have a tradition of being distrustful of show-offs. But today, I am prepared to cast our national shyness aside and blow Scotland’s trumpet, or bagpipes. The progress we have made in the past two years represents the first steps towards a radically different and much better way of getting a witness’ best evidence. It could even be described as revolutionary.

There have been three major milestones or stages in the revolution so far, and there will be more to come.

Evidence by Commissioner Hearings

The first stage was to take the existing legislation, and make best use of it. We focused on increasing the use of pre-recording both the evidence-in-chief and the cross-examination of witnesses in criminal trials. This is a concept with which you are all familiar, and will be discussing throughout the day. Indeed, an essential stimulus for our work in Scotland was the visit of Lady Dorrian and others in 2013 to see the section 28 pilots taking place in Leeds and Liverpool.

I won't go into the detail of the programme of research and consultation – much of it was covered in Lady Dorrian's speech of two years ago. In short, the judiciary, all the justice agencies, the legal profession and third sector groups worked together to develop proposals for the increased and better use of taking a child's or vulnerable witness' evidence in full in advance of the trial. In doing so, they created a level of consensus that was readily picked up by the Scottish Government and politicians of all parties.

That work identified that the quickest way to make early progress was to make use of an existing, but little-used, procedure in Scots criminal law, to introduce our own version of section 28 hearings. That procedure is known as Taking Evidence by Commissioner, or Commissioner hearing for short¹. And while we are translating from Scots legal practice to English, I'll be also referring to Joint Investigative Interviews, or JIIs, which are the equivalent of an Achieving Best Evidence Interview here.

The principal means by which Commissioner hearings were initially given a boost, were two High Court Practice Notes. The first Practice Note, issued in 2017, was designed both to encourage the use of Commissioner hearings for vulnerable witnesses in High Court cases and to give clear directions on how they should be prepared for and conducted. It drew heavily on the lessons learned here in England from the section 28 pilots, and especially from the guidance and toolkits from the Advocates Gateway. It introduced the concept of a ground rules hearing, and with that, the idea that questions to the witness might be revealed and discussed in advance. You have to realise that these were utterly alien ideas, contrary to the culture and practice of advocates over many decades.

¹ Section 271I, Criminal Procedure (Scotland) Act 1995

That is why this first Practice Note of 2017 has been supplemented by another Note which was issued earlier this year. The new Practice Note introduces a Protocol for Written Questions in Commissioner hearings. This was developed after a perception that there was inconsistency amongst judges in relation to whether or not written questions would be required. There is a small group of us who sit in preliminary hearings, when indictments in the High Court are first called and, as the name implies, preliminary issues are identified and ironed out as far as possible before a trial is assigned. We are the judges who decide, in the first instance at least, whether or not special measures such as evidence on commission will be put in place, although the new legislation that I will be talking about will have an effect on that. In any event, we decided that we should try to attain a measure of consistency and over a series of meetings and discussions we developed this protocol which was promulgated in the Practice Note after discussions with the Lord Justice Clerk, the Faculty of Advocates, the Crown Office and the Law Society. The fact that certain questions have been allowed by one judge does not, however, tie the hands of the judge who conducts the Commission and who can regulate procedure based on the circumstances at the time.

In order further to promote consistency and monitor what is going on, a Commissions Users Group has been set up with one of my colleagues as Chair so problems will be identified and dealt with efficiently and improvements made without fuss or delay.

As I said earlier, both these Practice Notes were designed to make the best use of the existing legislation and procedures, which had previously been underused. In that, they have been very successful, although we are still, from time to time, having to fix further hearings to allow counsel to prepare questions, a task they should have been carried out before the first hearing. However, most counsel are now on board and they find it a useful discipline to frame their questions in advance rather than proceeding on the traditional, somewhat ad hoc, advocacy. Many of you will remember that when the Human Rights Act was passed there was a period during which lawyers and judges found themselves in unfamiliar and uncomfortable territory but that is now part of the furniture and I am confident that that will soon prove to be the case in relation to Commissions.

Prior to the introduction of the first Practice Note, there were only a handful of Commissioner hearings in High Court trials each year, and even fewer in the sheriff courts.

In 2017, there were 50 applications for a Commissioner Hearing in the High Court. Twenty-nine of these led to recordings taking place (the others had pled out or been abandoned), 25 of which were played at trial. In 2018 that number had tripled to 158 applications, and it is likely that at least half of these will proceed to the trial stage. This may seem like small numbers in the English and Welsh context, but given that there were well under 1000 cases in the High Court in Scotland last year, their significance becomes more apparent.

I should also mention that there has been a great deal of work to improve the consistency and quality of the Joint Investigative Interview. These often form the witness' evidence in chief, and it has been recognised that a focus on ensuring the quality of questioning and the quality of the recording in JIIs will bring considerable benefits to the entire criminal process.

Occasionally we have problems with the recordings of the Commissions. The sound quality can be variable for example. In an effort to deal with problems like that the parties are required to view the recordings to make sure they are fit for purpose.

We do not get a transcript of the proceedings and occasionally we have to slow the DVD down or stop it altogether while we try to catch up if we are noting what has been said but these are minor issues in the great scheme of things.

Vulnerable Witnesses (Criminal Evidence) (Scotland) Act

If the first stage was to make best use of the current legislation, the second stage has been to change the legislation to make further improvements. The original statutory provisions for Commissioner hearings were not designed with the intention that this procedure would be a principal means of taking evidence. They were rather an option to be used as a last resort, much more use being made of CCTV links, screens, supporters and the use of prior statements as evidence in chief. As the numbers of Commissioner hearings increased over the past few years, some of the weak points in those provisions became readily apparent. A working-group, chaired by Lady Dorrian,

developed a number of recommendations designed to make the procedure more flexible and responsive to the needs of the witnesses and to the efficient administration of justice. The group's recommendations were taken up by the Scottish Government.

So the second big advance has come with the passage, just two months ago, of the Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill. This Bill was passed unanimously in the Parliament, reflecting the consensus that has been developed. I can tell you that it is now an Act having gained the Royal Assent on 13 June and it is, as I understand, likely to commence in January next year.

The Act's main features are:

- 1) It requires that child witnesses will give their evidence by means of a prior statement and/or a pre-recorded Commissioner hearing in advance of the trial, unless certain exceptions apply. These exceptions are if either the fairness of the trial or the child's best interests would be prejudiced by such a course of action, or if the child is 12 or over, has expressed a wish to give live evidence, and it would be in their best interests to do so. In other words, there is a strong presumption that the child's evidence in chief will be given by means of his or her recorded police and social work interview, the JII, and that cross-examination and re-examination will occur by means of Commissioner hearings. The Bill also provides that this presumption can be extended to other categories of vulnerable witness by means of secondary legislation.
- 2) The Bill requires there to be a ground rules hearing prior to the Commissioner hearing, and specifies some issues which must be considered at the ground rules hearing, including: the expected time required for questioning; the form and wording of the questions; the need for a supporter; and anything else that would help the witness participate effectively in the proceedings. The 2017 Practice Note provides further guidance on the conduct of these hearings.

- 3) The Bill makes provision to allow for a Commissioner hearing to take place even before the indictment has been served. There was a regular mention in the SCTS research that the gap between a child giving a prior statement in the form of recorded interview with the police, and their subsequent cross-examination on that interview, was far too long – over months or even years. This provides the opportunity to shorten that gap considerably, although it remains to be seen whether the parties are able to formulate their questioning, and provide sufficient disclosure prior to the charges being finalised.

The third major step forward has not been in the law or procedures, but in the facilities available for the witnesses to give their evidence in Commissioner hearings or by live TV link to court.

Vulnerable Witness Centres

The SCTS research emphasised the importance of creating an environment suitable for taking evidence from children and vulnerable witnesses – one that was away from the intimidating and austere courtroom. It's fair to say that our existing estate is not entirely user friendly. Our principal High Court remote link site has been, until now, located in a stand of Partick Thistle Football Club. Even the main Commissioner hearings room in Edinburgh is cold and characterless and located in the heart of the grandiose and intimidating surroundings of Parliament House.

It was quickly recognised that this would not be good enough to cope with the increasing volume of cases requiring either a Commissioner hearing or live video link to court. With support from the Scottish Government, the SCTS is investing in creating four dedicated Evidence Suites. These are purpose built facilities designed to ensure that children and vulnerable witnesses:

- are supported to give their best evidence, and have it tested, in more witness friendly environments
- are able to engage with trauma informed staff who can manage all hearings and live TV links in a manner that empathises with the needs of those with vulnerabilities.

The first and largest of these has already been built in central Glasgow. It's a purpose built facility solely for the use of taking evidence from children and vulnerable witnesses, and separate from either the High Court or sheriff court. The accused will view proceedings from one of these court buildings. This is a departure from practice as I understand here in England and Wales, where section 28 hearings are conducted in court, with the witness usually in a live link room.

This facility will have a dedicated specialist staff. And the design of the unit has been developed in consultation with children. This vulnerable witness suite has three hearing rooms, suitable for Commissioner hearings, and each hearing room in the suite has its own dedicated waiting room. The cameras in each room are built in and unobtrusive.

It also has rooms for live video links to Court, where the accused will be with his solicitor. He will not be allowed to be in the same building as the witnesses. It has break-out rooms, and a sensory room suitable for autistic children.

Similar facilities, although on a smaller scale, will be developed in Edinburgh, Inverness and Aberdeen.

The new facility in Glasgow has just been kitted out with the technical equipment and furnishings, and it is expected that the first Commissioner hearings will take place there in the next few weeks. The suite has already been used for hearings of the Additional Support Needs Tribunal, as that Tribunal also requires to take evidence from children, many of whom are particularly vulnerable.

There will be some challenges, which no doubt will become evident as the suite becomes more regularly used. One will be if there are multiple accused, each of whom would wish to view proceedings and relay instructions to their advocate. It may be that the advocates will have to go in one at a time and we would hope that at ground rules hearings in such cases we could identify common areas of questioning so that material will not be covered with the witness more than once, insofar as that can be avoided.

Looking to the future

I said at the outset that these are the first steps in the journey. There is still more to be done. To support the implementation of the new Act, our Judicial Institute is planning to collaborate with the Faculty of Advocates and the Law Society to develop training videos demonstrating good and bad practice in Commissioner hearings. Again, we have taken inspiration from the video on the Advocates Gateway website; ours will be filmed in the new Glasgow facility.

And there is plenty of appetite for further changes to the system. This was particularly evident in the Parliamentary discussions during the passage of the Bill. The Parliament's Justice Committee had visited the Barnahus, or Child's House, in Norway, and were keen to know when a similar facility and procedures would be introduced to Scotland. I presume that you are all familiar with the Barnahus concept which brings together child protection, health care, social work and forensic interviewing services into a single facility for children who are the victims of or have witnessed violent or sexual abuse. It originated in Iceland about twenty years ago, and it is now in place throughout the Nordic countries, and Baltic States, and is being developed in many other European countries.

I understand that progress is already being made to provide a Barnahus-style facility in Scotland for the conduct of Joint Investigative Interviews – a facility where all the medical, therapeutic and other support services are in place, as well as police and social workers trained in forensic interviewing.

And the working group that Lady Dorrian chaired did set out a long term vision for the most serious cases, in which the concept of examination and cross-examination was replaced by a Barnahus-style interview in such a facility. All questioning, favourable to the crown or favourable to the defence, would be mediated through a trained forensic interviewer in circumstances where the child will not come to court at all.

We know that this would require a very significant change in deeply ingrained legal culture and practice. This would be the real revolution, and it is not likely to be happening any time soon. But the fact that such a radical development is being actively and seriously discussed is an indication of how far we have come in a very short time.

Other initiatives include a Victims Task Force, co-chaired by the Justice Secretary and the Lord Advocate, which is looking at how to improve the experience of complainers throughout the criminal trial process. Another initiative is that Lady Dorrian, who is proving to have endless enthusiasm for chairing working groups on criminal justice, has just established a review of Sexual Offences and the way they are handled in court. This review will be looking at a range of issues, essentially starting from a blank slate. One option to be explored might be to establish a national Sexual Offences Court jurisdiction, to sit just below the High Court, but nothing is decided yet.

Conclusion

Only six years ago the landscape of provision for children and vulnerable witnesses in Scotland was far from ideal. Joint Investigative Interviews were of highly variable quality, and there was no consistency in the way they were deployed in criminal proceedings. If a case did reach a trial, many months or years later, little provision was made for vulnerable witnesses, other than the standard special measures of a screen, supporter or live video link. We would, of course, usually divest ourselves of wigs and gowns, often to the disappointment of child witnesses, and we would all speak in what we thought was a reassuring, soft voice, which I suppose was nothing more nor less than patronising. There was certainly little thought given to the nature of the questioning that young or vulnerable witnesses were subject to, or the environment in which they were questioned.

That is now changing, and changing radically. There is now a coalition of judiciary, practitioners, voluntary organisations and the politicians that has combined to bring about substantial change – change which should make the experience of those encountering the criminal justice system so much better, and more suitable for the real administration of justice. We have changed our procedures and practices, our legislation and our facilities; and the benefits are beginning to show. Most importantly the mind set has changed, so that the debate in Scotland about children, vulnerable witnesses and vulnerable accused too is no longer about “what is the bare minimum we need”, but “how ambitious can we be, and how far can we go?”