

**HIGH COURT OF JUSTICIARY
PRACTICE NOTE
No. 1 of 2017**

**TAKING OF EVIDENCE OF A VULNERABLE WITNESS BY A
COMMISSIONER**

Introduction

1. This Practice Note has effect from 8 May 2017. It replaces Practice Note No. 3 of 2005.
2. Statutory provision for the availability of special measures for vulnerable witnesses has been a feature of the criminal courts for more than a decade. In spite of that, the day to day practical application of these measures can sometimes leave much to be desired. This is particularly the case with the taking of the evidence of a vulnerable witness by a commissioner.
3. The most common deficiency in cases where there is a child witness, a deemed vulnerable witness or other vulnerable witness is a failure by the parties (both Crown and defence) to address their minds at a suitably early stage to the question of whether a commission is necessary for that witness. Early conduct of a commission has benefits not only in the earlier capture of the evidence but also in giving more time for addressing issues such as editing and admissibility.
4. Practitioners can find useful information to bear in mind at:
<http://www.theadvocatesgateway.org/>
5. The purpose of this Practice Note therefore is to give guidance as to—
 - (a) when practitioners should consider whether a commission is required;
 - (b) what practitioners must do in preparation for seeking authorisation to take the evidence of a vulnerable witness by a commissioner;
 - (c) what issues the court will expect practitioners to address in an application in relation to taking of evidence by a commissioner.

When practitioners should consider whether a commission is required

6. Parties need to consider proactively at an early stage whether any witness is, or may be, a vulnerable witness. In High Court proceedings, if the Crown intends to seek the special measure of a commission that must be intimated to the defence at the earliest opportunity so that appropriate legal aid cover can be arranged without delay. Similarly, the defence must intimate any such intention to seek a commission as soon as possible.
7. In cases where it is intended to rely on a prior statement as evidence in chief, it is particularly important that the commission should proceed at as early a stage as possible, having regard to the observations of the court in the case of *MacLennan v HM Advocate* 2016 JC 117 at paras 21 and 28.

Preparation for seeking the special measure of taking of evidence by a commissioner

8. In preparing a Vulnerable Witness (VW) notice or application a practitioner is to:
 - have regard to the best interests of the witness;
 - seek the views of the witness, and/or parent or guardian of the witness, as appropriate, with a view to determining whether taking evidence by commissioner will be the most suitable special measure, or whether another special measure, or a combination of measures, will be better in obtaining the witness's "best evidence";
 - take account of any such views expressed by the witness, or a parent or guardian of the witness as appropriate; and
 - consider how relevant information relating to the application or any subsequent commission will be communicated to the witness.
9. The VW notice or application is to
 - reflect any relevant statutory provisions;

- explain the basis upon which the witness qualifies as a vulnerable witness, and any specific issues relating to the witness;
- state why a commission is considered appropriate for the witness;
- state whether the commission requires to be held in any particular place, or environment, due to the location of the witness or any particular vulnerabilities which the witness may have;
- state whether the witness requires additional special measures;
- state whether the witness will give evidence to the commission by live television link;
- state whether the witness is restricted as to any times of the day, or particular days or dates that he or she can attend a commission as a result of his or her vulnerability;
- state whether the witness is likely to need frequent breaks or any other special requirements, such as disabled access;
- address how any question of identification is going to be dealt with;
- identify any productions or labels that may require to be put to the witness (the use of any productions or labels should be kept to a minimum);
- if any prior statement in any form may be put to a witness, identify the statement or the particular passages therein;
- state the manner in which such statement should be put, and the provision, if any, of the Criminal Procedure (Scotland) Act 1995 ("1995 Act") being relied upon;
- state whether an interpreter is needed;
- state the communication needs of the witness: identifying the level of the witness's comprehension, and whether any communication aids or other reasonable adjustments are required (in certain cases it may assist the court to be provided with any expert report addressing these issues and any other relevant issues mentioned in paragraph 11); and
- estimate the likely length of the examination in chief and cross examination.

Decision on the application at preliminary hearing

10. If the court appoints the VW notice or application to be disposed of at a hearing the solicitor must, forthwith, inform the Clerk of Justiciary and the Electronic Service Delivery Unit of Scottish Courts and Tribunals Service of the intention to seek authority to have the evidence of a vulnerable witness taken by a commissioner and check the availability of a suitable venue.
11. At the hearing the court will expect to be addressed on all matters set out in the VW notice or application. Parties will be expected to be in a position to assist the court in its consideration of the following matters:
 - whether the witness will affirm or take the oath;
 - the location of the commission which is the most suitable in the interests of the witness;
 - the timing of the commission which is the most suitable in the interests of the witness;
 - pre-commission familiarisation with the location;
 - where the accused is to observe the commission and how he is to communicate any instructions to his advisors;
 - if the commission is to take place within a court building in which the witness and the accused will both be present, what arrangements will be put in place to ensure that they do not come into contact with each other;
 - the reasonable adjustments which may be required to enable effective participation by the witness;
 - the appropriate form of questions to be asked (the court may consider asking parties to prepare questions in writing);
 - the length of examination-in-chief and cross examination, and whether breaks may be required;
 - how requests for unscheduled breaks may be notified and dealt with;
 - potential objections, and whether they can be avoided;
 - the lines of inquiry to be pursued;
 - the scope of any questioning permitted under s275 of the 1995 Act, and how it is to be addressed;

- the scope of any questions relating to prior statements;
- where any documents or label productions are to be put to the witness, how this is to be managed and whether any special equipment or assistance is required;
- whether any special equipment (for example, to show CCTV images to the witness) may be required;
- the scope for any further agreement between the parties which might shorten the length of the commission or the issues to be addressed;
- where there are multiple accused, how repetitious questioning may be avoided;
- the extent to which it is necessary to “put the defence case” to the witness (parties are invited to have regard to the observations of the Court of Appeal in *R v Lubemba* [2015] 1 WLR 1579 and *R v Barker* [2011] Criminal LR 233);
- how that is to be done;
- whether the parties have agreed how this issue may be addressed in due course for the purposes of the jury;
- any specific communication needs of the witness;
- whether any communication aids are required, e.g. “body maps”;
- if a statement in whatever form is to be used as the evidence in chief of the witness, whether and what arrangements should be made for the witness to see this in advance of the commission (i.e. how, where, and when);
- whether any such statement requires to be redacted in any way;
- in such a case, whether, and to what extent, there should be any examination in chief of the witness;
- the court may also make directions as to the circumstances in which visually recorded prior statements may be made available to the defence;^a
- the wearing of wigs and gowns;
- whether the judge/parties should introduce themselves to the witness in advance, how and when this will take place, preferably together;

^a HMA v AM & JM [2016] JC 127

- the arrangements to be made in due course for parties to view the resultant DVD prior to a post-commission hearing.
12. The court may make directions about these matters, or any other matters which might affect the commission proceedings, or which may be required for the effective conduct of the commission. If combined special measures are sought, the court will address how this is to work in practice.
13. At the hearing, whether or not a trial has been fixed, the court will consider fixing a post-commission hearing at which the court may address:
- any questions of admissibility which have been reserved at the commission;
 - any editing of the video of the commission which may be proposed (parties may request that the clerk allow the recording to be viewed prior to the further hearing to assess the quality of the recording, and the court may specify the conditions under which such viewing may take place);
 - the quality of the recording (and, where the quality is poor, whether transcripts are required); and
 - how the evidence is to be presented to the jury.

CJM Sutherland
Lord Justice General
Edinburgh
28 March 2017