

**Evaluation Report No. 1:**

***– Practice Note 1 of 2017 (Evidence by Commissioner)***

*Covering: the 11 month period from May 2017 to March 2018*

*Issued: September 2018*

**INTRODUCTION**

1. The High Court of Justiciary Practice Note (1 of 2017) *(appendix 1)* on the taking of evidence of a vulnerable witness by a Commissioner came into effect on 8 May 2017. This was as a consequence of the work of the Evidence and Procedure working group, led by Lady Dorian, on the pre-recording of evidence from children and other vulnerable witnesses. A series of Evaluation Reports is planned to help monitor whether the new Practice Note has had its desired effect in terms of the way in which evidence by commissioner hearings are conducted and in increasing the number of times this special measure is used:

* *Evaluation Report No. 1 (this paper)* - is focussed on the way in which the guidance within the Practice Note has been perceived by those directly involved in making applications for commissioner hearings in the first eleven months following its introduction (i.e. through to the end of March 2018).
* *Evaluation Report No. 2* - will follow later in 2018 based on the outturn for the six months to September 2018. That report will focus on how well the component parts of the Justice System have been able to respond to growth in the volume of applications made.

**THE LEVEL OF DEMAND (High Court Only)**

1. During 2017-18 there were a total of 792 indictments lodged with the High Court, and of those 461 (60%) proceeded to trial. In that same period the applications for taking evidence by a commissioner covered the potential for pre-recording the evidence for a total of 62 witnesses *(44 child witnesses and 18 adult witnesses).*
2. High Court data currently records the breakdown of the applications it has received each month as follows:



1. In previous years the number of such applications has been in the order of 1 to 2 per month. The Practice Note was introduced with effect from May 2017 and has clearly made a positive contribution in the growth of the number of applications made e.g. there was an average of 9 applications per month made in the last quarter.
2. That increase in volumes in 2017-18 is modest but we expect growth to continue to build strongly over the coming year (2018-19) as practitioners become more familiar with the procedure and are better able to assess its benefits.

**METHODOLOGY**

1. For this first evaluation report the aim is to assess how the Practice Note is perceived by users, and whether it meets the objective set out within the Practice Note itself:

*To provide guidance to practitioners on:*

* *When consideration should be given as to whether a commission is required.*
* *What must be done in preparation before seeking authorisation to take the evidence of a vulnerable witness by a commissioner*
* *The issues the court expects to be addressed in the application*

1. The methodology used was to issue questionnaires to key participants during early February 2018, with responses to be returned during March 2018. Separate questionnaires were issued to judges, the Crown Office and Procurator Fiscal Service (COPFS), Victim Information and Advisory Service (VIA) and advocates/solicitor advocates seeking their views on whether the Practice Note has achieved its objectives and whether there any lessons to be learned or improvements made. The Scottish Criminal Bar Association assisted with issuing the questionnaires to their members and COPFS issued the questionnaires to Advocate Deputes and VIA, and collated the VIA responses.
2. An example of the questions as issued to COPFS is included as appendix 2 to this report to assist readers in understanding the type of questions asked.

**THE RESPONSES RECEIVED**

1. The SCTS received 18 formal responses to the questionnaires as issued, with some of those collating information from multiple individuals:

|  |  |
| --- | --- |
|  | Number of  Responses |
| Judiciary | 8 |
| Crown Office and Procurator Fiscal Service (COPFS) | 2 |
| Defence Agents | 2 |
| Victim Information and Advisory Service(VIA) | 6 |
| *Total Responses* | 18 |

*Judicial Feedback (8 responses)*

1. All responses were favourable in terms of the Practice Note being helpful in identifying the issues in granting an application for the taking of evidence by a Commissioner. It was commented that the training provided previously to judges was helpful, and that refresher training should be considered in a year’s time.
2. There were mixed responses regarding the completion of the Vulnerable Witness application form - 37% of responses suggested that information was not always complete, with one response stating,

*“The applications are frequently lacking in information on the abilities of the witness and reports from psychologists etc. are sometimes not provided with the applications.”*

1. It was also suggested that the applications should be dated.
2. 37% of respondents felt that the evidence and cross examination at a commission hearing was faster than if the witness was to attend trial. One response stated:

*“If the witnesses’ evidence had been taken at trial under the pre-practice note system, then I would estimate that it would have taken twice as long.”*

1. There is strong support for focused questioning which is achieved by having a ground rules hearing. One response stated,

*“Counsel were very well prepared, questions were short and clear and the setting for the commission was appropriate.”*

1. In terms of suggested improvements, one response referred to section 11 of the Practice Note - (the appropriate form of questions to be asked (the court may consider asking parties to prepare questions in writing)), which stated;

*“I wonder if this should be more directed to the court developing a culture whereby written questions are expected in the case of young children (certainly those aged under 10) and perhaps also in the case of witnesses with learning difficulties. I have invited questions on several occasions and it worked well. I did not encounter resistance from the bar. Defence counsel can apply themselves to the task and it helps them to learn how to frame questions in the light of the guidance in the Toolkits. It also demonstrates to defence counsel how many questions are unnecessary and so shortens questioning of the witness.”*

1. Another suggested improvement was to have greater emphasis on providing the court with as much detail about the witness’ mental limitations and abilities to answer questions. It was considered that this would be valuable where the witness has such problems and that this would make it easier to ascertain what sort of questioning would be appropriate.

*COPFS Feedback (2 responses)*

1. The COPFS responses support the use of Evidence by Commissioner hearings where appropriate, and view the Practice Note as being helpful. The main criticism relates to the current process for arranging the commission hearing and the time this can take.
2. Comments were made regarding the need to provide written questions beforehand and that it’s not always possible to produce a complete script for examination in chief. It was suggested that there should be some flexibility to go ‘off script’ although it was noted that the current practice varies and some judges require parties to seek leave before asking a question that is not on the list.
3. COPFS suggested that the witnesses’ evidence took about the same time or in some cases much less time at the commission hearing than at a trial.
4. In terms of what could be improved, it was suggested that a continued preliminary hearing could be fixed immediately before the commission (e.g. for 9.30am for a 10am commission, with the same judge hearing both). This would enable any unexpected procedural business to be dealt with. For example, in one case, at the start of the commission the commissioner raised the prospect that some of the proposed defence questions might require a section 275 application. This proved to be unnecessary, but if a section 275 application had been needed the Advocate Deputes understanding is that that could not have been moved at the commission itself. Another example might be a late section 67 notice adding material for use at the commission. Such matters ought to be addressed in advance of the day of the commission, but issues might arise unexpectedly – e.g. a motion to adjourn the trial due to a complainer’s health problems.
5. One response suggested that the Practice Note is repetitive at times and would benefit from being streamlined.

*Defence Feedback (2 responses)*

1. Feedback from defence respondents suggested that the Practice Note is clear, although it was noted that the preparation and presentation of written questions can be difficult and inflexible for the purpose of cross examination (and examination in chief) which will not always proceed as predicted.
2. Additionally, it was noted that it can be difficult to determine which Advocate Depute has been allocated a case (in advance of the commission and trial) and so the discussions can often take place later than would be desirable. Earlier notification of this would encourage earlier engagement.
3. All respondents stated that they did not experience the emergence of any material subsequent to the commission which would have the affected the way in which the commission was conducted and the questions asked.
4. In terms of what could be improved, one respondent noted that when he viewed the DVD of the commission, the image of the witness was not the dominant image due to the camera angle. It seemed that the questioning counsel was the dominant image on the screen rather than the witness which may have diminished the jury’s opportunity to fully assess the manner and demeanour of the witness.

*Victim Information and Advisory Service Feedback (6 Responses)*

1. VIA respondents reported that the Practice Note assisted them when considering evidence by commission as a special measure and that the checklists are very helpful in drafting the VW application. Overall, the process of applying for and preparing for the preliminary hearing is easier than it used to be due to the methods of making the necessary practical arrangements and responsibilities of parties clearer.
2. While there was no specific feedback from witnesses, VIA reported that the limited locations in which commissions were held meant that the best option for witnesses was not being provided.
3. It was reported that Evidence by Commissioner hearings from remote links can be difficult for a number of reasons. More often than not the local court is not advised that the hearing is taking place and it does not have staff/room available. Where a witness is giving evidence by Commissioner from a remote link there is no VIA support and therefore if there is a difficulty with the witness breaks/refusing to continue there is no one available to convey any issues to the Crown/AD. On one occasion there was a commission hearing where the AD required to show video footage to the witnesses. There was no separate screen in the commission room which meant that part of the evidence (lap top used) could not be filmed in entirety.
4. The single biggest issue continues to be the provision of remote sites for commissions, as there are now no suitable non-court sites in the east of Scotland (apart from a newly assigned Edinburgh remote site in George House, which VIA are advised is not suitable so Sheriff Court Vulnerable Witness Rooms are used). Some of those are not suitable to accommodate face to face commissions, requiring room for 7/8 people which also creates some pressure on sheriff and jury trials. While the Practice Note helpfully enshrines location as a key consideration for commissions VIA find that the logistics and practical limitations of available accommodation mean that they often have to approach the issue not on the basis of what is best for the child, but if the child can travel into Edinburgh. Parliament House, while it has the best facilities for a Commission, is a very imposing building and does not have the facility to be a “remote site” so that the accused and Commissioner can be elsewhere with the child linking in from Parliament House.
5. A pre-court visit is normally arranged to show the witness the room and have an opportunity to meet the Advocate Depute. Feedback from parents/guardians is that it is helpful to the child (in particular if they are very young) to meet both Counsel and the Judge on the day of the hearing and before the commission commences. It is also helpful for the child to see the room where the commission is to take place when it is all set up, to allow them to understand where all parties will be sitting and where they will be.
6. Parents of child witnesses have commented that when pre-commission visits are carried out, the room is empty and there is no camera equipment in place. On the day of the commission, the witness enters a very different room full of people including a camera and operator. This can be daunting for the witness and they should be made aware in advance that the room will look more crowded / different on the day.

**CONCLUSIONS**

1. The conclusions that can be drawn from the 18 responses received are:

*Guidance* – The new Practice Note has been well received and it has delivered improved guidance to those who were actively involved in the process of taking Evidence by Commissioner. It has been seen by the respondents as meeting its objective of providing greater clarity on a) when a commission is appropriate b) the level of preparation expected and c) the likely questions that the court needs to have addressed. Suggested improvements included numbering the subparagraphs, along with strengthening the level of detail provided to the bench on the specific vulnerabilities of each witness.

*Demand* – The aim of the practice note is to help drive up the use of this special measure. Previously demand was running at an average of 1 - 2 applications per month and during 2017-18 that lifted to an average of 9 applications per month (over the last quarter). That upward trend is a positive outcome but the longer term expectations of the working group is a significantly higher growth in the number of applications and the use of evidence by commissioner procedure.

*Application Forms* – When the Vulnerable Witness Application forms are next updated the legal drafters should consider the usefulness of incorporating the checklists into those forms.

*Site Familiarisation* – Some respondents expressed a view that current arrangements for site familiarisation could be enhanced through the greater use of pictures / videos, and a greater uptake of site visits.

1. It should be noted that in June 2018 the Scottish Government tabled the *Vulnerable Witnesses (Criminal Evidence) Bill* in the Scottish Parliament. That Bill, if approved, will put in place the legal presumption that all children (and deemed vulnerable adults) should have their evidence pre-recorded in order that they do not have to appear in court.
2. Whilst that bill will take time to progress through the Scottish Parliament it provides a very clear message regarding the Scottish Governments’ desired direction of travel and it is likely to provide added impetus for growth as we progress through 2018-19.

**RECOMMENDATIONS**

1. It is recommended that:

* Within individual cases the judiciary could routinely challenge why the taking of *Evidence by Commissioner* has not been sought if any child witness is involved
* The 2nd Evaluation Report scheduled for publication in late 2018 will consider:
* The operational perspective on the capabilities within the justice system to respond to the increasing growth in evidence by commissioner applications to the High Court.

*Scottish Courts and Tribunals Service*

*September 2018***APPENDIX 1 – THE PRACTICE NOTE AS ISSUED**

**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—
   1. when practitioners should consider whether a commission is required;
   2. what practitioners must do in preparation for seeking authorisation to take the evidence of a vulnerable witness by a commissioner;
   3. 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**

1. 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.
2. 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**

1. 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.

1. 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**

1. 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.
2. 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;
* the arrangements to be made in due course for parties to view the resultant DVD prior to a post-commission hearing.

a HMA v AM & JM [2016] JC 127

1. 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.
2. 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

**APPENDIX 2 – EXAMPLE QUESTIONS *(as issued to COPFS)***

1. What would discourage you from making an application for taking evidence by a commissioner? (e.g. paperwork, distance to travel, difficulty to arrange etc. )?

2. Were there occasions when evidence by commissioner was considered but not used? If so, please give reasons why it was not used.

3. What other measures, if any, were used instead?

4. Were the views of the witness (and/or the views of the parent/guardian) sought to determine whether evidence by commissioner was the most suitable special measure?

5. Did you find the template that was introduced to coincide with the Practice Note helpful? Was there anything that could be improved with the template?

6. Did the Crown and the defence have an opportunity to discuss the conduct of the commission in advance?

7. If so, were you able to limit the issues to be addressed or the duration of the commission? And in what way?

8. Was there a visually recorded prior statement?

9. If so, was it used as evidence in chief?

10. Did the crown need to ask any supplementary questions before cross examination?

11. What arrangements were made to show the visually recorded prior statement to the witness before the commission?

12. Did the judge have an opportunity to see it?

13. Did any material emerge subsequent to the commission which would have the affected the way the commission was conducted or any of the questions asked?

14. If so, how that was dealt with?

15. How long did the commission hearing take?

16. Can you provide an estimate of how long the witness’ evidence might have been expected to take if given only at trial?

17. Did it result in the need for the witness to attend the trial?

18. Did you require to ask the witness further questions at the trial? (e.g. if new evidence came out during the trial).

19. If so, how was this achieved?

20. Was there anything that could be improved?