

# HIGH COURT OF JUSTICIARY

## Practice Note

No.1 of 2019

### **VULNERABLE AND CHILD WITNESSES: written questions**

1. This Practice Note takes effect from 8 April 2019.
2. It supplements *High Court Practice Note Number 1 of 2017: Taking of evidence of a vulnerable witness by a commissioner*. Paragraph 11 of that Practice Note provides that the court may consider asking parties to prepare questions in writing. The Protocol set out in the schedule to this Practice Note sets out the general approach to be taken in this matter.
3. The Protocol has been agreed by the Crown, the Faculty of Advocates and the Law Society of Scotland.

CJM Sutherland

Lord Justice General

Edinburgh

5 March 2019

## SCHEDULE

### PROTOCOL FOR WRITTEN QUESTIONS

#### VULNERABLE AND CHILD WITNESSES

In assessing whether to call for written questions in advance of a commission to take the evidence of a child or vulnerable witness, the court will be mindful that each such witness will have different abilities and limitations. No rigid and inflexible rules can be laid down. Prior approval of questions does not necessarily preclude different or additional questions being put to the witness; matters may have to be reassessed having regard to the demeanour and presentation of the witness in the course of the commission hearing. The commissioner can expect advocates-depute and counsel for the accused, as officers of the court, to act in accordance with their professional responsibilities. These may require different or additional questions to be asked, the content of which will depend on the answers given. All questioning is subject to the overall control of the commissioner and he or she will have regard to whether any different or additional areas of questioning ought to have been predicted and the relevance of the questions.

Certain general principles can be identified.

Parties should always be properly informed about the communication abilities and additional vulnerabilities of any witness who is the subject of an application to take evidence on commission. The Crown should be in a position to inform the court and the commissioner on all the relevant issues affecting the vulnerable witness. In some cases the Crown will have had the witness examined by a psychologist. The report should always be made available to the defence and the court when the application is lodged. It will sometimes be appropriate for the examining psychologist to be shown proposed questions so that a view on the format of the questions can be given.

The taking of evidence from child and vulnerable witnesses should entail the least number of questions consistent with the duties of counsel. It should be carried out as speedily as is possible. Questions should be simple and straightforward. The language used should be understandable to the witness. The questioner should avoid tagged or hypothetical questions and complex syntax. Regard will be paid to the best interests of the witness.

A child under 12 is not put on oath. As a general rule, in the case of such children written questions will be called for. In the case of witnesses with significant communication or comprehension difficulties, whether as a result of learning disability or a mental health condition or otherwise, written questions will generally be called for. The court will consider each such case on its merits and will, when appropriate, dispense with the requirement for

written questions on being satisfied that the evidence of the witness can be properly adduced without prior approval of questions. In the case of children of 12 and over, written questions may be required, having regard to the child's best interests and the information available as to the child's abilities.

In appropriate cases, other means to protect the witness and to allow his or her evidence to be obtained will be considered. For example, it will sometimes be sufficient for the defence to intimate the lines of questioning proposed for the witness. This may be the case, for example, where the Crown anticipate substantial questioning of the witness at the commission and are to intimate written questions in advance. Even in the absence of written questions, all those participating in eliciting the evidence of vulnerable and child witnesses must bear in mind the limitations of the witness. They should craft their questions according to the principles outlined above and to the guidance provided by the Advocates Gateway website.