

HIGH COURT OF JUSTICIARY
PRACTICE NOTE
No 1 of 2024

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

Introduction

1. This Practice Note will come into effect on 2 September 2024. It replaces Practice Note 1 of 2017.
2. Statutory provision for the availability of special measures for vulnerable witnesses has been an increasing feature of the criminal courts for many years, most recently by the *Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019*. The 2019 Act introduced ground rules hearings to be held before evidence is taken by a commissioner to ensure preparedness. It also allows pre-recording of evidence before indictment if appropriate.
3. In spite of that, the day to day practical application of these measures can on occasion leave much to be desired. This is particularly the case with the taking of the evidence of a vulnerable witness by a commissioner.
4. 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.
5. Those preparing and considering applications, conducting commission hearings and presiding over them must bear in mind that sections 274 and 275 of the *Criminal Procedure (Scotland) Act 1995* apply just as they do at trial (section 271I(5) and (6)). They must bear in mind the powers of a commissioner to decide an objection at a commission hearing (Act of Adjournal Rule 22.12(3)). They are reminded that, on the day of the commission, it may be necessary to ensure: that all microphones are working, and on when required; that the witness is favourably situated in respect of a microphone; and that they take care not to speak over the witness.
6. Practitioners can find useful information to bear in mind at:
<http://www.theadvocatesgateway.org/>
7. The purpose of this Practice Note is to give guidance on—

- (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; and
- (c) what issues the court will expect practitioners to address in an application in relation to taking evidence by a commissioner;

When practitioners should consider whether a commission is required

8. Parties need to consider proactively and 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.

9. 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 *HM Advocate v MacLennan* 2016 JC 117 at paras [21] and [28].

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

10. 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 on commission 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.

11. 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 and in particular whether there should be a supporter;
- identify the appropriate form, wording and scope of questions to be asked and, where appropriate, written questions should be prepared for consideration by the court (see Practice Note 1 of 2019 “VULNERABLE AND CHILD WITNESSES: written questions”);
- 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, be accompanied by a copy of the statement and identify the relevant passages therein (which should be kept to a minimum);
- state the manner in which such a statement should be put, and the provision, if any, of the *Criminal Procedure (Scotland) Act 1995* being relied upon;
- confirm that the parties have discussed the best means of putting such a statement to a witness, having regard to the interests of the witness and the fairness of the trial;
- 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

- provide a carefully considered estimate of the likely length in minutes of the examination in chief and cross examination.

Decision on the application at preliminary hearing/ground rules hearing

12. 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 Tribunal 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.

13. 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:

- 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, wording and scope of questions to be asked. The court may consider asking parties to prepare questions in writing (see Practice Note 1 of 2019 “VULNERABLE AND CHILD WITNESSES: written questions”);
- 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 s 275 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 confine 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, what arrangements are to be made for the witness to see this well in advance of the commission (i.e. how, where, and when), not on the day of the commission;
- whether any such statement requires to be redacted or edited 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;
- how the judge/parties should introduce themselves to the witness in advance, when this will take place, having regard to the needs and preferences of the witness
- whether the parties should speak to the witness after the commission;
- the court will direct that parties may access a copy of the recording once available on standard conditions:
 - (i) that copies will not be made of any recording, disc(s) or storage device (s);
 - (ii) that no disclosure of the recording or contents of the disc(s) or storage device (s) will be made unless necessary in the legitimate interests of the accused;
 - (iii) that the disc(s) or storage device (s) will be returned at the end of the proceedings;
 - (iv) that except when being viewed, the disc(s) or storage device(s) will be kept in a locked, secure container and not unattended or otherwise unprotected; and
 - (v) that the accused can view the recording, disc(s) or storage device (s) only under the supervision of their legal representatives.
- the court may impose other conditions as seems appropriate;
- the court will direct that, within 14 days of parties being advised that a copy of the commission recording is available for borrowing, parties are to confirm to the court in writing that they have viewed and listened to the recording of the commission and confirm that it is of sufficient quality without headphones for use at the trial;
- the court will direct that, in the event that there is a problem with the commission recording, parties should seek to solve it and, if the intervention of the court is required before the trial diet, use section 75A procedure by accelerating the trial to convene a preliminary hearing at which any issue can be resolved. The trial diet can be reserved and re-fixed at the conclusion of the preliminary hearing.

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

- if at the trial the recording is found to be deficient, the court will expect to be addressed on why this was not identified sooner.

14. The court may make directions about these matters, or any other matters which might affect the commission proceedings (including specifying any other steps which will facilitate the giving of evidence by the witness), 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.

15. Witnesses report a benefit from meeting practitioners before the commission itself. Accordingly where practitioners are to meet a witness before the commission, it will be presumed that defence counsel will make themselves available to do so unless they have given notice to the contrary at the PH/GRH, and satisfied the Court at that hearing of the reason.

16. At the hearing, the court will only consider fixing a post-commission hearing when it is known that the court will have to address any questions of admissibility which have been reserved at the commission.

17. Having regard to the vulnerability of the witness, parties are expected to make every effort to avoid adjournment of a commission, particularly on the day of the commission itself.

18. If counsel becomes unavailable to conduct the commission, every effort must be made to ensure, well in advance thereof, that an alternative counsel is made available.

19. Commission hearings must commence on time.

20. If in the commission it is apparent to the commissioner that the commission recording should be edited before trial, the commissioner should inform parties of the issue and invite them to ensure it is done. The clerk should minute accordingly.

Lord Justice General
Edinburgh
1 August 2024