Pre-recording Evidence of Child and other Vulnerable Witnesses

Consultation Analysis

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Scottish Government
Riaghaltas na h-Alba
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Executive Summary

Between 29 June 2017 and 29 September 2017, the Scottish Government consulted on pre-recording evidence of child and other vulnerable witnesses. The focus of the consultation was on addressing identified legislative and practical gaps within the current arrangements for enabling child and other vulnerable witnesses to have their evidence pre-recorded in advance of trial, with a particular focus on strengthening and improving the current arrangements for evidence being taken by a Commissioner.

The consultation received 47 responses, comprised of 16 individuals and 31 organisations. The major themes to emerge from analysis of responses to the consultation were as follows.

Presumption in favour of child and other vulnerable witnesses giving pre-recorded evidence

- Overwhelming support for the longer-term aim of a presumption that child and other vulnerable witnesses should have all of their evidence taken in advance of a criminal trial.
- Majority supported an amendment to the Criminal Procedure (Scotland) Act 1995 to include the use of (a) prior statements as evidence in chief and (b) evidence by a Commissioner as standard special measures.

Transitional arrangements for moving to pre-recorded evidence for child witnesses

- Respondents generally favoured the initial focus to be on all younger child witnesses and complainers.
- Focusing initially on serious crimes heard in the High Court was largely supported.

Right to choose to give evidence in court

- Balance of opinion fell towards maintaining the right to give evidence in court for all witnesses regardless of age but on the basis that current practice in supporting child and vulnerable witnesses is improved.
- It was suggested that provision should be made for the event they changed their mind as to the method they wished to use.

Child accused in criminal cases

- Vast majority considered that a child accused should also be able to give pre-recorded evidence in advance of a trial due to the acute vulnerability of the accused child.
- Many believed there were differences to be considered between how a child complainer or witness could give pre-recorded evidence and how a child accused could do so.
- Respondents detailed a range of procedural issues to be considered including the tactical nature of the decision of whether an accused gives evidence, the lack of statutory procedure for taking evidence by Commissioner before

service of the indictment and usually it is not clear what requires to be proven until service of the indictment.
- Due to the range of complex procedural issues involved, it was suggested that further work should be undertaken to review the approach for child accused.

The timing of taking of evidence by a Commissioner

- The majority felt that legislation should provide for the taking of evidence by a Commissioner before service of the indictment due to the current lengthy delays within the criminal justice process.
- Issues of disclosure, procedure and resourcing were given as further barriers to the taking of evidence by Commissioner before service of the indictment.
- Solutions proposed included wider cultural changes, increased resources, piloting and learning from the experiences of other jurisdictions to address identified barriers.
- The need for highly trained Commissioners and suitable locations for the taking of evidence was highlighted.

Ground Rules Hearings

- Almost all respondents were strongly in favour of the introduction of a ground rules hearing.
- Respondents highlighted the need to hold the hearing as soon as possible in the process, but with enough time for adequate preparation.

Role of the Commissioner

- The majority who commented were in favour of the same individual sitting as a Commissioner and presiding as the judge at the trial citing the benefits of familiarity and consistency for the witness. However, several highlighted potential issues with the scheduling of trials and the availability of judges.
- The Commissioner having the power to review arrangements for the vulnerable witness giving evidence was supported by a majority of respondents.
- The majority of respondents were also in favour of the Commissioner being the ultimate decision maker on which questions were appropriate to be asked during a pre-recorded examination.

Other significant issues raised

- The use of the Barnahus model as a desirable long term aim for Scotland.
- The need for similar changes to those proposed in this consultation to be made to the civil and children's proof hearing procedures in Scotland.
- The quality of Joint Investigative Interviews.
- The role of intermediaries.
- The need for on-going monitoring and evaluation of the system.

Introduction

This report analyses the responses to the Scottish Government's consultation on pre-recording evidence of child and other vulnerable witnesses.

Background

One of the most important functions of the justice system is to protect the interests of witnesses to crime. However, there is the risk that witnesses – especially child and other vulnerable witnesses of the most serious and traumatic crimes – can be re-traumatised through their participation in the criminal justice process. This does not benefit witnesses or the interests of justice. Giving evidence in court long after events have taken place also does not support witnesses to provide the best evidence.

In recent years, arrangements have been strengthened within the justice system to extend access to special measures in court and, where appropriate, to help keep children and other vulnerable witnesses out of court, for example through greater access to remote video links for both summary and solemn criminal cases. However, the Scottish Government believes strongly that more can and should be done to support child and other vulnerable witnesses.

Between 29 June 2017 and 29 September 2017, the Scottish Government consulted on pre-recording evidence of child and other vulnerable witnesses. The focus of the consultation was on addressing identified legislative and practical gaps within the current arrangements for enabling child and other vulnerable witnesses to have their evidence pre-recorded in advance of trial, with a particular focus on strengthening and improving the current arrangements for evidence being taken by a Commissioner.

The initial focus of any changes is likely to be on child witnesses but the consultation also sought views on potential changes for vulnerable adult witnesses. This consultation also needs to be seen within the context of the wider work being taken forward to progress the vision set out by the Cabinet Secretary for Justice in order to improve the experiences of child and other vulnerable witnesses more generally.

The consultation received 47 responses, comprised of 16 individuals and 31 organisations. These were received via the consultation website Citizen Space, and also via email to a dedicated email account.

The consultation paper and the responses for which permission has been received to publish are available at: https://consult.scotland.gov.uk/criminal-justice/pre-recorded-evidence-for-criminal-trials/.

Next steps

The responses to this consultation will be considered as part of the Scottish Government's work to develop policy proposals for forthcoming legislation.

Classification of respondents

Table 1 groups respondents into six cohorts. This allows for analysis of any patterns in response across different types of organisations, or groups of individuals. A list of respondents can be found at Annex 1.

Table 1: Respondents by group

Respondent group	**Number**
Legal/academic individuals	5
Other individuals	11
Total individuals	**(16)**
Advocacy and support	8
Children and Young People	6
Local Authorities, health and multi-agency partnerships	9
Enforcement/Legal	8
Total organisations	**(31)**
Total	**47**

Where respondents have raised multiple points under one question, these have been dealt with under the most relevant section of the analysis.

Analysis

Presumption in favour of child and other vulnerable witnesses giving pre-recorded evidence

Question 1 - Do you consider that the ultimate longer-term aim should be a presumption that child and other vulnerable witnesses should have all their evidence taken in advance of a criminal trial?

Respondent group	Yes	No	Unclear	No response
Individuals				
Legal/academic individuals	4			1
Other individuals	10	1		
Organisations				
Advocacy and support	6	2		
Children and Young People	5			1
Local Authorities, health and multi-agency partnerships	9			
Enforcement/Legal	8			
Total (47)	**42**	**3**		**2**

There was overwhelming support across individual and organisation responses for the longer term aim of a presumption that child and other vulnerable witnesses should have all their evidence taken in advance of a criminal trial.

One respondent stated that “a statutory presumption that child and vulnerable witnesses should have their evidence taken in advance of a criminal trial is a logical and sensible approach and one that will, if carried out effectively and to the necessary standards, will serve both the public interest and the administration of justice”.

It was noted by another respondent that the presumption is a suitable longer term aim for the criminal justice system but that there are challenges in achieving this, most notably the speed of proceedings and that many cases will not proceed to trial. However, that pre-recording already takes place successfully in other jurisdictions including Western Australia and England and Wales was raised by a number of respondents.

Some comments centred around the wider benefit of pre-recording rather than detailing why a specific presumption in law for pre-recording would be more beneficial than having to apply for its use as a special measure.

It was highlighted by a few respondents that pre-recording of evidence would increase access to justice for children and vulnerable adults. An advocacy organisation noted that currently there was a very high risk of victim withdrawal from

the justice process due to the victim's perceptions they would not be able to give their best evidence safely.

All legal and enforcement respondents were in favour of a presumption as a longer term aim. They did, however, note some technical issues to be considered:

- The recording of cross examination should follow the recording of examination in chief as closely as possible. Any re-examination should be dealt with immediately after cross examination.

- The change to a presumption to pre-record would "introduce a more inquisitorial approach to the broadly adversarial nature of the criminal trial, will move effort and resource from the trial to the investigatory process, potentially change the professional obligations for defence solicitors and other participants in the criminal justice process and see a significant cultural change in the ways in which child and vulnerable witnesses are treated".

- The speed of proceedings in the initial stages would have to increase.

- A solution would require to be found where there was delayed disclosure, as this would cause difficulties for the defence in determining how to approach a case and bring forward or challenge evidence.

Cross examination and defence

Some respondents pointed to research suggesting the negative impact of court-based cross examination on adults and children. This was linked to the perceived combative style of questioning undertaken by advocates, which as one respondent noted "does not elicit best evidence and is traumatic". Many respondents emphasised that it was crucial that witnesses are interviewed by highly trained and skilled experts in the field. For children, it was stressed that the questioner should have knowledge of child development and how they process information and consolidate and communicate from memory. For vulnerable adults, this would include availability of those specialised in understanding effects of dementia and fluctuating cognisance and the optimum time to take forward recording of evidence.

There was a consistent view that a presumption in law by itself would not be enough to mitigate the stress of questioning of child and vulnerable witnesses, and to obtain good quality evidence.

Quality of evidence

Nearly half of respondents cited an increase in the quality of evidence obtained by removing child and other vulnerable witnesses from live court proceedings.
This seemed to be with the presumption that the evidence would be recorded much closer in time to the taking place of any alleged offence, and hence would allow for more accurate recall of events by the witness.

Choice of individual

Those in opposition to legislating for a presumption asserted that witnesses should be given a choice as to whether to appear in court or not. A number of respondents stated that it should be the individual's choice as to whether they pre-record or give evidence in person, if they have the capacity to make that decision and are fully informed of what it would involve. One organisation noted that some individuals deemed vulnerable would not wish to be treated differently and would prefer to give their evidence in court, with any necessary support they require, and should be free to do so. Another respondent queried which professional would be best placed to inform the child of their rights in this regard.

Other comments

- Although in favour of a presumption, one respondent noted "that this is not a novel and complete departure from what is currently available. All of the proposed procedures and facilities already exist and have done so since the inception of the Victims and Witnesses (Scotland) Act 2004. None of it is new; we are trying to improve and build on what is already there so there are no 'start up costs'. Anecdotal evidence indicates that practitioners have been reluctant to submit applications for the taking of evidence by commissioner because commission hearings are regarded as being 'onerous' to organise and conduct and are therefore perceived as being a last resort when there is no other way of securing a vulnerable witness's evidence, as opposed to a mark of best practice".

- An advocacy respondent gave a detailed description of the process they felt required to be followed:

  "The vulnerable witness notice submitted to the court must contain a clear and comprehensive summary of the views of the adult or child witness (for child witnesses, also their parents, where appropriate), information on the needs of the witness and on the approach to conducting the commission hearing that will support the witness to give their best evidence".

  They stressed that the investigating officer reporting the crime should obtain as much relevant information as possible, and the party citing the witness should undertake a detailed assessment of the witness's communication and support needs. They should also understand dynamics around coercive control "to ensure that children and young people are not treated differently and/or are prevented from accessing appropriate support, purely on the basis of the ability of the investigating police officer, the COPFS [Crown Office and Procurator Fiscal Service] and/or defence to understand exactly what has occurred".

- The court should be the final decision maker on whether a witness appears in court.

Question 2 - Should section 271A(14) of the 1995 Act be amended to include the use of (a) prior statements as evidence in chief and (b) evidence by a Commissioner as standard special measures?

Respondent group	Yes	No	Unclear	No response
Individuals				
Legal/academic individuals	4			1
Other individuals	10	1		
Organisations				
Advocacy and support	7			1
Children and Young People	5			1
Local Authorities, health and multi-agency partnerships	9			
Enforcement/Legal	5	3		
Total (47)	**40**	**4**		**3**

The overwhelming majority of respondents supported an amendment to the 1995 Act to include the use of (a) prior statements as evidence in chief and (b) evidence by a Commissioner as standard special measures. However, some detailed concerns were raised by enforcement/legal organisation respondents.

A number of respondents felt that including prior statements and evidence by Commissioner as standard special measures would increase their use. Others, however, cautioned that the current quality of written and visually recorded prior statements was often not to the standard required to be used at trial. An enforcement/legal organisation respondent also noted that currently, an application for evidence by Commissioner cannot take place until after service of the indictment by the Crown. This often takes place a long time after the alleged offence. Thus, if the intention is for evidence to be taken earlier, this is unlikely to be successful under current arrangements.

One respondent stated that simply including the two methods would not lead to their preferential use over the other available special measures. They suggested framing the legislation in a different way, such as stating a presumption that where a vulnerable witness is to give evidence, this will be via prior statement and evidence taken by Commissioner, unless the court is shown cause to grant otherwise.

Three enforcement/legal organisation respondents did not agree with the inclusion, expressing the following concerns:

- The use of prior statements as evidence in chief would raise the question of whether there was access to these in advance, which could cause issues from the defence's perspective.

- The resource implications of an increased use of evidence by Commissioner if it was made a standard special measure.

- One respondent stated that it was not appropriate for written prior statements to be a standard special measure but did not specify why.

- It was submitted that the use of the two measures should not be classed as standard, but rather evaluated on a case by case basis, “whereby the category and circumstances of the case and the vulnerabilities of the witness should be considered prior to determining the appropriate way to proceed”.

Other comments included:

- A benefit to inclusion as standard special measures would include a reduction in bureaucracy and the current protracted negotiations should a child witness choose a measure not listed as standard.

- The presumption should be that the statement is visually recorded, unless there are exceptional reasons not to do so.

- It must be clear that the presumption will be that evidence in chief is taken in the form of a prior statement and cross examination is taken by Commissioner.

- Including as prior statements those written in notebooks and Personal Digital Assistants as well as those visually recorded, could cater for evidence gathered across a broad spectrum of crimes or offences.

- That the use of prior statement should be the preferred option, thus minimising the number of times a child witness requires to answer questions, with the increased trauma this brings.

- A few respondents requested that the Joint Investigative Interview statement given by those children for whom there is a child protection concern should be used as their evidence in chief. Where the court finds areas of interest have not been addressed, the child should be interviewed again in an appropriate setting with skilled interviewers.

Transitional arrangements for moving to pre-recorded evidence for child witnesses

Question 3 - If a presumption to use pre-recorded evidence is placed on a statutory basis, how best should it be phased in to allow for appropriate piloting and expansion of necessary operational arrangements, eg:

- Should the initial focus of any presumption be on all child witnesses, or on child complainers or on those under a certain age?

If the initial focus was to be on a specified age cohort, respondents generally favoured the initial focus to be on all younger child witnesses and complainers.

A number of respondents wished to see an initial focus on all child witnesses and complainers with one respondent stating that children and young people have different rates of development maturity, especially in language and communication skills. One respondent noted their agreement with the Evidence and Procedure Review's Next Steps Report,[1] which suggested limiting a first stage to children under the age of 16, whilst allowing flexibility to account for exceptional circumstances. However, they went on to suggest further limiting the initial focus to sexual and serious violence cases that would merit indictment in the High Court, as discussed below.

Concerns raised about focusing on only one age group included:

- Missing potential specific challenges or required technology in the roll-out to other cohorts including, for example, child accused (particularly since the Evidence and Procedure Review did not consider this group) or adult witnesses with different communication needs.

- The focus has to be on the individual's life circumstances and personal needs rather than their age. It was also noted that trauma impacts different individuals in different ways.

- A number of respondents proposed vulnerable adult witnesses should also be included in a pilot, including those involved in rape and/or domestic abuse cases.

If a pilot were to focus on a certain age group, respondents tended to advocate for younger children and those with special needs, or those in care, to be included.

A few respondents suggested using the current improvement work on Joint Investigative Interviews as a basis for phasing in the presumption. This would therefore involve child complainers, and would not be restricted by type of offence as

[1] Available at: http://www.scotcourts.gov.uk/docs/default-source/SCS-Communications/evidence-and-procedure-report---next-steps---february-2016.pdf?sfvrsn=2.

is discussed below. This would require gradual implementation as national training for interviewers was rolled out.

- Should the initial focus be on all solemn cases, cases in the High Court or cases involving only certain types of offences, eg sexual offences; serious violent offences etc.

Respondents were generally in support of an initial focus on serious crimes heard in the High Court.

Many respondents felt the focus should be on especially serious and traumatic crimes including sexual assault and serious violent offences.

However, concerns raised about limiting the initial focus to solemn cases included that victims in domestic abuse cases would not benefit, as the majority of these are dealt with in summary cases. Another organisation advised that the initial focus should be based on the category of offence, not which court it is passing through. They suggested basing it on cases where special measures for vulnerable witnesses already automatically apply. An advocacy group did point out that children have often experienced a range of abuse and focusing the initial phase on only certain offences, could lead to their giving pre-recorded evidence for one count and not another.

A number of the enforcement/legal organisation respondents felt that solemn cases in the High Court were a suitable pilot focus, due to resource management and to "ensure that the change in practice and procedure proposed is successful and there is a careful and consistent development of case law". It was suggested that when the necessary resources are available this practice could then be rolled out through solemn cases in Sheriff Courts and then on to summary cases.

One respondent queried the practicality of using prior statements in solemn cases as a focus, as "at the point a prior statement is recorded, it may not be clear whether the case will proceed on a summary or solemn basis".

<u>Piloting and phased implementation</u>

Respondents recognised the substantial resource and logistical implications of a shift to a presumption to use pre-recorded evidence and were supportive of pilots and phased implementation.

A respondent felt the Scottish Government's commitment to reviewing current technology and facilities should be "pursued as a matter of urgency to ensure as smooth and quick a transition as possible". They also felt an immediate improvement to current practice would be a clear and consistent framework governing the use of current special measures.

Several respondents suggested taking a geographical approach to the pilot with comments including:

- The introduction of pre-recording by geographic area, rather than restricting by age or type of offence, would make the best use of investment and "most effectively encourage the cultural and practice shifts required by professionals across all levels of the justice system".

- A pilot should be based, focusing on Joint Investigative Interview subjects, on a spread of geographical areas to reflect operational policing.

- There should be consideration of the differing needs in rural areas, such as easily accessible venues.

- Piloting across a number of Local Authorities.

- A geographical spread could highlight potential benefits and drawbacks within localised systems and skill sets.

Evaluation

The need to consider baseline information was raised, "including data about how often special measures are utilised; the reasons for them not being taken up; information about the court estate such as numbers of appropriate remote sites and the availability of relevant, reliable technology". One respondent recommended assessing the impact of the pilot, identifying and challenging barriers to success, and utilising improvement methodology before wider roll out. The same respondent emphasised that any cultural or operational challenges should be balanced within the context of the reduction of trauma, better quality of evidence and greater efficiency of court processes.

Resources and training

There was also a focus on the importance of appropriate awareness-raising, resources and training for legal practitioners prior to the commencement of a pilot. Proposals by respondents included:

- That all judges and lawyers involved in child sexual abuse cases should undertake mandatory specialist training.

- Witnesses should also be able to access materials about the process of pre-recording, for example online, or a film guide. It was suggested these could be developed for use by both legal professionals and witnesses to create shared understanding and for efficient resource use.

Other comments

- The phased implementation should contain appropriate timescales and a structured review process.

- Phasing in for witnesses should be as short as possible and consistent with operational capacity. Pilots in England and Wales have already demonstrated benefits to witnesses, therefore there is no need to conduct a lengthy pilot on this basis in Scotland.

- The introduction of the presumption in law will have as yet unknown resource implications, and must be introduced in a manner which does not place impossible strain on the justice system's limited resources. The approach for phasing in and expansion will require consultation between justice system partners, in light of the policy focus as directed by the Scottish Government.

Right to choose to give evidence in Court

Question 4 - Do you consider any further change is necessary regarding how a child witness's wishes, on whether to give evidence during the trial, are taken into account?

Respondent group	Yes	No	Unclear	No response
Individuals				
Legal/academic individuals	3			2
Other individuals	8	3		
Organisations				
Advocacy and support	4			4
Children and Young People	4		1	1
Local Authorities, health and multi-agency partnerships	4	5		
Enforcement/Legal	3	3	1	1
Total (47)	**26**	**11**	**2**	**8**

Respondents felt that not only should the child be fully informed of the different options available to them, but comprehensive preparatory work should be undertaken so that they are aware of what each option for giving their evidence will involve. This included making provisions for the event that they changed their mind as to the method they use.

Many respondents focused on the need to ensure child witnesses' wishes, on whether or not to give evidence during the trial, were given on a fully informed basis and on what is best for the individual child.

It was observed that the following must be undertaken when reaching a decision on whether the child would appear to give evidence:

- An assessment of the capacity of the child to make an informed decision and consideration of the potential impact on them as an individual, taking into account their age and developmental understanding.

- One respondent noted that rather than applying an age or offence category in deciding when to consult on a child's preferences, this should be sought on an individual case by case basis. They suggested this could involve expert involvement such as a child psychologist, but noted that this would have resource implications for the criminal justice system.

- The child should have immediate access to an independent, specially trained advocate or intermediary who would ensure they understood the process and court environment, their rights and the options available to them. The trained professional could be sourced from a victim support or advocacy organisation. It was also noted that the better a child is supported the more able they are to articulate their wishes and needs, while another respondent felt that any increased use of child advocates would require prioritisation to improvements in their training.

- Informed consent should include an understanding of how any evidence recorded or presented at trial would be used throughout the process.

Several respondents stated that children should have the opportunity to change their mind and that the system should be prepared for this. For example, even if the child states early on that they wish to appear in court, the interview process should still be conducted at a standard suitable for use as evidence in chief if the child later changes their mind.

A few respondents discussed adequate preparation for the experience of giving evidence in court or at a remote site. They suggested this should include a familiarisation visit and, crucially, the opportunity to practice using a live link system if the child will be using this special measure. A respondent noted that experience in England and Wales had shown that simply visiting the court and being shown the equipment without being able to practice using it is not good enough, and influenced the successful exercise of a child's choice.

Question 5 - Should the right to choose to give evidence in court be maintained for all witnesses or limited to those above a certain age, eg. children aged 12 or above?

The balance of opinion fell towards maintaining the right to give evidence in court for all witnesses regardless of age, although current practice in supporting child and vulnerable witnesses would need to be improved.

Maintaining the right

The majority of those who expressed a view were in favour of maintaining the right to choose for all witnesses, regardless of age. This included views from a range of health, child protection and justice organisations.

A commonly given reason was that developmental stage and capacity to engage in, and understand the implications of, the relevant process did not always correlate with age. It was noted that some children sought the right to give evidence in court as part of their healing process. Another respondent advised that the informed right to choose gives the witness some control which could help improve the quality of their evidence. Some respondents cited the United Nations Convention on the Rights of the Child with regards to evolving capacities and encouraging the participation of children in decisions that affect them.

Respondents advised that the right to choose should be carefully balanced against the capacity of the individual concerned to make an informed choice and understand the implications. It was stated that the witness should be fully and independently supported and the option of their appearance in court should be risk assessed. It was advised that the court must have strict criteria with which to decide when it would not be appropriate, and the authority to rule against a witness appearing in person if necessary according to such criteria.

One respondent cautioned against conflating children and vulnerable witnesses within a general definition, as they have different needs and require specialised support. Another advised that a child should be told there was a presumption against them giving evidence in court but if they wished they could still do so. They stated this should “be accompanied with a requirement to increase awareness of children’s rights across the judiciary, particularly with regard to listening to children’s views and taking these into account”.

Limiting the right

A few respondents, across a range of groups, felt that there should be a presumption against, or even prohibition on, children under a certain age giving evidence in court even if they wished to do so. The most commonly cited age for the limit was under the age of 12.

Rationales for these views included that cultural notions of justice in Scotland can lead to children feeling they have to give evidence in court, only to then be traumatised by the realities of the process. It was felt that the justice system, while respecting the views of the child, also has a duty to protect them from harm. Some organisations reported that child and vulnerable witnesses who had insisted on attending court experienced trauma from the process. One respondent stated “How can we possibly explain to children and vulnerable adults what is likely to happen before and during court in a realistic way which enables them to make a truly informed choice, but doesn't completely put them off undergoing the criminal justice process in any form?”

One respondent felt that unless there was a system to ensure children under 12 were fully supported to make the right choice for them, then perhaps legislation should prohibit them from appearing in court.

In addition, an enforcement/legal respondent noted that children over the age of 12 should not give evidence in court, and with suitable recording of their evidence, the child’s rights were not being infringed by their not appearing in person. Another respondent suggested that children over 12 years, while asked for their preference, should also be advised that the presumption is that they would give pre-recorded evidence.

One respondent commented that any presumption should be “open to rebuttal in circumstances where a court considers it appropriate”, while another stated that the court must ultimately decide whether it is necessary or appropriate for the witness to attend.

A respondent in favour of the right to choose for children over the age of 12 advised that those children should be fully supported to reach this decision by skilled professionals who understand the court process, criminal justice system, child development and trauma. They suggested this could be undertaken by victim support services if appropriate resources were available to them.

Child accused in criminal cases

Question 6 - Should a child accused in a criminal case be able to give pre-recorded evidence in advance of trial?

Respondent group	Yes	No	Unclear	No response
Individuals				
Legal/academic individuals	5			
Other individuals	10	1		
Organisations				
Advocacy and support	7			1
Children and Young People	5			1
Local Authorities, health and multi-agency partnerships	7		1	1
Enforcement/Legal	7			1
Total (47)	**41**	**1**	**1**	**4**

The vast majority of respondents considered that a child accused should also be able to give pre-recorded evidence in advance of a trial. The most commonly cited reason for this response was the acute vulnerability of the accused child.

Vulnerability

Many respondents pointed to research findings which demonstrate the high incidence of Adverse Childhood Experiences (ACEs) and ongoing trauma, such as violence, neglect and sexual abuse, in the lives of child offenders. It was stated that they, along with child witnesses, require protection from further trauma. One respondent reported “the link between vulnerability and offending is retrospective not predictive, in that most children who experience adverse childhood experiences and trauma do not go on to seriously offend, but children who are involved in serious offending or frequent offending almost always have experienced trauma”.

Another respondent noted a precedent in the creation of the Children’s Hearings System in Scotland, formed in recognition of the vulnerability of accused children, and that this should also be recognised in the criminal courts.

A mixed opinion was expressed by one respondent, on the one hand seeing “merit in the child being exposed to the realities of their situation and its potential consequences. However, the court case should still be managed with sensitivity, as accused children tend to be very vulnerable people.”

It was also suggested that adopting a specialised model of Joint Investigative Interview for accused children could potentially identify more victims of abuse including of human trafficking.

Access to justice

Reference was made to equality of access to justice. For example, one respondent emphasised that child accused have “the same rights to be heard and to be protected from harm within the criminal justice system as children who are victims or witnesses”.

Another respondent stated that the upholding of the rights of child accused under the United Nations Convention on the Rights of the Child, including their right to a fair trial, would be further met by their being able to pre-record their evidence.

One organisation pointed out that the relatively high proportion of children “supported by youth justice services have speech, language and communication needs, which have often gone unrecognised” and for justice to be achieved, require processes to be adapted, such as being able to pre-record their evidence.

Another organisation advised that child accused “have significant difficulties in understanding and engaging with the language and processes of court and they often lack familiarity with, and experience of, such processes”. They raised that this has a significant impact on the perception of procedural fairness which has been found to be particularly important for young people, and in turn has implications on their compliance with court measures.

Finally, an enforcement/legal respondent noted that also allowing the child accused to give pre-recorded evidence would “allow a degree of parity between the Crown and defence”.

Quality of evidence

Several respondents highlighted again that the adversarial court environment does not lead to the elicitation of complete, reliable and consistent evidence from children and vulnerable witnesses and therefore allowing child accused to pre-record their evidence would lead to improved justice outcomes.

It was reported that “complex trauma can result in fragmented memories and a stressful interview can impact very negatively on the quality of evidence as children use their internal resources to cope with their emotions rather than focusing on remembering facts”.

Procedural issues

A number of procedural issues were raised by respondents, including:

- Evidence taken by Commissioner from an accused child needs to be kept entirely separate from that of a vulnerable victim or witness, in date and/or location.

- How would cross examination be conducted as at this early point not all other sources of evidence may be available – would there be provision for further questions to be put to the child if necessary?

- In general, it would not be proper for the accused to pre-record their evidence as, if they choose to give evidence in their defence, they are required to answer the case and pre-recording their evidence would undermine that: "it would be extraordinarily difficult for a defence lawyer to examine-in-chief ahead of trial without hearing the prosecution's case and the testimony of its witnesses. It would be even more difficult for the prosecution to cross-examine a child accused ahead of trial for the same reasons."

Further comments

Two respondents felt that although the child accused should have the choice of pre-recording their evidence, this should not be made a presumption, due to particular considerations that would apply. For example, it was advised that the child would have to make the decision to pre-record their evidence in advance of the trial following the advice of their lawyer, with consideration to the circumstances of the case and method of giving best evidence. The lawyer should "have been provided with full disclosure by the Crown, that all the necessary enquiries in relation to the child accused's defence have been made and that he or she is furnished with sufficient information to allow him or her to understand the child's level of maturity, intellectual and emotional capacities and what other steps can or are to be taken to promote the child accused's ability to understand and participate in proceedings". It was emphasised that the decision on whether to pre-record the child accused's evidence "may require to be taken at a relatively late stage in the pre-trial process".

It was recommended by one respondent that pre-recording evidence of child accused should be piloted.

Question 7 - Are there are any differences to be considered between how a child complainer or witness can give pre-recorded evidence and how a child accused can do so?

Respondent group	Yes	No	Unclear	No response
Individuals				
Legal/academic individuals	4		1	
Other individuals	2	9		
Organisations				
Advocacy and support	4	3		1
Children and Young People	2	1	1	2
Local Authorities, health and multi-agency partnerships	6	2		1
Enforcement/Legal	4	1	2	1
Total (47)	**22**	**16**	**4**	**5**

On the whole, respondents wished to see child accused treated with the same level of care and protection as child complainers and witnesses, although a number of procedural issues to be considered were raised.

One respondent stated that the key difference between how a child complainer or witness can give pre-recorded evidence and how a child accused can do so is "the fact that, an accused person is entitled to legal representation and is not obliged to give evidence at trial". This was reflected in many of the responses.

<u>Decision to give evidence</u>

A respondent noted that, in practice, whether a child accused gives evidence is a tactical decision made following an assessment of all the evidence led against them. Other respondents noted that if a child accused's evidence was to be pre-recorded this would take place before the Crown had led its case therefore neither the Crown nor the defence would know the detail nor strength of the Crown's case. It was highlighted that allowing the child accused to give their evidence before the Crown has led theirs may not be in that child's interest, as they would be giving evidence before knowing exactly what would be said against them. Unless the evidence was taken in the absence of the Crown, the Crown would know what the child accused had said by the time the Crown witness came to give their evidence. It was raised by another respondent that the European Parliament's procedural safeguards for children suspected or accused in criminal proceedings highlight "that accused children must be afforded the right to be present during the trial, as otherwise their rights to defence could be compromised".

Further work required

In recognition of the complex procedural issues involved in pre-recording the evidence of a child accused, one respondent stated that "it is regrettable that the place of child accused was not explored in the Evidence and Procedure review as this may have illuminated further potential issues". Another proposed that "work should be undertaken jointly by the criminal justice organisations to review approaches for dealing with vulnerable accused under the age of 18 years". It was suggested by another respondent that the differences to be considered in the giving of pre-recorded evidence by a child accused was "worthy of a wider consultation and may be better considered as part of the Minimum Age of Criminal responsibility Bill, when focusing on children who offend".

Timing of taking evidence by a Commissioner

Question 8 - Do you consider legislation should provide for the taking of evidence by Commissioner before service of the indictment?

Respondent group	Yes	No	Unclear	No response
Individuals				
Legal/academic individuals	1		1	3
Other individuals	7	4		
Organisations				
Advocacy and support	5	1	1	1
Children and Young People	4		1	1
Local Authorities, health and multi-agency partnerships	6	2		1
Enforcement/Legal	5	1		2
Total (47)	**28**	**8**	**3**	**8**

The majority of respondents felt that legislation should provide for the taking of evidence by Commissioner before service of the indictment, due to the current lengthy delays within the criminal justice process.

Those in favour of a provision in legislation for the taking of evidence by Commissioner in advance of service of the indictment commonly cited the lengthy time that it often currently takes for the indictment to be served. It was submitted that a provision allowing for recording closer to the time of, or disclosure of, an alleged offence would increase the quality of evidence obtained. It was frequently expressed that the victim or witness must not be made to wait any longer than necessary to start any required recovery process. As one respondent stated, "the law needs to allow for as much flexibility in making decisions about when to take best evidence and that allow for an understanding of the child's age, development and psychological wellbeing".

A number of respondents noted that in most cases what requires to be proven is sufficiently clear in advance of service of the indictment. It was proposed that where further clarification or information is required, another session could be undertaken by the Commissioner, with one respondent advising this should preferably be the same individual.

One respondent stated that "it is in the best interests of the child and of a fair justice system that evidence should be taken as soon as possible after the event".

It was advised by another respondent that delays experienced in England and Wales in the implementation of pre-recorded cross examination pilots[2] were due to "perceived system barriers such as the belief that disclosure was unlikely to be completed until just before the trial". The respondent stated that this "was overcome in practice through tight timetabling enforced by judicial case management" and suggested that such solutions could be applied in Scotland.

However, one respondent was concerned that "the short timescale allocated to the appointment of a Commissioner may not allow the rapport building necessary to ensure the gathering of relevant evidence". Another respondent, although in favour of a provision, also expressed some reservations as "full facts of the case may not be known at an earlier stage, resulting in a witness being re examined. Also, indictment doesn't necessarily mean a case will be prosecuted so commissioner may take evidence in many cases which never actually go to trial. Though on the plus side, evidence taken by the commissioner, may lead to a case been progressed".

Those respondents opposed to a provision for taking of evidence by Commissioner before service of the indictment made the following comments:

- The focus should be on reducing time delays in the criminal justice system, "not on identifying a solution to a problem arising as a consequence of time delays".

- Although the accused may have appeared on Petition, the final charges appearing on the indictment may differ.

- As raised in the concerns above, it could lead to repeat interviewing if the required evidence is not clear before indictment. If the decision is taken not to proceed, the evidence by commission would have been unnecessary.

[2] Under section 28 of the Youth Justice and Criminal Evidence Act 1999.

Question 9 - What other barriers, if any, may exist in relation to taking evidence by Commissioner before service of the indictment? And how these could be addressed?

Respondents cited issues of disclosure, procedure and resourcing as further barriers to the taking of evidence by Commissioner before service of the indictment. Solutions proposed included wider cultural changes, increased resources, piloting and learning from the experiences of other jurisdictions to address identified barriers.

Disclosure issues

A few respondents highlighted that issues of disclosure will require to be addressed. In particular, one respondent noted that in practice disclosure of later material by the Crown frequently occurs and this can often be a number of months after the indictment has been served. They stated this would be a problem for defence Counsel as they may not be in a position, when cross examining a witness during a commission, to put all points they would have otherwise have made. It was emphasised by one respondent that there is therefore "the genuine anxiety for defence Counsel that the quality and effect of a cross examination may be significantly diminished by reason of these factors, all to the prejudice of the accused". The respondent did, however, suggest this barrier could be overcome if the Crown were to adopt the early disclosure approach recommended by the Evidence and Procedure Review's Next Steps Report.

Procedural issue

Three respondents raised that in taking evidence by Commissioner before service of the indictment, it may not be sufficiently clear what requires to be proven in a specific case. Another respondent suggested that there may be "court time/listing challenges in relation to ground rules hearings and in relation to the taking of evidence".

Resources

Several respondents expressed that there would be considerable resource and financial implications which would be a barrier if sufficient funds are not available. Specific examples of resource barriers that would require investment included:

- Lack of suitably skilled solicitors with knowledge in relation to appropriate questioning of children. The need for specific training and evaluation of Commissioners was also highlighted (see Question 10 below for more detail).

- The quality and availability of equipment and knowledge of how to use it.

However, one respondent commented that "any real additional costs and structural barriers to change must be weighed against the impact of reducing trauma to the

witness, increasing reliability of evidence, reducing the time of cross examination, raising awareness of inappropriate questioning and making courts more efficient".

Proposed solutions

It was suggested that, in general, barriers "could be addressed by a concerted effort to shift the culture to thinking about the needs of the child or vulnerable witness as a priority". This would require legal practitioners to work to quicker timescales, including more swiftly identifying vulnerable witnesses.

Another respondent suggested that the section 28 pilot in England and Wales was an example of how such barriers could be overcome, noting that "Despite the barriers, the section 28 pilot demonstrates the huge benefits that can be achieved, both in terms of a better service for witnesses and more efficient courts. Further, as changes bedded in, barriers lessened".

This respondent further recommended the establishment of an operational working group "to identify barriers and ways to reduce them in advance of implementation. In the pilot or phasing in, improvement methodology should be used to challenge and react to barriers as they arise".

Question 10 - Do you have any comments on any other changes that may be required to this process to make evidence by a Commissioner a more effective and proportionate mechanism for taking evidence in advance of a trial?

Respondents raised a range of further issues, including the need for highly trained Commissioners and suitable locations for the taking of evidence.

Training and evaluation

Many respondents advised that Commissioners would require to be highly skilled and trained in order to effectively and proportionately conduct their duties. Respondents noted the need for Commissioners to be able to employ a "a wide range of communication skills/and or be able to call upon speech and language therapists".

One organisation respondent advised that "introducing legislative presumptions is not enough. Legislation has to be accompanied by rigorous case management and judicial control, and heightened awareness of inappropriate questioning. This is achieved in England through pan professional training, delivered by barristers and judges, court rules, toolkits and Ground Rules Hearing".

One organisation respondent noted the "need for consistent dedicated training and evaluation of practice of those acting as commissioners", while another advised that "the views of commissioners should be regularly sought".

Location

Several respondents referred to the location for taking of evidence by Commissioner. Four organisations emphasised the need for the environment for child witnesses to be child-centered, with one stating "the court should come to the child and not the other way around". It was raised by another respondent that children having their evidence taken by Commissioner may endure long journeys if they have to travel to a suitable venue and to the trained Commissioner.

Two organisation respondents advised the recording should take place in the courts. One stated that, for adult vulnerable witnesses "context is an important element in the judiciary process", while the other felt it "might be more effective and cost efficient if recording facilities were provided in-house by SCTS [Scottish Courts and Tribunal Service] as opposed to private contract".

High Court Practice Note

Two respondents welcomed the new High Court guideline (Practice Note Number 1 of 2017), with its detailed guidance and drive for improved consistency of approach by Commissioners.[3] Another referred to the fifth amendment to the Criminal Practice Directions 2015 in England and Wales,[4] stating that it covers several practical matters relating to pre-recording evidence.

Other comments

Other comments raised included:

- Independent advocacy should be available to the witness throughout the process, and they should fully understand the proceedings.

- The Commission should not occur "without an accused having been identified and proceedings having commenced against them".

- Having their evidence taken by a Commissioner, "can still be a stressful experience for children and has the potential to trigger trauma for them". It was considered that a commission should only take place "where the quality of the [initial] interview (either technically or in content) is insufficient to meet the needs of a fair trial".

- A multi-disciplinary approach to gathering evidence should be employed to ensure completeness and to avoid later re-interviewing or cross examination.

[3] Available at: http://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/practice-notes/criminal-courts/criminal-courts---practice-note---number-1-of-2017.pdf?sfvrsn=4.
[4] Available at: https://www.judiciary.gov.uk/wp-content/uploads/2017/07/amendment-no-5-cpd-july-2017-update.pdf.

Ground Rules Hearing

Question 11 - Do you agree that a ground rules hearing should be a requirement for all cases where a cross examination of a child witness is to be pre-recorded?

Respondent group	Yes	No	Unclear	No response
Individuals				
Legal/academic individuals	4			1
Other individuals	10	1		
Organisations				
Advocacy and support	8			
Children and Young People	4			2
Local Authorities, health and multi-agency partnerships	8		1	
Enforcement/Legal	8			
Total (47)	**42**	**1**	**1**	**3**

Almost all respondents were strongly in favour of the introduction of a ground rules hearing. It was seen to be a good way to agree on appropriate lines and manner of questioning a vulnerable witness.

In supporting the introduction of a ground rules hearing, many respondents referred to the ability to set appropriate lines and manner of questioning, reducing in-court challenges and the re-traumatisation of the witness. Respondents pointed to research, and their experience, of the inappropriate manner of questioning child and vulnerable witnesses currently utilised in court. It was advised that, "by implementing a ground rules hearing, it would be possible to increase a sense of collaboration, trust and transparency for vulnerable witnesses". It was thought that the questions being available in advance of the recording would be valuable in allowing for processing time and explanation of the questions.

A number of respondents stated that a ground rules hearing should be a requirement for all cases involving a child or vulnerable adult witness regardless of whether they have pre-recorded their evidence.

Pilot hearings in England and Wales were raised by several respondents, with one noting that ground rules hearings have been instrumental in their success and another stating they had been "enormously helpful case management tools". It was suggested that these could be set up relatively quickly in Scotland.

Several respondents also pointed to the "tried and tested" toolkits available on the Advocates Gateway,[5] and suggested that these should be taken into consideration for any developments in Scotland.

[5] See http://www.theadvocatesgateway.org/toolkits.

Intermediaries

Two enforcement/legal respondents recommended the use of intermediaries as they would be able to advise on the particular communication needs of the witness and assist the judiciary in eliciting best evidence from them. Comments included:

- A court-appointed intermediary would be able to provide a formal assessment of the witness's communication needs to enable the court to set any rules required for cross examination.

- Intermediaries would be able "to ensure that the format of planned questioning reflects best practice as it evolves".

- They would act "as an officer of the court and will be there to assist all participants, including Counsel".

However, one respondent cautioned against introducing intermediaries alongside ground rules hearings. They were concerned "that the introduction of registered intermediaries within the Scottish system could have the unintended consequence of 'specialising' knowledge and thinking about the needs of child witnesses and introducing yet another professional within the traditional setting of the 'court-room'". They felt that "significant resources" would be used only to "tweak" the system, as opposed to more transformational change in keeping children out of court.

Procedural issues

In terms of how a ground rules hearing would work in practice in Scotland, respondents suggested:

- That questions should be submitted in advance and the hearing should cover any additional questions in chief and cross examination. Re-examination questions should also be judicially approved, "with a brief adjournment for a short ground rules hearing before re-examination begins".

- Issues of admissibility should be resolved before cross examination, "if not, there is the possibility, if not the likelihood, that the pre-recorded cross examination will be interrupted. Any interruptions might be edited out but that will not assist in getting the best evidence from the witness".

- The defence should be allowed to fully prepare by full disclosure being completed before the hearing.

- The hearing should decide whether a child's wishes to give evidence in person is "necessary or appropriate".

Two respondents queried whether existing preliminary hearings could also function as ground rules hearings. Under current case management approaches, a vulnerable witness application covers many of the same type of issues as a ground rules hearing.

Wider training

A few respondents advised that any legal changes must be accompanied by “rigorous”, “coordinated and mandatory” training of all those involved in vulnerable witness cases, from judges to solicitors. It was cautioned that without this, there is no guarantee that any hearing would be conducted properly, and inappropriate questions could still be approved.

Question 12 - Do you have any comments on the proposed timing for the ground rules hearing?

> **The main theme raised was the need to hold the ground rules hearing as soon as possible in the process, but with enough time for adequate preparation**.

Many respondents stated that the ground rules hearing should take place as soon as possible in proceedings reiterating the argument that the earlier evidence is taken, the higher quality it is, and the witness can then more quickly focus on their recovery.

It was also noted that sufficient time should be built in for preparation, consultation with specialists and submission of questions. If the charges have not been made clear, “it would be difficult for the judge to decide whether to permit questions, and there is the risk of multiple commissions or disjointed evidence”. Another respondent advised that “evidence from other witnesses may lead to other questions being asked so good precognitions of other witnesses will be required”.

In particular, two respondents noted that the hearing should not be allowed to be deferred until the day on which the witness is giving evidence. They pointed out that this does not allow time for revisions to planned questions, regardless of if these were submitted in advance, and “almost inevitably delays the start of the witness's evidence, increasing waiting time”.

One enforcement/legal respondent noted the need for careful preparation and that a well delivered ground rules hearing should lead to a much smoother process for the witness giving their evidence.

Role of the Commissioner

Question 13 - Should the same individual (i.e. Judge/ Sheriff) who will act as the Commissioner also preside at the trial?

Respondent group	Yes	No	Unclear	No response
Individuals				
Legal/academic individuals	1	1		3
Other individuals	6	4		1
Organisations				
Advocacy and support	5			3
Children and Young People	2	1		3
Local Authorities, health and multi-agency partnerships	6	1	1	1
Enforcement/Legal	4	1	3	
Total (47)	**24**	**8**	**4**	**11**

Of those responding to this question, the majority were in favour of the individual acting as Commissioner also presiding at trial. Respondents frequently cited the benefits of familiarity and consistency for the witness.

Many respondents referred to the benefits for the witness of familiarity and consistency of having the same person oversee both the commission and the trial. One respondent anticipated that “using the same individual at trial as at Commission could result in more effective elements of overall case management”.

There was some concern around impartiality from two respondents, one of whom advised that having the same individual as Commissioner and trial judge could raise challenges from the defence on impartiality and “therefore prolong proceedings”.

This concern was not shared by most of the enforcement/legal respondents to this question. Although they, along with other respondents, highlighted potential issues with the scheduling of trials and the “limited number of judges available and the likely volume of relevant cases”.

One enforcement/legal organisation respondent advised it was not essential for the same individual to preside, as had been found for pre-recorded examination cases in England and Wales. It was stated by one respondent that “it may be better for the vulnerable witness for the evidence by commissioner to take place locally, and judicial continuity would likely be a barrier to this”.

Question 14 - Do you consider that the Commissioner should be able to review the arrangements for a vulnerable witness giving evidence?

Respondent group	Yes	No	Unclear	No response
Individuals				
Legal/academic individuals	**2**	**1**		**2**
Other individuals	**8**	**3**		
Organisations				
Advocacy and support	**6**			**2**
Children and Young People	**4**			**2**
Local Authorities, health and multi-agency partnerships	**9**			
Enforcement/Legal	**7**		**1**	
Total (47)	**36**	**4**	**1**	**6**

The majority of respondents were in favour of the Commissioner having the power to review arrangements for a vulnerable witness giving evidence, for example to allow for flexibility in responding to any changing needs, which they would be well placed to understand.

Several respondents in support of the Commissioner having the ability to review the arrangements for a vulnerable witness referred to the need to respond to changing circumstances, and to allow arrangements to be amended to meet the witness's needs. It was also stated that the Commissioner would have "had an opportunity to understand the needs and particular vulnerabilities of the witness" and "would be in a position to evaluate whether agreed measures were indeed still appropriate as they were in progress".

Two respondents expressed support for the recommendation in the Evidence and Procedure Review's Pre-Recorded Evidence Project Report[6] that section 271D of the Criminal Procedure (Scotland) Act 1995 be amended to enable the Commissioner to review the arrangements for a vulnerable witness to give evidence. Although one did note that "the occasions on which a commissioner is required to review the arrangements for a vulnerable witness are likely to be rare, particularly if GRHs [Ground Rules Hearings] are established".

It was suggested that any proposed review of the arrangements for vulnerable witnesses should be challengeable by the defence. In support of their position that the same individual should not act as the Commissioner and also preside at the trial, one respondent proposed that if a review was to be subject to challenge, for independence and impartiality, the decision could then be made by the presiding Judge or Sheriff.

[6] See http://www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/reports-data/evidence-and-procedure-pre-recorded-evidence-report-28-09-17.pdf?sfvrsn=2, at paras 50-51.

Although in favour of the Commissioner having the power to review arrangements for a vulnerable witness, one respondent thought this should only happen in exceptional circumstances as "we should be encouraging special measures to be thought about and discussed with the witness well in advance. We should be discouraging any last minute 'challenges' to the special measures already agreed". Another respondent expressed that any review of the arrangements should be done with great care as "[t]o do otherwise would be contrary to the interests of justice and defeat the purpose of the GRH, which is to encourage and facilitate the attendance of vulnerable witnesses and their participation in the trial process".

One respondent not in favour expressed concern that a review of arrangements by the Commissioner "could cause uncertainty or fear for the witness".

Question 15 - Should the Commissioner be the ultimate decision maker on which questions are appropriate to be asked during a pre-recorded cross examination?

Respondent group	Yes	No	Unclear	No response
Individuals				
Legal/academic individuals	3			2
Other individuals	6	4	1	
Organisations				
Advocacy and support	4	1		3
Children and Young People	4			2
Local Authorities, health and multi-agency partnerships	4		4	1
Enforcement/Legal	4	2	2	
Total (47)	**25**	**7**	**7**	**8**

The majority of respondents were in favour of the Commissioner being the ultimate decision maker on which questions are appropriate to be asked during a pre-recorded examination. However, several respondents added the caveat that the Commissioner must be adequately trained and have access to specialist advice to do so.

Of those in favour of the Commissioner being the ultimate decision maker on the appropriateness of questions to be asked, many added the caveat that the decision should be made based on what has been agreed at a ground rules hearing. A few respondents also qualified their support with the condition that the Commissioner and the presiding Judge or Sheriff should be the same individual, as discussed above.

Several respondents emphasised the need for the Commissioner to be sufficiently trained and to have access to specialist advice, for example in communication and trauma, in order to make any final decision. One respondent recommended Commissioners should be "considerably upskilled to be able to make the final

decisions, not just about the questions to be asked at a ground rules hearing but about the broader issues of when, where and how a Commission should be conducted in order to enable a child to give their best evidence without risk of further harm".

A few respondents referred to the need for the Commissioner to demonstrate due regard for the rights of the accused when making any decision. One respondent noted, this must be conducted in "a manner which will permit robust examination but will also be proportionate and prioritise the wellbeing of the child or vulnerable witness to avoid lasting harm".

The approach piloted in England and Wales in which "[the defence] are required to submit draft questions to the court in advance of the GRH and these require to be approved by the judge [acting as Commissioner]", was recommended by one respondent as a model which could be followed in Scotland.

As they did not support the same individual acting as the Commissioner and presiding at the trial, one respondent thought that if a review was to be subject to challenge, for independence and impartiality, the ultimate decision should then be made by the presiding Judge or Sheriff.

Other comments

Question 16 - Do you have any other comments relevant to this consultation?

23 respondents gave further substantive comments. Some comments given were not immediately relevant to this consultation, but have been included in this analysis.

<u>Investigative Interviews</u>

One respondent raised the need for increased resources to support the practice of visually recorded investigative interviews including for fit for purpose equipment, practitioner training and time. The need for updated guidance and training in respect of Joint Investigative Interviews was reflected in a number of responses.

It was further proposed by another respondent that "urgent consideration should be given to the issue of whether or not it would be much more cost effective for Scotland to invest in a specialist, independent and free-standing investigative interviewing service capable of conducting developmentally appropriate investigative interviews with children. Prosecutors, defence lawyers and judges, as well as the police, social services and other interested parties would be able to invest faith in such an expert facility. This, in turn, would minimise the need for children to be cross-examined by lawyers either at a commission or in court".

Interviews

A number of respondents also raised the issue of skilled interviewers in the context of obtaining better evidence. Regarding children, one organisation respondent advised that research has shown that "children are unlikely to lie but may not give best evidence (even with existing safeguards) when the questions posed to them during any examination are closed, leading, complex or take insufficient cognisance of the child's age and developmental stage".

One respondent did highlight that taking statements too close in time to the alleged offence without appropriate support could potentially re-traumatise victims and could inadvertently not have allowed sufficient time to pass for the victim or witness to process the experience and report a coherent and reliable narrative. Another organisation advised that disclosure must be at the victim's pace.

It was advised by one respondent that "trauma memories often contain gaps and are recalled in a non-sequential manner" and there would therefore require to be an understanding by the court that if evidence is taken closer in time to the alleged offence, it does not preclude difficulty recalling specific aspects. Safeguards would require to be in place to ensure the witness is able to give their most accurate reflection of what had transpired, allowing for processing time.

Wider roll-out and longer-term aim

Many respondents advocated for a wider roll-out of the pre-recording of evidence to include:

- "the full Pigot" (the pre-recording of both evidence in chief and cross examination);
- all vulnerable witnesses; and
- civil and children's hearings proof proceedings

Most, however, were sympathetic that this would have to be done in a staged manner.

Barnahus concept

The Barnahus system was recommended by many respondents as a desirable long term aim for Scotland. Respondents pointed to its child-centred and trauma-informed approach.

Views of children and young people

It was raised by two respondents that the views of children and young people should be sought "and included in this process to help inform culture, systems and practice change".

Ongoing evaluation

A few respondents stated that there must be on-going monitoring and evaluation of whether the system is getting it right and "making the rapid progress that is urgently required to develop a child-centred, rights-based model of justice and support for child victims, witnesses and defendants for children and vulnerable witnesses". It was specifically raised by one respondent that the "dearth of information to-date about the use of special measures in cases involving children has made it extremely difficult to track progress and must be urgently addressed". They went on to suggest the Scottish Government consider using the standards developed by the PROMISE project[7] to measure progress in Scotland.

Intermediaries

Several respondents expressed the importance of assessing the role intermediaries could play in the vision for the pre-recording of evidence, particularly in ground rules hearings. One respondent advised that the pre-recording of evidence will not be as effective if intermediaries are not also introduced as they "ensure access to justice for children and for adults with communication needs. They do so by fundamentally changing the approach to questioning, making it fairer, and this is even more important than the benefits available through live links and pre-recording. Pre-recording cross-examination will be of very little benefit if it simply moves inappropriate questioning… to an earlier stage".

Trauma-centred approach

Nearly 60% of respondents asserted that the proposed approach is more humane and trauma-centred, and would bring Scotland more into line with best practice as understood from a child protection and health perspective. Many noted that the need to present evidence in court compounds any trauma already suffered by child and vulnerable witnesses. In addition, pre-recording may allow the therapeutic recovery process for victims to start sooner.

Presuming that pre-recording is intended to allow the therapeutic process to start sooner, a respondent queried whether the witness would still potentially need to give further evidence at a later stage if more evidence became available to the defence lawyer; this could then impede the start of the recovery process. They queried whether this risk would be explained to the victim.

[7] For further information see: http://www.childrenatrisk.eu/promise/european-barnahus-quality-standards/.

Annex 1

List of Respondents

Individuals

Legal/academic individuals	5
Other individuals	11

Organisations

Action Against Stalking

Archway Sexual Assault Referral Centre

Centre for Youth and Criminal Justice

Children 1st

Eighteen and Under

Falkirk Child Protection Committee

Glasgow Bar Association

Includem

Law Society of Scotland

Lexicon Ltd

NHS Education for Scotland & University of Glasgow Institute of Mental Health and Wellbeing

North Lanarkshire Child Protection Committee

NSPCC Scotland

Perth and Kinross Services for Children, Young People and Families and Police Scotland

Police Scotland

Rape Crisis Scotland

Royal College of Paediatrics and Child Health

Scottish Association of Social Work (SASW)

Scottish Borders Child Protection Committee

Scottish Children's Reporter Administration

Scottish Courts and Tribunals Service

Scottish Independent Advocacy Alliance

Scottish Women's Aid

Scottish Women's Rights Centre

Sheriffs' Association

Social Work Scotland

South Lanarkshire Child Protection Committee

Supporting Offenders with Learning Difficulties (SOLD)

The Faculty of Advocates

Triangle

Victim Support Scotland

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