# Vulnerable Witnesses Act - Section 9 Report

December 2023

Scottish Government
Riaghaltas na h-Alba

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## Executive Summary

The **Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019** ("the Act") introduces a presumption in law that where children under the age of 18 (other than the accused) are giving evidence in criminal cases that are to be heard in front of a jury and which involve specific offences, their evidence should be pre-recorded ahead of trial except in specific circumstances.

The Act requires that this evidence must either be recorded in advance of trial at an Evidence by Commissioner (EBC) hearing or given in the form of a prior statement.

The purpose of the Act is to reduce the risk of re-traumatisation to vulnerable witnesses arising from the experience of giving evidence and to support them in providing their best evidence.

The Act requires that Scottish Ministers report to the Parliament on the first three years of the Act's implementation.

### Implementation of the Act to date

To avoid overwhelming the justice system with increased demand for pre-recorded evidence, the Scottish Government has adopted a phased approach to implementation of the Act. This involves gradually rolling the presumption out to different groups of child and adult vulnerable witnesses in stages as set out in an Implementation Plan agreed with justice partners.

To date, the provisions of the Act, have been commenced in respect of children under the age of 18 giving evidence in relation to cases which are to be heard in the High Court involving specific offences.

Delivery against the Implementation Plan has been supported by £2 million in capital funding from the Scottish Government which supported the construction of four EBC suites specifically designed to be trauma-informed spaces for taking the evidence of vulnerable witnesses. These are located in Aberdeen, Edinburgh, Glasgow and Inverness and together provide capacity to conduct over 2,000 EBC hearings a year. A fifth suite is currently under construction in Dundee and will provide further capacity once it becomes operational.

Implementation of the presumption in accordance with the timelines set out in the Implementation Plan has been affected by the impact of the Covid-19 pandemic on the justice system and the subsequent pressures arising from the backlog of cases created.

### Key data collected to evaluate the effectiveness of the Act

Data collected by the Scottish Courts and Tribunals Service (SCTS) and the Crown Office and Procurator Fiscal Service (COPFS), demonstrates that:

During the course of the review period, there was a total of 870 witnesses to whom the presumption applied – that is witnesses under the age of 18 who were required to give evidence in relation to cases involving specified offences indicted to the High Court ("relevant witnesses").

Of these 870 relevant witnesses, a total of 650 (75%) had their application to provide evidence by commissioner approved by the Court. The vast majority of those applications not approved were because that witness no longer needed to give their evidence by commissioner (e.g. because the accused had tendered a guilty plea or because the witness's prior statement was approved to be used as their whole evidence at trial thus removing the need for further evidence to be taken at an EBC hearing).

Of the 650 relevant witnesses who had an application for their evidence to be taken by commissioner approved by the Court, as at 6 December 2023, 503 (77%) progressed to an EBC hearing. There were 147 relevant witnesses who did not give their evidence at an EBC hearing despite having an application approved by the Court. In a significant proportion of these cases, the reason an EBC hearing did not take place was because evidence was no longer needed from that witness e.g. the accused tendered a guilty plea or the case was deserted by the Crown. Another significant reason for EBC hearings not progressing was because of the failure of relevant witnesses to attend, this accounted for 51 of the 147 relevant witnesses (35%) who had applications for EBCs granted but where these did not take place.

As at 6 December 2023, of the 503 relevant witnesses who gave their evidence at an EBC hearing, 373 (74%) of those have had a recording of that evidence played at a trial diet. The most common reason why evidence has not been played at a trial diet is because the trial has not yet happened which accounts for 49 (33%) of those recordings which have not been played at trial.

**Consultation responses**

The Scottish Government consulted a number of key individuals, justice partners and stakeholders who have an interest in the operation of the Act.

Respondents were generally supportive of the ethos of the Act and acknowledged that many of its aims are already being achieved through everyday practice. Many respondents felt that there has been a noticeable change in the culture around taking evidence from children and vulnerable witnesses, with a greater recognition of the impact of trauma and more support available for children to participate in the criminal justice system.

Some respondents felt that fewer children were being required to attend Court in order to give evidence, although some highlighted that children were still being required to give their evidence in Sheriff and Jury cases.

Concerns were, however, expressed about areas where the Act was not felt to be working as it should, or where improvements could be made. The availability and appropriateness of facilities, the available resourcing across the system, and the backlog of cases post-pandemic were all highlighted as areas of concerns related to

the effectiveness of the Act at supporting vulnerable witnesses to participate in the criminal justice system.

**Key findings of the evaluation**

An evaluation of the data and information gathered demonstrates that the Act has delivered the following benefits:

- the Act has generated a significant increase in the number of applications for EBC hearings for child witnesses, the number of orders that have been made, the number of EBC hearings that have been held and the number of recordings of evidence given at EBCs that have been played at trial;
- many more child witnesses are receiving the benefits of being able to pre-record their evidence ahead of trial;
- adult vulnerable witnesses in High Court cases also appear to be benefitting from a much wider use of pre-recorded evidence; and
- Ground Rules Hearings have played a key role in taking evidence by commissioner from vulnerable witnesses.

The evaluation also identified some challenges associated with the operation of the Act, namely that:

- the proportion of applications approved by the Court that actually progress to an EBC hearing has fallen in comparison to the equivalent proportion in 2017. Reasons include because the evidence of the witness was no longer required, or that the EBC was no longer required (e.g. because evidence had been agreed). However one other reason for this was witnesses failing to attend EBC hearings. Additionally, there were significantly fewer applications, orders and EBC hearings in 2017 compared to the review period;
- implementing the Act is resource-intensive and places additional pressures on the justice system; and
- the facilities for conducting EBC hearings and the technology for playing recordings at trial require to be kept under review to explore what improvements can be made to the development of future suites and facilities.

The evaluation concludes that, while there are some challenges associated with the operation of the presumption, the Act is supporting witnesses to participate in the criminal justice system. This conclusion is based on the evidence of a substantial increase in the use of taking evidence by a commissioner, a special measure that is known to improve the quality of evidence provided by vulnerable witnesses and to reduce their risk of re-traumatisation both of which are key tenets of participation in the criminal justice system.

**Next steps for implementing the Act**

The Scottish Government remains committed to further implementing the Act so that the presumption in favour of pre-recorded evidence extends to all groups of child and vulnerable witnesses identified in the Implementation Plan.

Scottish Ministers recognise the need to work closely with justice partners in implementing the Act and are taking this forward as part of wider work underway to deliver a person-centred, trauma-informed justice system.

Work is ongoing with partners and stakeholders through a cross sector implementation group and Scottish Ministers will publish a revised Implementation Plan by the end of March 2024 which sets out the next steps for implementing the Act.

# 1. Introduction

The **Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019** ("the Act") creates a legislative presumption that the evidence of child witnesses (other than the accused), in cases that are to be heard in front of a jury and which involve specific offences, should be pre-recorded ahead of trial except where specific exceptions apply. The Act came into effect on 20 January 2020 in relation to child witnesses in the High Court.

**Section 9** of the Act requires that Scottish Ministers must prepare a report which evaluates whether the amendments made by sections 1 and 5 of the Act have helped witnesses to participate in the criminal justice system during the 'review period' set out by the Act. It also requires Scottish Ministers to set out the next steps that they intend to take in relation to further commencement of the Act.

The provisions at **section 1** of the Act introduce a presumption that the evidence of child witnesses in certain criminal cases that are heard in front of a jury should be pre-recorded ahead of trial except where specific exceptions apply.

Pre-recording of a child's evidence may occur by using the special measure of "giving evidence in chief in the form of a prior statement" (usually the Joint Investigative Interview carried out by specially trained police and social worker interviewers) followed by the special measure "taking evidence by a commissioner". Alternatively, the whole of the child's evidence including the cross-examination may be taken by a commissioner.

The provisions at **section 5** of the Act require that a Ground Rules Hearing (GRH) must take place where the evidence of a vulnerable witness is taken by a commissioner. Section 5 also introduces additional powers for commissioners giving them equivalent powers to judges when reviewing arrangements for taking evidence from a vulnerable witness and enabling them to make an order changing those arrangements, for example, requiring the use of additional special measures for taking evidence. Section 5 of the Act also gives the Court the power to conduct an evidence by commissioner (EBC) hearing before an indictment is served.

The '**review period'** referred to in the Act means the period of three years beginning with the day that section 1 of the Act came into force for any purpose. As such, the review period runs from 20 January 2020 to 19 January 2023.

The report required by section 9, must include the following information:

- the number of witnesses to whom the presumption in favour of pre-recording in the Act applied during the review period – these are known as "**relevant witnesses**";
- the percentage of those relevant witnesses that had their evidence taken by a commissioner;
- the percentage of those witnesses whom, having had their evidence taken by a commissioner, had a recording of their evidence played at trial; and

- where the evidence of relevant witnesses was not taken by a commissioner during the review period despite the court ordering it to be so, or, where it was taken but has not been played at trial by the time the report is prepared, the reasons for this.

The Act obliges the Scottish Government to consult a number of key individuals, justice partners and stakeholders in preparing the report. In fulfilling this obligation, Scottish Ministers have engaged both with justice partners that are directly involved in the operation and conduct of EBC hearings as well as with stakeholders who engage directly with vulnerable witnesses.

An analysis of the responses to this targeted consultation exercise, along with the required data, form the basis of the evaluation contained in this report. These have been supplemented by additional statistical information provided by justice partners including the Scottish Courts and Tribunals Service (SCTS) and the Crown Office and Procurator Fiscal Service (COPFS) in order to support a more rounded evaluation of the impact of the Act. The terms of section 9 are set out in full at **Annex 1.**

**Limitations of the evaluation**

It is important to note the limitations inherent in any evaluation of the ability of individuals to participate in the criminal justice system. In the context of relevant witnesses, their capacity to participate will inevitably be impacted by factors that lay beyond the scope or influence of the Act, not least the specific circumstances of their case. This is particularly pertinent in the context of the COVID-19 pandemic and its effect on the operation of the criminal justice system which has impacted on how everyone, including witnesses, engage with court processes and proceedings.

The Act came into operation on 20 January 2020, shortly before the effects of the pandemic were felt across the justice system. Those effects include additional delays in cases coming to trial. This is important context for understanding the pressures faced by the justice system and the broader circumstances in place during the review period. Further detail on the implementation of the provisions in the Act are set out at **Chapter 5**.

## 2. Structure of the report

Chapter 1 introduces the report and provides a broad overview of what it covers with Chapter 2 providing a short breakdown of what is covered in the individual chapters as well as an explanation of certain terms used in the report. An overview of the context and background to the Act is provided in Chapter 3. An overview of what the Act does is set out at Chapter 4 while the steps that have been taken by the Scottish Government to implement it are provided at Chapter 5. Chapter 6 presents the statistical findings. The main findings from an analysis of consultation responses are set out in Chapter 7. Chapter 8 brings together the statistical findings, analysis of consultation responses and supporting information to evaluate the extent to which the provisions at sections 1 and 5 of the Act are supporting relevant witnesses to participate in the criminal justice system. Chapter 9 details the next steps that the Scottish Ministers intend to take in considering further implementation of the provisions in the Act to a wider cohort of vulnerable witnesses. Lastly, the methodology for gathering the data to deliver against the reporting requirement as set out in the Act is provided at Chapter 10.

### Terminology used

Throughout the report, the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019 is referred to as '**the Act**'.

The term "**relevant witness**" is used to describe those witnesses to whom the presumption in favour of pre-recorded evidence applies under the provisions in the Act commenced to date. The presumptions covers witnesses (other than the accused) that are under the age of 18 on the date that proceedings are initiated against the accused[1] and who are required to give evidence at or for the purposes of a hearing in the High Court in cases that involve offences specified in the Act such as serious violent and sexual offences.[2]

The term **"vulnerable witness"** applies to all witnesses under the age of 18 (irrespective of offence or Court in which a case is being heard) as well as to adult victims of specified offences such as sexual offences, domestic abuse, trafficking and/or stalking (Criminal Procedure (Scotland) Act, 1995).[3] The term "vulnerable witness" also applies to those witnesses where the Court considers that the quality of their evidence would be affected by virtue of a mental disorder or because of fear or distress associated with giving evidence, and to those witnesses who are at significant risk of harm solely because of giving evidence.[4]

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[1] For the purposes of determining whether an is a 'relevant witness' the age of the witness is calculated based on the date that the accused appeared on petition or from the date that the indictment was served on the accused

[2] A relevant witness is defined as section 9 of the Vulnerable Witness (Criminal Evidence) (Scotland) Act 2019 as witness to whom the presumption in favour of pre-recorded evidence applies.

[3] The definition of a vulnerable witness was expanded through the Victims and Witnesses (Scotland) Act 2014 to encompass witnesses over the age of 18 who are the alleged victim in specified sexual, trafficking, domestic abuse and stalking offences.

[4] As set out at Section 271 of the Criminal Procedure (Scotland) Act 1995.

The term **“presumption”** is also used widely and in the context of this report is used to describe the rule under the Act that a relevant witness’ evidence should be pre-recorded ahead of trial, unless an exception applies.

A list of acronyms used in the report is provided at **Annex 2**

## 3. Context and background

### Vulnerable witnesses' experiences of the justice system

The challenges that vulnerable witnesses face when engaging with the criminal justice system are well-documented. Numerous studies conducted over many decades and across multiple jurisdictions have highlighted the additional barriers that specific groups face when giving evidence either as a victim of, or witness to, a crime (SCTS, 2015). In particular, this research has shown that for both children and adult victims of specific offences (i.e. sexual offences, domestic abuse, trafficking and stalking), the experience of giving evidence in Court is problematic for two reasons. Firstly, the experience of going to Court can feel intimidating, distressing and demeaning, particularly where they are required to give evidence of an intimate or personal nature which can be re-traumatising. Indeed, some vulnerable witnesses have described the experience of giving evidence in Court as worse than their experience of the crime(s) that they are giving testimony about (Brooks-Hay et al, 2019). Secondly, traditional methods of questioning vulnerable complainers in Court, particularly children, are known to be a poor way of eliciting accurate and relevant evidence (SCTS, 2015). As such, it restricts the capacity of these witnesses to fully "participate" in criminal proceedings by limiting their ability to provide information and evidence to the court and impacts on their well-being.

It is also important to note that there are other factors beyond giving evidence which have an influence on a vulnerable witness' ability to participate in the criminal justice system. Delays in cases coming to trial and poor communication with witnesses by the police, courts and prosecutors are all known to have a material impact on the experience of vulnerable witnesses (SCTS, 2018). The length of time it takes for cases to come to trial has been significantly impacted by the COVID-19 pandemic and the resulting backlog of cases. These additional delays are likely to have heightened existing concerns and anxieties felt by vulnerable witnesses about the experience of giving evidence (Armstrong and Pickering, 2020).

While there continue to be delays in cases coming to trial as a result of the backlogs created by the pandemic, significant progress has been made in addressing this.

### Support for vulnerable witnesses to give evidence before the introduction of the Act

Supporting vulnerable witnesses to participate fully in the criminal justice system has been a longstanding priority for those working across this system. There has been a progressive expansion of the scope and parameters of support as our understanding of the barriers that vulnerable witnesses face when interacting with the criminal justice system has evolved.

Under the legislation in place prior to the introduction of the Act (which is found in the Criminal Procedure (Scotland) Act 1995 as amended by the Vulnerable Witnesses (Scotland) Act 2004 and the Victims and Witnesses (Scotland) Act 2014), those who meet the definition of a vulnerable witness had (and continue to have) access to a range of different measures designed to support them while giving evidence.

The focus of these measures is on seeking to alleviate some of the pressure associated with giving evidence in the often intimidating environment of a courtroom or to address the fear that some witnesses experience in coming face-to-face with the accused. Accordingly, before the Act was in place, vulnerable witnesses had and indeed continue to have, access to the following measures which are designed to support them to give evidence at trial or an applicable hearing in which evidence is to be given:

- a live TV link to allow evidence to be taken remotely;
- the use of a screen to shield the witness from the accused;
- a supporter to sit next to the witness while giving evidence;
- a closed court which would exclude the public from the Court while the witness is giving evidence;
- taking evidence by a commissioner; and
- giving evidence in chief in the form of a prior statement

To optimise the effectiveness of these special measures, the legislation also permits vulnerable witnesses to access more than one special measure which can be used in conjunction with, or alongside, another provided that they are not incompatible with each other. For example, the legislation entitles vulnerable witnesses to use a supporter while giving evidence from behind a screen.

**Support for vulnerable witness to pre-record their evidence ahead of trial before the introduction of the Act**

The final two bullet points above relate to special measures which enable vulnerable witnesses to pre-record all or part of their evidence ahead of trial. The aim of these special measures is to restrict the amount of time that they would be required to spend giving live evidence at trial, in front of a jury, or remove the need for them to do so altogether. These special measures also enable vulnerable witnesses to provide their evidence in an environment that is alternative to the traditional court setting to support them in providing their best evidence.

Where the special measure of taking evidence by a commissioner is applied for and granted by the Court, an EBC hearing is fixed for the purposes of securing the vulnerable witness' evidence. In addition to the witness, attendance at EBC hearings is restricted to a Commissioner appointed by the Court for the purposes of presiding over the hearing (a judge or sheriff); defence and prosecution as well as the clerk of court. The accused must be enabled to watch and listen to the proceedings, but is not permitted to be in the same room as the witness unless the court has granted leave on special cause shown. The witness is also entitled to have a supporter present at the hearing if they wish to do so and this is approved by the Court. The hearing is audio and visually recorded and this recording is played at trial as the witness' evidence. This means the witness does not need to attend the trial and their evidence is captured earlier.

The special measure of giving evidence-in-chief in the form of a prior statement is an interview or a statement which is taken pre-trial (or before the applicable hearing in which the evidence is to be given), often during the investigation phase, which could be a video or audio taped interview between the witness and the police, a visually

recorded interview between the witness, police and social worker (referred to as a Joint Investigative Interview(JII)) or a written statement that is then read out in Court. While the witness' evidence-in-chief can consist entirely of the prior statement, they may still need to provide evidence for cross-examination by the accused or their counsel which they may then be required to give in front of a jury or before a Commissioner. JIIs are formal interviews conducted with a child by trained police officers and social workers. They take place when there is a concern that a child is a victim of, or witness to, criminal conduct, and where there is information to suggest that the child has been, or is being, abused or neglected or may be at risk of significant harm. As these statements or interviews are usually obtained during the investigation stage by police, often the document or recording requires to be redacted or edited so as to remove inadmissible content.

The specific special measures which enable the taking of evidence by a commissioner and giving evidence through a prior statement, recognise that there are a number of advantages to enabling vulnerable witnesses to pre-record their evidence ahead of trial. Specifically, it enables those witnesses to give evidence out with the challenging and intimidating environment of a courtroom which promotes improved recall and enhances the reliability and accuracy of the evidence that they are able to provide (SCTS, 2018). The quality of evidence provided is further improved by allowing vulnerable witnesses to give their evidence earlier in the process supporting them to provide a more accurate and contemporaneous account (SCTS, 2018). This has become particularly important in the context of greater delays and lengthened journey times for cases after the COVID-19 pandemic.

Pre-recorded evidence is also associated with improved well-being for vulnerable witnesses compared to giving evidence in court. Earlier capture of evidence also supports healing processes to take place sooner, allowing the witness to move on with their life. This feature of pre-recorded evidence has been identified as particularly beneficial for young witnesses (SCTS, 2018).

Before the 2019 Act, however, the legislation gave greater prominence to those special measures intended to support witnesses to provide live evidence at trial. While, as noted above, legislation did authorise the use of special measures which enabled evidence to be pre-recorded ahead of trial, these could only be adopted on a case by case basis after application by either the prosecution or defence and requiring the express agreement of the Court. By contrast, vulnerable witnesses, including children had an automatic entitlement to the following ‘standard’ special measures which supported them when providing evidence at trial:

- a live TV link allowing evidence to be taken from the witness remotely;
- the use of a screen to shield the witness from the accused while in Court; and
- the use of a supporter to sit next to the witness while giving their evidence.

Data published by SCTS prior to the implementation of the Act reflects that, of the 2,536 special measures applications for solemn cases made in 2018/19 and from which it is possible to infer when the evidence was taken, at least 92% were for special measures which supported vulnerable witnesses to give evidence at trial

(Police Scotland et al, 2019).[5] Indeed, the vast majority of these applications were for the use of screens in the courtroom which accounted for 72% of the special measures applications lodged for cases heard in the solemn courts that year (Police Scotland et al 2019).

It is important to note that the Act does not repeal any of the existing legislation in place to support child witnesses but in addition, introduces a presumption in relevant cases, that a child's evidence will be pre-recorded in advance of trial. As such, the full range of special measures listed above remain available for those child witnesses that do not fall under the definition of a relevant witness or to whom an exception to the presumption is granted by the Court.

**The case for change**

That vulnerable witnesses, in particular children, needed further support to enable them to fully participate in the criminal justice system was a key finding of the Scottish Court Service's (now SCTS) judicially led Evidence and Procedure Review (EPR). Conducted between May 2013 and March 2015, the EPR reviewed the existing rules around evidence and procedure in criminal cases to explore opportunities to harness developments in technology as a means of reducing existing inefficiencies in the gathering of evidence, enhancing the quality of evidence collected from witnesses for trial and improving the treatment of vulnerable witnesses (SCTS, 2015). Following publication of the EPR, SCTS published a "next steps" report which set out measures that they intended to take in response to the findings and proposals which emerged from the EPR (SCTS, 2016). As part of the recommended new approach to taking the evidence of children and vulnerable adult witnesses a number of cross-justice working groups were established to look at and report on the pre-recording of evidence in chief and improving existing procedures for the taking of evidence by commissioner (SCTS 2017 (a) & 2017 (b)).

While the EPR was ostensibly about the rules and procedures around the gathering of evidence from vulnerable witnesses more broadly, it had a specific emphasis on the support and protections in place for child witnesses and victims. This recognised that children are particularly susceptible to the impact of aggressive questioning and delays in giving their evidence on both their wellbeing and their ability to give their best evidence (SCTS, 2015).

In conducting its review, the EPR found that, despite the existence of legislation permitting the courts to allow the evidence of vulnerable witnesses to be pre-recorded ahead of trial and the clear benefits that these provided to both child and vulnerable witnesses, these special measures were rarely sought (SCTS, 2015). To support this claim, the Review highlighted data from the three years between July 2011 and June 2014 which show that, of the 23,000 applications that were made to the Court for the use of special measures, just 1% were to seek the pre-recording of evidence ahead of trial (SCTS, 2015). Moreover, in some cases where the Court had permitted the evidence of a vulnerable witness to be pre-recorded, the EPR identified inconsistencies in the process being used by the Courts to capture this

[5] Applications made for the use of a supporter have been discounted for the purposes of this calculation as the majority of applications for this special measure are for use in conjunction with or alongside another special measure and do not influence where a witness provides their evidence.

evidence which was resulting in applications being declined by the Courts or evidence being collected in multiple different ways from a single witness making it challenging for the Court to get a clear account of event. The EPR therefore called for a much greater use of pre-recorded evidence in order to capture the evidence of vulnerable witnesses supported by protocols designed to introduce a standardised approach to conducting these hearings (SCTS, 2015).

In considering options for enhancing the support available to vulnerable witnesses when giving evidence, the EPR drew on the experiences of other common law jurisdictions to consider their experiences of taking evidence from child and vulnerable witnesses ahead of trial. In doing so, the EPR identified the need for all parties to be prepared in advance of the EBC hearing and for a clear focus on the questions to be asked at the hearing (SCTS, 2015). In particular, the Review pointed to the use of ground rules hearings in a pilot of pre-recorded evidence conducted in England & Wales. The outcomes of this pilot found that these hearings were essential to ensuring adequate preparation ahead of the relevant hearing and to ensure that full advantage was taken of the opportunities afforded by pre-recording a witness' evidence ahead of trial (SCTS, 2015).

The EPR also highlighted the opportunities of taking evidence from a vulnerable witness as soon as possible after the alleged offence had occurred in order to secure a more accurate and contemporaneous account of events and allowing witnesses to 'move on with their lives' (SCTS, 2015). That taking of evidence by commissioner supports vulnerable witnesses to provide their evidence earlier in the process was demonstrated by data collected by SCTS (SCTS, 2018b) as part of an evaluation into the impact of EBC hearings on vulnerable witnesses. This found that, of the 25 EBC hearings conducted in 2017, the witness was, on average, able to provide their evidence eight weeks earlier in the process compared to if they had given their evidence at trial. In two instances, the vulnerable witness was able to give their evidence over 16 weeks ahead of trial (SCTS, 2018b).

The findings of the EPR demonstrated that the use of special measures which enable child and vulnerable witnesses to pre-record their evidence ahead of trial is associated with enhanced participation in the criminal justice system. In particular, this approach supports vulnerable witnesses to provide information to the Court by enabling them to provide a more accurate and contemporaneous account. It also promotes improved wellbeing among vulnerable witnesses associated with the experience of giving evidence by enabling them to do so earlier and in a less daunting and intimidating environment.

Following the EPR, the High Court introduced two separate practice notices (Practice Note No.1 of 2017 and Practice Note No.1 of 2019) setting out processes that prosecution and defence counsel should follow when seeking pre-recorded evidence (High Court of Justiciary, 2017) and which set out expectations on counsel for preparing questions ahead of an EBC Hearing (High Court of Justiciary, 2019).

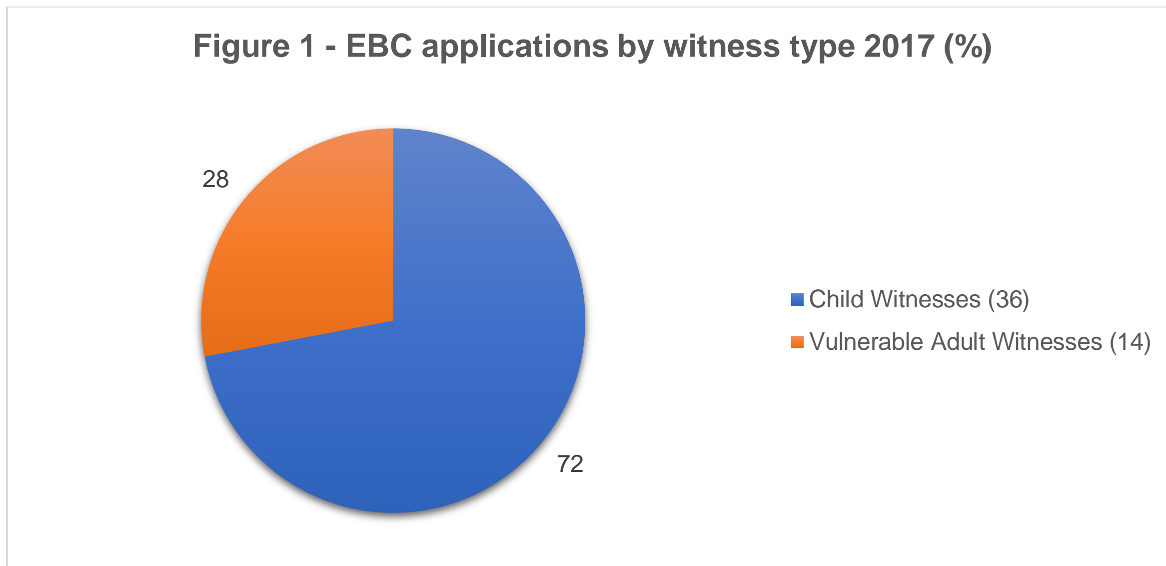
### Baselining the use of pre-recorded evidence in the High Court

In 2018, following the introduction of Practice Note 1 of 2017, SCTS published an evaluation paper which provided data relating to applications for EBC hearings in the

High Court for the whole of 2017 and ten months of 2018. The aim of this evaluation was to provide a quantified baseline to support future performance monitoring around the use of pre-recorded evidence in the High Court (SCTS, 2018b).

### Applications for EBC

Data from this evaluation demonstrated that during 2017, a total of **50** applications were made for EBC hearings to be conducted in the High Court. **36 (72%)** of those applications were for child witnesses while the remaining **14 (28%)** were for vulnerable adult witnesses (SCTS, 2018b).

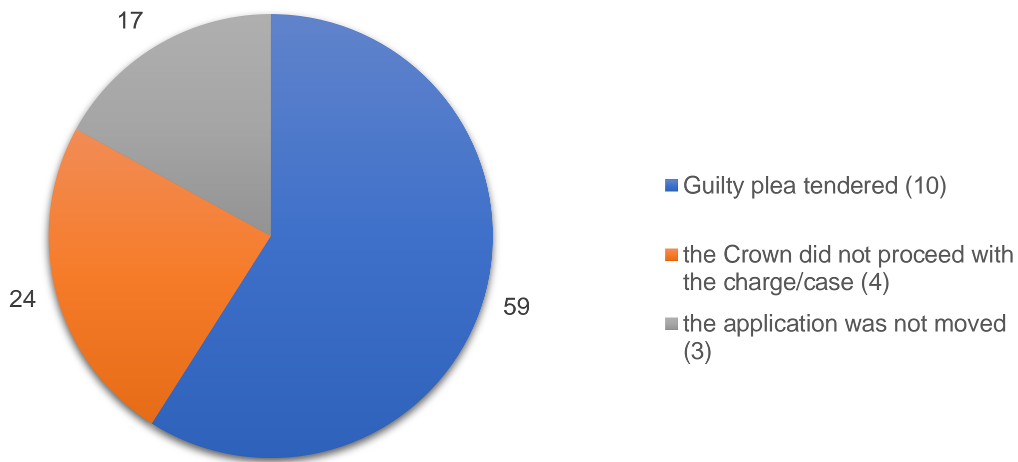



N= 50 EBC hearing applications

### EBC hearings conducted

In tracking these applications through the court system, the evaluation identified that, of the **50** applications for EBC hearings that were made to the High Court during 2017, **33 (66%) of those progressed to a procedural hearing** for an application to be determined by the Court. The reasons why **17(33%) of applications for pre-recorded evidence did not progress to a procedural hearing** are set out at Figure 2 below.

**Figure 2 - Reasons why applications for taking evidence by commissioner did not progress to a procedural hearing 2017 (%)**



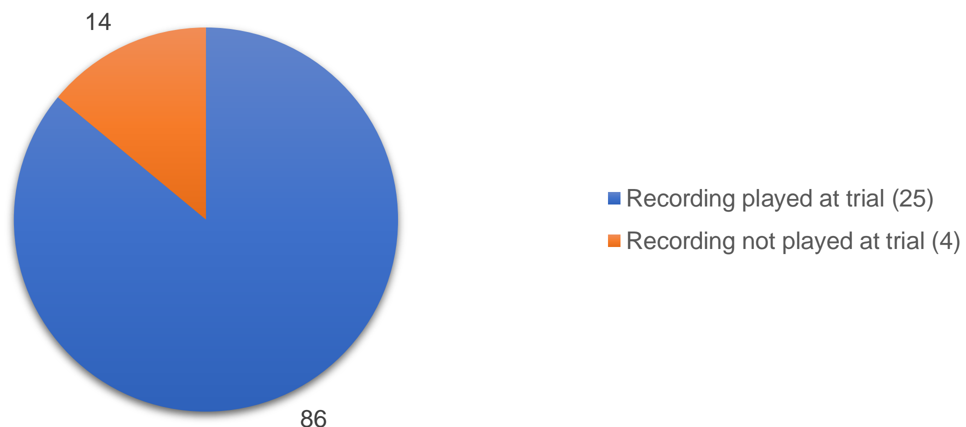

N= 17 EBC hearing applications that did not progress to a procedural hearing

Of the 33 applications that progressed to a procedural hearing, all were approved by the Court and **29 (88%) progressed to an EBC hearing** (SCTS, 2018b). **4 (12%) did not progress to an EBC hearing** either because the Crown did not proceed with the case or because the witness either did not attend or withdrew in advance from the hearing. (SCTS, 2018b).

**EBC recordings played at trial**

The evaluation further shows that, of the 29 EBC hearings that proceeded, **25 (86%)** of those recordings were played at a relevant trial diet with **4 (14%)** not being played at a trial diet (SCTS, 2018b).

**Figure 3 - Number of recordings played at trial 2017 (%)**




N= 29 EBC hearing recordings

Of the 4 recordings that were not used at trial, 1 was not played because a guilty plea was tendered by the accused at the trial while the remaining 3 were not played because COPFS did not proceed with the case (SCTS, 2018b).

In addition to the data for 2017, the Evaluation Report also provided data on applications for EBC hearings covering the first 10 months of 2018. This demonstrated a significant increase in the use of the special measure of taking evidence by a commissioner from the previous year. Specifically, it showed that a total of 133 applications for EBC hearings had been submitted between January and October 2018. The number of applications for EBC hearings submitted each month during 2017 and the first 10 months of 2018 is set out at Table 1 below.

**Table 1 – Number of applications for EBC hearings per month by witness type 2017 – 2018**

| | **Applications for EBC hearings** | | | |
|---|---|---|---|---|
| | **Child Witnesses** | | **Vulnerable adult witnesses** | |
| | **2017** | **2018** | **2017** | **2018** |
| January | 1 | 2 | 0 | 3 |
| February | 1 | 9 | 0 | 5 |
| March | 8 | 7 | 4 | 0 |
| April | 1 | 17 | 0 | 1 |
| May | 3 | 12 | 0 | 4 |
| June | 0 | 13 | 1 | 3 |
| July | 4 | 17 | 0 | 1 |
| August | 0 | 12 | 1 | 2 |
| September | 11 | 10 | 2 | 5 |
| October | 6 | 6 | 1 | 4 |
| November | 1 | - | 3 | - |
| December | 0 | - | 2 | - |
| **Average applications per month** | **3** | **11** | **1** | **2** |

Statistics on applications for EBC hearings in 2017 have been used in this report as the baseline data for the purposes of evaluating the efficacy of the Act at supporting relevant witnesses to participate in the criminal justice system. The reason for this is that a full year’s worth of data is available for 2017 and because the Evaluation Report provides additional information on the progress of EBC hearings from application to a recording of the evidence being played at trial which is not available for 2018.

## 4. The Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019

As noted in **Chapter 3**, it has been recognised for some time that certain groups of people, including children, face additional barriers in engaging with the criminal justice system where they are the victim of, or witness to, a serious crime. Legislative provision has evolved to make specific support available to these groups of people, described in law as 'vulnerable witnesses'.[6] Research has demonstrated that for vulnerable witnesses, the experience of having to recount traumatic events in an unfamiliar and often intimidating court environment is not only harmful but can also impact on their ability to give an accurate and credible account of events (SCTS, 2015). In response to the findings of the EPR and subsequent work taken forward by SCTS, the Scottish Government introduced legislation to the Scottish Parliament which sought to make it easier for vulnerable witnesses to access special measures which would enable them to pre-record their evidence ahead of trial. This became the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019.

By introducing a presumption in favour of specific special measures which eliminate the need for witnesses to give their evidence at trial, the Act aims to improve their ability to participate fully in the criminal justice system. This is set out in the Policy Memorandum (Scottish Government, 2018) which accompanied publication of the Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill.

### What does the Act do?

The Act creates a new rule that where a witness is under the age of 18 and they are due to give evidence as a victim of or witness to certain serious offences, they will be entitled to pre-record their evidence ahead of trial unless a specific exception to this rule is applied for and granted by the Court.

In order to establish this presumption, the Act makes amendments to the existing legislative framework that governs the special measures available to vulnerable witnesses when giving evidence in criminal cases as set out at Section 271 – 271M of the Criminal Procedure (Scotland) Act 1995.

### Who does the Act apply to?

Those to whom this rule applies are known as a "relevant witness" within the legislation.

In determining the circumstances in which the presumption applies, the Act specifies that this rule is only applicable in cases that are heard under solemn procedure and which must involve at least one of the offences (or an attempt to commit any of the offences) listed below:

- murder;
- culpable homicide;
- assault to the danger of life;

[6] The definition of a vulnerable witness is set out at Section 271 of the Criminal Procedure (Scotland Act) 1995

- abduction;
- plagium (child stealing);
- certain sexual offences;[7]
- domestic abuse;
- an offence that is aggravated by involving abuse of a partner or ex-partner by the perpetrator;
- human trafficking;
- modern slavery; and
- female genital mutilation

By focusing the presumption on these serious crimes, the aim of the Act is to capture those cases in which witnesses who may be required to give evidence are most likely to face challenges in engaging with the criminal justice system due to trauma experienced as a result of being a victim of, or witness to, the offences alleged.

The Act also includes provisions which enable Scottish Ministers to bring forward regulations that change the list of offences to which the presumption applies. This recognises that, in future, it may be necessary to expand this list in response to developments in our understanding of the impact that trauma has on the ability of vulnerable witnesses to give evidence.

While provisions in the Act establish the presumption specifically for children, in bringing forward this legislation, the Scottish Government recognised that other categories of witness could also benefit significantly from making greater use of pre-recorded evidence. Regulation-making powers were therefore included in the Act which enable the presumption to be extended to certain other groups of vulnerable witnesses i.e. deemed adult vulnerable witnesses. Scottish Ministers have already committed to use these powers to expand the Act beyond child victims and witnesses.

It was recognised that delivering the presumption to increase the use of pre-recorded evidence would place significant additional demands on the criminal justice system. It was therefore agreed with justice partners that it was necessary to adopt a staged approach to implementing the Act to avoid overwhelming the system. The Act was therefore specifically designed to provide a framework for the progressive extension of the presumption to other categories of vulnerable witness i.e. adult deemed vulnerable witnesses such as those who are the victim of a sexual offence, domestic abuse, human trafficking and/or stalking in solemn cases.

The focus of the implementation of the Act to date on children, reflects a consensus among justice partners that the presumption should initially be prioritised towards those witnesses that are the most vulnerable (Scottish Government, 2018). To date, the presumption has been commenced in respect of child witnesses giving evidence in the High Court in cases involving relevant offences. Further detail on the proposals for future implementation of the Act is provided at **Chapter 9**.

[7] The specific sexual offences to which the presumption applies are set out at Section 288C of the Criminal Procedure (Scotland) Act 1995 and includes offences such as rape, attempted rape, sexual assault and indecent exposure amongst other offences.

## Exceptions to the Presumption

The Act recognises that pre-recording the evidence of a relevant witness will not be appropriate in every case to which the presumption applies. The Act therefore provides that evidence must be pre-recorded unless certain exceptions apply. For example, the Act gives the Court the power to override the presumption where it considers that taking evidence from a witness in advance of trial would risk the fairness of proceedings or would not otherwise be in the interests of justice.[8] Crucially, in determining this, the Act requires the Court to satisfy itself that the risks to the fairness of proceedings outweigh any potential risks to the interests of the witness. This ensures that the application of the presumption does not jeopardise an accused's right to a fair trial as set out at Article 6 of the European Convention on Human Rights (ECHR).

Additionally, provisions in the Act also allow the Court to override the presumption where the witness expresses a preference to give their evidence at trial provided that the witness is over the age of 12 on the date of commencement of the proceedings of which the relevant hearing forms part. This exception recognises that some witnesses want to give live evidence at trial and the Act permits this provided the Court considers it is in the best interests of that witness (bearing in mind their expressed preference).

## Reforms to Existing Special Measures

In addition to both introducing the presumption and setting out the circumstances in which it applies, a key feature of the Act is the reforms that it makes to existing special measures that were already available to the courts for the purposes of pre-recording the evidence of vulnerable witnesses. These special measures, namely taking evidence by a commissioner and giving evidence in chief in the form of a prior statement, had been among a suite of special measures available to the courts for many years. Prior to the introduction of the Act, however, there was no presumption in place.

One of these reforms is to require that a Ground Rules Hearing ("GRH") must take place in advance of an EBC hearing where the special measure of taking evidence by a commissioner is used to secure testimony from a vulnerable witness. Crucially, GRHs are not only required to take place in those cases to which the presumption applies, but rather must be used in all circumstances in which this special measure is adopted.

The objective in introducing GRHs is for the Commissioner or other judge presiding over the hearing to satisfy themselves that all parties are prepared for the EBC hearing and to ensure that proper consideration is given to the conduct of that hearing. Accordingly, the Act sets out those issues that the Commissioner must consider at the GRH including the length of the EBC hearing, any additional support that the witness may require to participate fully in proceedings and, where

[8] Note that the Court can only consider an application if one is lodged. The Court is not privy to information about all potentially relevant witnesses and can only make decisions about exceptions when an application is received.

appropriate, the form and wording of questions to be asked. GRHs are typically conjoined with the Preliminary Hearing

In addition, the Act also includes provisions intended to encourage the same judge, where practicable, to conduct both the GRH and, acting as a Commissioner, the EBC hearing. This is to encourage greater consistency in how cases involving vulnerable witnesses are managed as they progress through proceedings.

A further reform introduced by the Act was to enable EBC hearings to be conducted prior to the service of an indictment on the accused. This provision also applies to all cases in which the evidence of a witness is taken by a Commissioner, not just those which involve a relevant witness. The aim of this provision is primarily to recognise that it may be necessary to take the evidence of a witness at the earliest opportunity and before an indictment has been lodged in order to advance criminal proceedings against an accused. For example, where a witness is terminally ill. It also recognises that capturing a witness' evidence at the earliest opportunity can improve the quality of their evidence by enabling them to provide a more accurate and contemporaneous account (SCTS, 2015).

While the Scottish Government acknowledged when it brought forward the Act that pre-indictment EBC hearings were likely to be rare, these provisions were included in the Act in order to both future-proof the legislation and to provide the flexibility should this be considered appropriate in any specific case.

## 5. Implementation of the Act

The Scottish Government recognises that the expansion of taking evidence by commissioner places significant additional demands on the criminal justice system. In particular it requires those involved in conducting a case, to prepare to take evidence earlier than they would otherwise and also requires them to resource an additional hearing. These additional demands are particularly challenging at a time when justice agencies and partners are already experiencing acute pressures due to growth in volume of cases and the pressures caused by the pandemic.

The need for a managed approach to rolling out pre-recorded evidence was emphasised in the EPR next steps report. It recommended a staged approach to the implementation of pre-recorded evidence to avoid creating an 'insupportable surge in demand on the justice system's limited resources' (SCTS, 2016). In addition, the EPR also highlighted the importance of having the right technology and facilities in place to support roll out of evidence by commissioner, stressing that this was necessary to ensure the collection of good quality evidence in an environment which, as far as possible, is not intimidating or overwhelming for a witness (SCTS, 2015).

The Policy Memorandum which accompanied the Bill recognised that there would be a number of practical and operational implications for justice sector partners associated with the implementation of the presumption and that this necessitated a phased implementation of the Act (Scottish Government, 2018). Accordingly, the Bill was specifically drafted to enable a framework for a progressive extension of the arrangements to child and vulnerable witnesses. This phased implementation was, and remains, essential to ensure that the criminal justice system can adjust to a substantially different way of taking evidence from a large number of witnesses.

To manage commencement of the Act, an Implementation Plan was developed in conjunction with justice partners, a copy of this is attached at **Annex 3**. The Implementation Plan set out a phased approach to implementation, meaning that presumption would be extended to different groups of vulnerable witnesses at different times. The Implementation Plan also stated that an evaluation would be conducted after the commencement in respect of the first two cohorts of witnesses, in order to assess how the presumption is operating and what impact it is having on criminal justice partners and agencies.

The Implementation Plan identified that the Act would be rolled out in the following stages:

- **Phase 1 –** child complainers and witnesses under the age of 18 in High Court cases that involve specific offences.
- **Phase 2 –** period of evaluation of how the provisions are operating in the High Court.
- **Phase 3 –** child complainers aged under 16 in Sheriff & Jury cases that involve specific offences.
- **Phase 4 –** period of evaluation of how the provisions are operating in the sheriff court.
- **Phase 5 –** child witnesses aged under 16 in Sheriff & Jury cases that involve specific offences.

- **Phase 6 –** child complainers and witnesses aged 16 & 17 in Sheriff & Jury cases that involve specific offences.
- **Phase 7 -** deemed vulnerable adult witnesses in High Court sexual offence cases.
- **Phase 8 -** all remaining deemed vulnerable adult witnesses in High Court cases (i.e. complainers in human trafficking, stalking and domestically aggravated offences).

The approach captured in this plan was intended to ensure sufficient capacity within the justice system to meet the obligations under the Act and to ensure that the intended benefits are delivered to vulnerable witnesses.

At present, the Act applies to children under the age of 18 required to give evidence in relevant cases indicted to the High Court. The impact of the Covid pandemic has meant that further rollout of the Act's provisions has been impacted by the broader pressures and challenges facing the criminal justice system.

To support implementation of the Act, the Scottish Government has provided £2 million in capital funding to facilitate the construction of four EBC suites specifically designed to be trauma-informed spaces for taking the evidence of vulnerable witnesses. These bespoke suites, which are all fully operational, are located in Aberdeen, Edinburgh, Glasgow and Inverness. Collectively they provide capacity to accommodate over 2,000 commissions annually. The EBC suite in Glasgow was the only site that was operational at the outset of the review period with Inverness opening in March 2020 and Edinburgh in October 2022. Aberdeen EBC suite became operational following the end of the review period in October 2023. A further suite is due to open in Dundee next year. Work is ongoing with SCTS to identify other areas where additional suites are required to ensure sufficient capacity is in the right areas to meet demand for EBC hearings.

The Act remains a vital part of our ongoing plans to transform the justice system and ensure that witnesses are supported to give the best possible evidence. Further detail on work to extend the provisions in the Act to a wider cohort of vulnerable witnesses is provided at **Chapter 9**.

### Additional Support for Vulnerable Witnesses in Scotland

Providing the right support to vulnerable witnesses is a priority for the Scottish Government. One of the principles of the Scottish Government's Vision for Justice is to embed person-centred and trauma informed practices in the justice system, ensuring that everyone is treated in a way that minimises re-traumatisation.

The Scottish Government is bringing forward a range of policies to support children and vulnerable adults to give their best evidence in court. These include the Bairns' Hoose model, the Scottish Child Interview Model, the pilot of Video Recorded Interviews, and the Victims, Witnesses and Justice Reform (Scotland) Bill.

### Bairns' Hoose

Bairns' Hoose is Scotland's approach to the Icelandic 'Barnahus', which means 'child's house'. Bairns' Hoose is a transformational, whole-system approach to

delivering child protection, justice, health and recovery for children who have been victims or witnesses of abuse or violence, as well as children under the age of criminal responsibility whose behaviour has caused significant harm or abuse.

The Scottish Government has introduced a three-phased approach for the development of Bairns' Hoose in Scotland. The first phase, the Pathfinder phase, launched in October 2023 with the announcement of six Pathfinder Partnerships marking a significant milestone for the development of Bairns' Hoose. The Pathfinders will demonstrate how the recently published Standards work in practice in different contexts, enabling the design of a national Bairns' Hoose model and the support required to achieve this. A Fund of up to £6m will support the Pathfinder phase in 2023-24 with a similar level of investment expected in 2024-25.

**Scottish Child Interview Model**

Bairns' Hoose builds on the momentum of the Scottish Child Interview Model (SCIM) for JIIs, which is being introduced nationally from 2021 to 2024.

The Scottish Child Interview Model is a new approach to joint investigative interviewing which is trauma informed. By maintaining the focus upon the needs of the child in the interview, it seeks to achieve best evidence through improved planning and interviewing techniques. It has been purposefully designed to minimise re-traumatisation of children and young people and the accompanying training programme equips interviewers with the knowledge and skills required for the specialist task of forensic interviewing.

Informed by international research on forensic interviewing, and incorporating an evidence-based interview protocol, this ground-breaking approach to interviews for vulnerable child victims and witnesses in Scotland which is currently being rolled out across the country, supported by £2 million of Scottish Government funding.

Local authorities and Police Scotland have worked jointly to lead the development and implementation of this new model of practice, in collaboration with their wider protecting children partners. There is growing evidence of improved experiences and outcomes for children and young people.

24 local authorities, 11 policing divisions and 10 health boards are currently live in practice with the SCIM. Many involve cross-authority partnerships, working collaboratively across regions to deliver this new approach. Remaining areas are currently undertaking preparatory work to install the new model of practice and it is expected that the SCIM will be available in every area by the end of 2024.

**Video Recorded Interview (VRI) Pilot**

The Scottish Government has been working with partners (Police Scotland, Crown Office and Procurator Fiscal Service and Rape Crisis Scotland) to support a pilot to visually record rape complainers' initial statement to the police within Edinburgh, Dumfries and Galloway, as well as the Highlands and Islands.

The two-year pilot project was launched on 1 November 2019 and formally extended until 1 May 2022.

Where appropriate, the aim of the pilot is for COPFS to use these interviews as the complainer's evidence in chief should the case proceed to trial, and to make an associated application to facilitate the cross-examination of the complainer by means of an EBC hearing.

An interim review of the pilot is currently underway and when sufficient numbers of cases involved from the pilot progress to trial, a full and meaningful evaluation will be completed.

While the pilot has formally concluded, VRI still operates within the areas that formed part of the pilot approach, with training continuing to be rolled out by Police Scotland.

**Victims, Witnesses, and Justice Reform (Scotland) Bill**

The Victims, Witnesses, and Justice Reform (Scotland) Bill seeks to establish a specialist sexual offence court, taking forward the recommendation of the Lady Dorrian Review and designed to put the experience of victims at its heart through specialist, trauma-informed approaches.

The Sexual Offences Court is part of a package of reforms proposed by the Bill which are intended to improve the experiences of sexual offence victims in their interactions with the criminal court system.

Provisions in the Bill seek to introduce an automatic presumption in favour of pre-recording the evidence of complainers in cases that are indicted to the Sexual Offences Court. Introducing a presumption towards the pre-recording of evidence for complainers was a core tenet of the Sexual Offences Court as recommended by the Lady Dorrian Review and builds on existing commitments to expand the use of pre-recorded evidence.

## 6. Statistics on relevant witnesses

### Background

The Act requires that this report includes specific data relating to the operation of the presumption since the start of the 3-year review period:

- the number of witnesses to whom the presumption in favour of pre-recording evidence applied during the review period ('relevant witnesses');
- the proportion of those witnesses that, by the time the report is prepared, have had their evidence taken by at an EBC hearing;
- the proportion of those witnesses who, having had their evidence taken at an EBC hearing, have, by the time report is prepared, had their evidence played at trial;
- the reason that the evidence of any relevant witness has not been taken by a commissioner despite a court having made an order authorising its being taken in that way; and
- the reason that the evidence of any relevant witness that was taken by a commissioner had not been used at a trial diet.

As the information required by the Act relates to the operational performance of a specific aspect of the criminal justice system, this data is not routinely collected by the Scottish Government. Accordingly, the Scottish Government has worked in close conjunction with SCTS and COPFS to capture and analyse the data required.

A detailed overview of the methodology setting out the process followed for collecting this data is set out in **Chapter 10**. SCTS and COPFS have gathered this data up to 5 December for the purposes of including in this report and ensuring that statistics informing our evaluation of the Act are as up-to-date as possible.

Analysis of the data collected can be found at **Chapter 8**.

### Results of the data gathering exercise

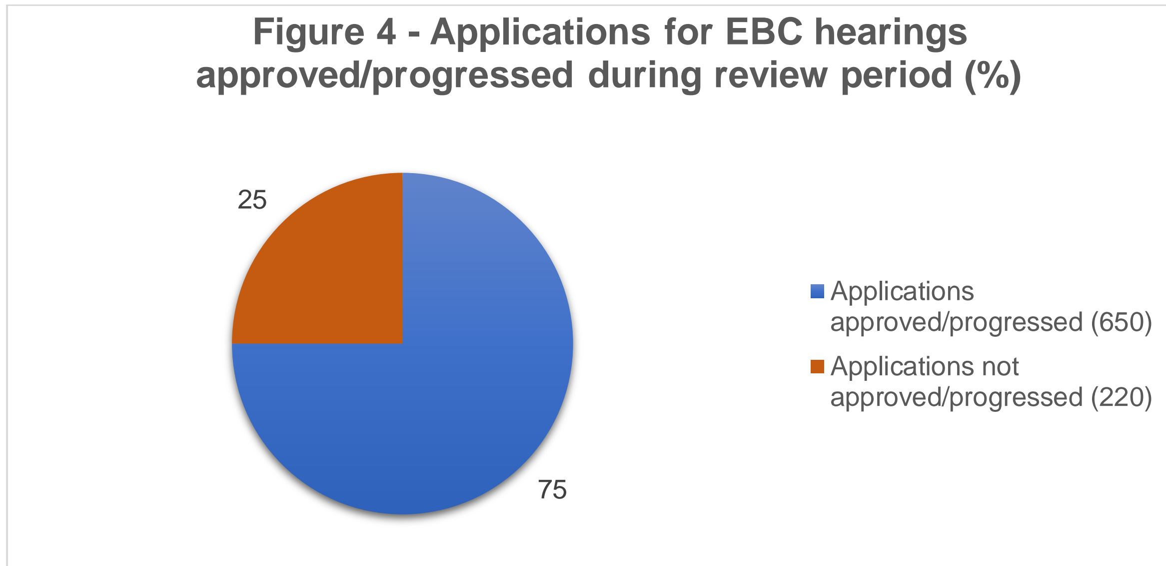
This section of the Report provides an overview and analysis of the data gathered in meeting the reporting requirements on Scottish Ministers as set out in section 9(2)(a) – 2(d)(ii) of the Act.

### Number of "relevant witnesses"

- **870** relevant witnesses were identified during the review period– that is witnesses under the age of 18 who were required to give evidence in relation to cases involving specified offences indicted to the High Court ("relevant witnesses"). This includes those relevant witnesses where specific applications under section 271BZA of the Criminal Procedure (Scotland) Act 1995 were made by COPFS and those that were made by defence counsel.

### Number/proportion of relevant witnesses in respect of whom applications for EBC hearings were granted

- **650** of those **870** relevant witnesses, or **75%**, received an order approving/granting a commission.




N= 870 relevant witnesses

**Number/proportion of relevant witnesses in respect of whom applications for EBC hearings were not sought, not approved or not progressed**

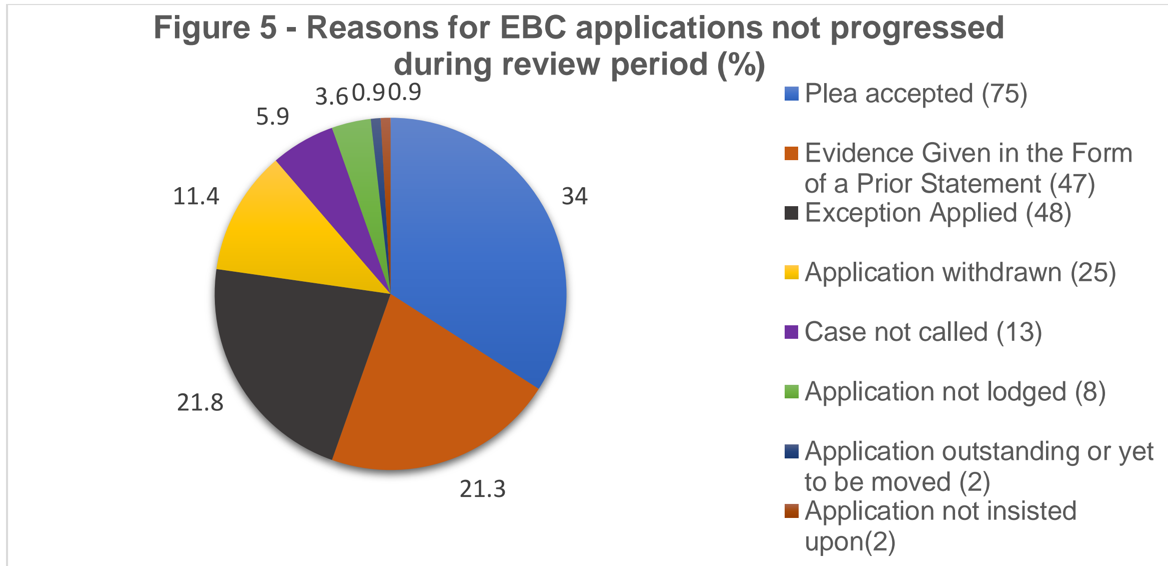
- **220** of those **870** relevant witnesses, or **25%**, did not receive an order approving/granting a commission.

There are a number of reasons why an application for taking evidence by commissioner may not have been made or moved by the relevant party or granted by the Court.

The most common reason was that a plea was accepted by COPFS removing the need for an application to be considered by the Court. This occurred for **75, or 34%, of the 220** relevant witnesses who did not have an application for an EBC progressed or approved

Another common reason, accounting for **47, or 21%,** of the 220 relevant witnesses who did not have an application for an EBC progressed or approved, was that applications were made to the Court for testimony given by those relevant witnesses in the form of a prior statement to be used as their whole evidence, without the need for them to be cross-examined or examined further. Thus those witnesses did not require an EBC hearing to take place.

A full list of the reasons why an application may not have been approved by the Court or progressed is provided at Figure 5 below:

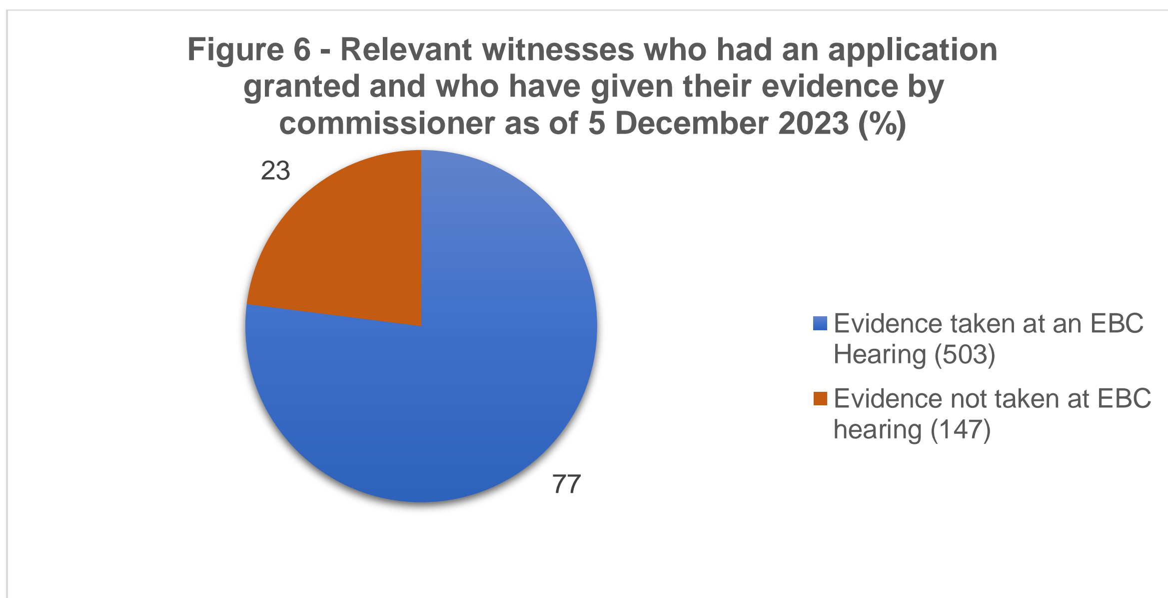



N= 220 EBC hearing applications not approved/progressed

It is notable that in a significant number of instances, the reason that a relevant witness did not have an EBC application progressed or granted is because the case concluded or because no further evidence was required from that witness.

**Number/proportion of relevant witnesses in respect of whom applications for EBC hearings were granted, that gave evidence at an EBC hearing**

- **650 relevant witnesses** had applications for EBC hearings granted by the Court.
- As of 6 December 2023, **503, or 77%** of those **650** relevant witnesses in respect of whom orders for EBC hearings have been granted, have given their evidence at an EBC hearing.




N = 650 EBC hearing applications approved

**Reasons why relevant witnesses in respect of whom orders for EBC hearings have been granted, have not had their evidence taken at an EBC hearing**

The data collected shows that the most common reason for a previously granted EBC hearing not going ahead is that the witness/a party has failed to appear at the EBC hearing. This accounts for 35% of those cases in which an application has been granted by the Court but the EBC hearing has not gone ahead. On further examination, in each of these cases, it was the relevant witness that failed to attend.

Another key reason for an EBC hearing not proceeding despite an application being granted is where relevant witnesses are not required to give evidence at an EBC hearing because a plea has been tendered by the accused and accepted by COPFS.

**Table 2 – Reasons why evidence has not been taken at an EBC hearing**

| Reason why evidence not taken by Commissioner | Number of witnesses | Percentage (%) |
|---|---|---|
| The witness/ a party failed to appear at the EBC hearing so it did not proceed[9] | 51 | 35 |
| The case resolved by way of a guilty plea from at least one accused | 19 | 13 |
| Evidence no longer required | 11 | 7 |
| The EBC is no longer required | 23 | 16 |
| The indictment/case was deserted | 7 | 5 |
| The EBC hearing has not yet taken place | 3 | 2 |
| The witness disengaged during the EBC hearing | 0 | 0 |
| Other reason | 33 | 22 |
| **Total** | **147** | **100** |

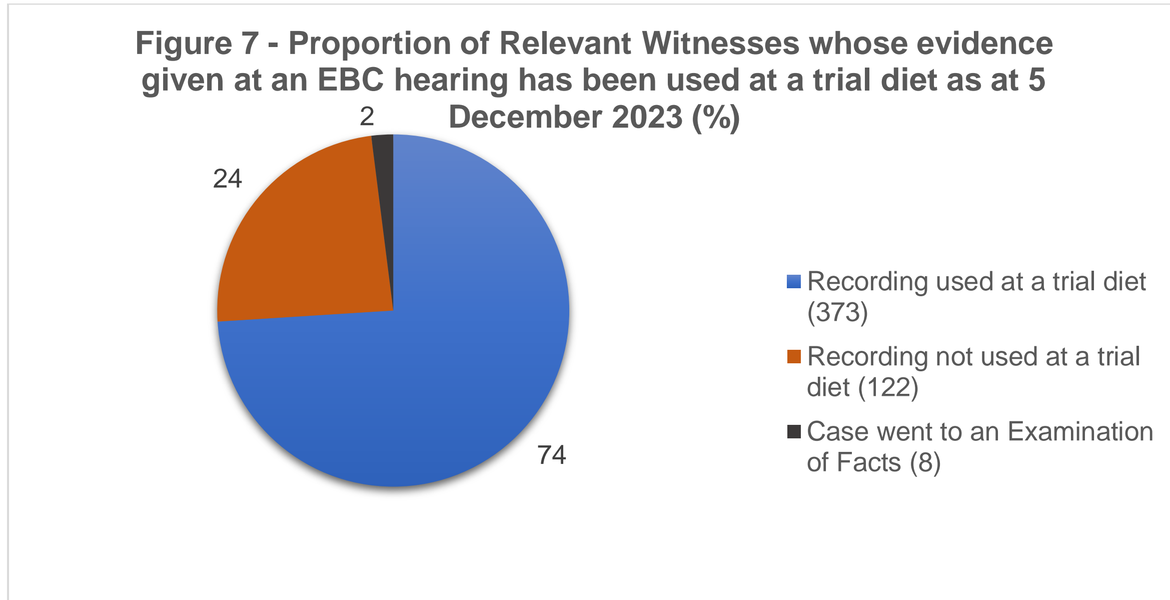
The ‘other’ category encompasses a number different reasons why an EBC hearing may not have taken place despite an order having been made to take the evidence of a relevant witnesses on commission. Examples include, a party to the case’s solicitor withdrawing their representation, an inability for parties to a case to attend or due to ill health of a party involved in a case.

**Number/proportion of relevant witnesses whose evidence given at an EBC hearing has been used at trial**

- Of the **503** relevant witnesses whose evidence had been given at an EBC hearing, **373, or 74%,** had a recording of that evidence played at trial by 6

[9] As noted above, that while the heading under which this information was gathered includes both witnesses and parties failing to appear, in all cases captured by the review period it was the witness who failed to attend.

December 2023. A further **8, or 2%,** had their case progress to an Examination of Facts[10].
- The remaining **122, or 24%,** have not had a recording of their evidence used/played at a trial diet.




N = 503 relevant witnesses whose evidence was taken at an EBC hearing

**Reasons why relevant witnesses recorded evidence from EBC hearings has not been used/played at trial**

Data shows that, by a considerable margin, the most common reason why recordings of evidence taken at EBC hearings have not been played at trial is because the trial has not yet taken place. This accounts for 49, or 40**%** of those recordings which have not been played at a trial diet.

The High Court has been significantly impacted by the Covid-19 pandemic and the additional pressures that this has placed on the criminal justice system. It is important to note that while the recording itself has not yet been played at trial, the involvement of the relevant witness in that trial has concluded. Had the evidence of these 49 witnesses not been taken on commission then they would still be waiting to provide their evidence.

Another reason identified, accounting for 23 relevant witnesses, is that he case was resolved by way of a guilty plea from at least one accused.

**Table 3 – Reasons why recordings of evidence taken by commissioners have not been played at trial as at 5 December 2023**

[10] Where a court has deemed that an accused is unfit to stand trial, an examination of facts will occur. This is **a procedure where evidence is led in before a judge sitting without jury**. The Crown and the defence will have an opportunity to lead evidence and the defence has a duty to test the Crown case during this process**.**

| Reason why evidence not played at Trial | Number of witnesses | Percentage (%) |
|---|---|---|
| The case was resolved by way of a guilty plea from at least one accused | 23 | 19 |
| The indictment/ case was deserted, including not called | 19 | 16 |
| The witness gave live evidence or live evidence in part at the trial instead of their EBC recording being played | 5 | 4 |
| The trial has not yet taken place[11] | 49 | 40 |
| Other reason | 26 | 21 |
| **Total** | 122 | 100 |

The 'other' category includes a variety of other reasons why the recording of an EBC hearing may not have been played at trial, many of which relate to prosecutorial discretion regarding what evidence they choose to lead in a case and how they decide to present that evidence at trial based on the specific characteristics of the case.

**Three-month evaluation data**

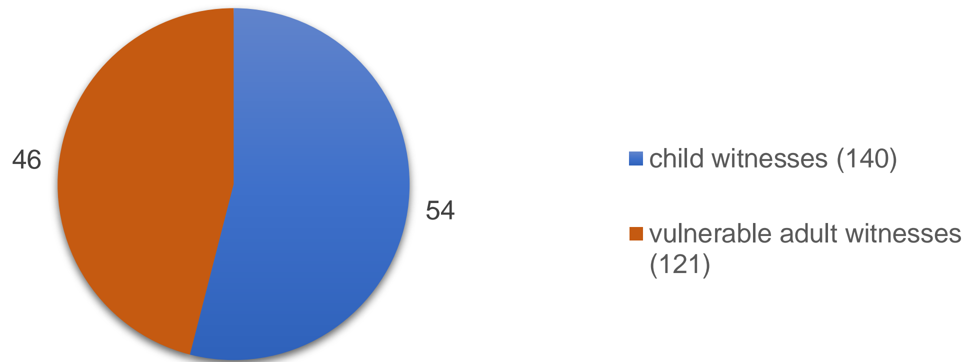
In addition to the data collected by SCTS and COPFS to meet the reporting requirements set out in section 9 of the Act, this report has also been informed by the findings of a short term evaluation of the presumption that was completed during the three year review period in accordance with the Implementation Plan. The evaluation was conducted over a three month period in the High Court between 20 September 2022 and 20 December 2022.

The core metrics underpinning the Review are set out in Annex 4. The results of the three-month evaluation have been published alongside this report http://www.gov.scot/ISBN/9781835217931

A significant finding that emerged from this review was that a significant proportion of all applications to take evidence by commissioner during the three month period were for adult vulnerable witnesses. Of the **261** applications in the High Court for evidence to be taken by commissioner, **121** or **46%** were in relation to vulnerable adult witnesses, despite the fact that they are not covered by the presumption. The remaining **140 or 54%** of applications made during this three month period were for child witnesses.

[11] This can also include cases where the accused does not turn up at trial and the trial has been re-scheduled.

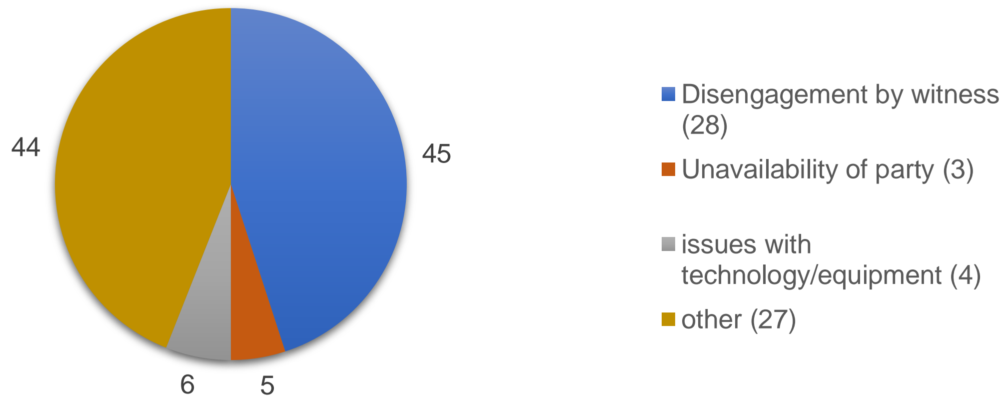
**Figure 8 - EBC hearing applications by witness type during Three-Month Evaluation (%)**




N = 261 applications for taking evidence by commissioner

A further significant finding of this evaluation was the frequency of adjournments of EBC hearings and the reasons for those adjournments. Data from the review demonstrated that the **most common reason for adjournment of an EBC hearing was due to disengagement of the witness which accounted for 28 of the 62 EBC hearings that were adjourned on the day** during this period, including those instances where the witness failed to attend the EBC hearing.

**Figure 9 - Reasons why EBC hearing adjourned on the day during Three-Month Evaluation (%)**




N = 62 EBC hearings adjourned on the day of the hearing

# 7. Analysis of consultation responses

## Background

In evaluating the operation of the Act and setting out the next steps that Scottish Ministers intend to take in respect of implementing the presumption for further groups of witnesses, the Act requires Scottish Ministers to consult with parties who have an interest in the operation of the Act:

- the Lord President,
- the Scottish Courts and Tribunals Service,
- the Crown Office and Procurator Fiscal Service,
- the Chief Constable of the Police Service of Scotland,
- the Scottish Legal Aid Board,
- the Law Society of Scotland, and
- the Faculty of Advocates.
- persons or bodies who provide support to child witnesses (within the meaning of section 271(5) of the 1995 Act).

## Methodology

Consultees were issued with a list of questions that sought to elicit views on the following:

- how the Act is working in practice;
- whether it is achieving the aims of supporting relevant witnesses to participate in the criminal justice system;
- any improvements that could be made to how the Act is operating;
- whether the experience of relevant witnesses giving evidence in the High Court has changed since the introduction of the Act;
- what the impact of the Act has been on the wider justice system – positive or negative;
- whether the proposals for further rollout of the Act were still felt to be the best approach to extending the presumption to other groups of witnesses; and
- what other challenges, if any, remained with the further rollout of the Act.

Respondents were also asked to share any additional views on the operation or the impact of the Act. Respondents were not asked to specifically provide their own data or evidence as part of their responses.

Further information was also sought from specific respondents regarding the operation of the Act where it was felt that these partners had particular operational experiences that would provide additional insight into the effectiveness of specific provisions within the Act. This information has been synthesised into the general summary of responses received from consultees.

A copy of the document sent to consultees is included at **Annex 5**.

In asking these specific questions, the Scottish Government aimed to gather evidence on whether the Act had helped relevant witnesses to participate in court proceedings, and whether further work would be needed to support additional rollout of the Act. In doing so, the aim was to capture not only the consultee's experiences of relevant witnesses in the High Court but also their experiences of the Act as they related to the court system more widely, in order to best support the rollout of the Act's provisions.

The questions were also structured so as to elicit feedback where consultees felt the provisions in the Act were working well, or where they identified specific challenges in extending the Act to a wider cohort of vulnerable witnesses in accordance with the approach set out in the Implementation Plan.

As well as the consultation exercise, views on the impact of the Act, the experiences of relevant witnesses in giving evidence and the effect of provisions on the operation of the criminal justice system more broadly have also been sought through the *Expansion of Pre-Recorded Evidence Implementation Group*. This Group was established by the Scottish Government to support and monitor rollout of pre-recorded evidence across the criminal justice system and includes representation from across the justice system. Themes identified and views gathered through discussions at Implementation Group meetings have also been incorporated into the analysis below.

The targeted consultation was conducted in October 2023. Consultees were given four weeks to respond to the questions provided although some respondents chose to share their views without responding to the set questions provided.

Alongside the seven consultees named in the Act, the Scottish Government identified a further thirteen organisations who it was felt would have insights that would support a robust evaluation of the Act. A full list of those individuals and organisations that responded to the consultation is provided at Annex 6.

These additional consultees were identified as those organisations that have experience of working directly with child witnesses and/or adult vulnerable witnesses in addition to those organisations who engage with children who may have come into contact with the criminal justice system. The Scottish Government aimed to capture the experience of witnesses during their journey through the justice system as well as organisations who would be able to offer contextual evidence about the experience of child and vulnerable witnesses outside of their experiences in giving evidence and in court.

Responses were received from fourteen consultees in total: eight responses were received from justice partners, five from victims' support organisations and one from a non-justice professional body.

In gathering the evidence and insights to inform this report, a decision was taken not to seek the views of children who had been victims and witnesses in criminal cases to inform the evaluation. There are significant ethical and practical challenges associated with seeking the views of those who are victims of or witnesses to crime, particularly where those individuals are children. It was felt that many child witnesses

would be unwilling to participate in a qualitative evaluation of their experiences of giving evidence and that those who did engage would be unable to provide insights that would enable us to compare how pre-recording their evidence differed from providing their evidence at trial as many would only have been through the criminal justice system once. In addition, asking children about their experiences of the justice system necessarily requires researchers to question them about what was likely to have been an extremely difficult experience thereby risking further harm and/or re-traumatisation. Accordingly, it was felt that the potential risks of conducting a qualitative evidence gathering exercise with children outweighed the insights that would be gained from seeking the views of children about their experiences of giving evidence and that there was other work ongoing which was better placed to capture evidence and learning about children's experiences of the justice system e.g. work associated with the development of Bairns' Hoose.

**Summary of consultation responses**

The main question that the consultation set out to gather views on was whether the provisions in the Act have supported relevant witnesses to participate in the criminal justice system by reducing the barriers that they face when giving evidence.

Most respondents to the consultation agreed there was general support for the ethos of the Act and acknowledged that a lot of its aims are already being achieved through everyday practice, thanks in part to the culture change brought about by the Act.

Consultees who had direct experience of child witnesses and pre-recording their evidence felt that there has been a noticeable change in the culture around children and vulnerable witnesses. Specifically, these responses highlighted that there was a greater recognition of the impact of trauma which had started to influence the actions of justice partners through, for example, the content and format of questions posed at EBC hearings. Responses also show broad consensus among the responses that children have been aided to participate in the criminal justice system through the provisions in the Act.

Some consultees also felt that there had been a marked reduction in the number of children being required to attend Court in order to give evidence although some respondents expressed concern that a large number of children were still being required to give their evidence in Court. This disparity in perspective could be explained by the fact that, so far, the presumption only applies to children giving evidence in the High Court and does not yet apply to Sheriff and Jury cases. However, logistical issues remain. The availability and appropriateness of facilities, the available resourcing across the system, and the backlog of cases post-pandemic have all had an impact.

There are some areas where the Act does not appear to be working as it should, and areas where respondents felt that additional resource was required to ensure a successful further rollout of the Act's provisions. Concerns were raised about the number and location of evidence by commission suites, and the potential travel time to these suites once the presumption in favour of pre-recorded evidence is extended to Sheriff and Jury cases if no further facilities become available.

Some respondents also highlighted the additional resource it takes to conduct EBC hearings, although it was acknowledged that taking evidence by a commissioner can reduce the trial length. GRHs were singled out in particular as being resource-intensive due to the additional time and resource required to prepare for them. While consultees recognised that GRHs could support improvements in the experience of witnesses by helping to reduce inappropriate questioning by counsel it was stressed that this could only be achieved through the investment of necessary time and resource at an earlier stage in the process than where the evidence of that witness is given at trial at an earlier stage in the process than where the evidence of that witness is given at trial.

**Themes arising from the consultation**

A number of overarching themes were identified from the consultation responses:

- Impact of the Act on supporting relevant witnesses to participate in the criminal justice system
- Impact on improving the experiences of child witnesses when giving evidence
- Challenges to the operation of the Act
- Impact of the Act on justice partners and the wider criminal justice system
- Challenges to further rollout of the Act
- Solutions suggested

**Impact of the Act on supporting relevant witnesses to participate in the criminal justice system**

On the whole, respondents felt that the Act has supported relevant witnesses to participate in the criminal justice system and had led to improvements in the experience of child witnesses and victims. For children who are captured by the presumption, consultees report that the provision is working well and reducing the number of children who are required to give evidence in person.

Many respondents reported fewer children having to attend court in person, avoiding the potential re-traumatisation of giving evidence in person. Justice agencies in particular highlighted the reduction in children giving evidence in person and the child-centred nature of questioning in evidence by commission hearings.

Section 5 of the Act provides that the commissioner presiding over a GRH should take steps to ensure that the witnesses can participate effectively in the hearing, including authorising the use of a supporter and potentially deciding on the form and wording of questions to be used. The Faculty of Advocates felt that these measures were working well in supporting witnesses.

'…they have clearly supported children as the provisions give the court the ability to more tightly control the way in which examination and cross-examination of a child is conducted. This allows the court to determine what are the most appropriate measures required for each individual child witness and allows the court to provide a more tailored approach for each child witness addressing their specific vulnerabilities

rather than a one size fits all approach. In doing this it can ensure that evidence can be taken with the minimum amount of trauma to the child' – Faculty of Advocates

The Lord President said 'It [the Act] is working very well indeed', pointing out that more children are now giving evidence by commission earlier on in the process. COPFS agreed that children are now only giving evidence in the High Court in 'exceptional circumstances'. Questioning of children was felt to be more gentle and focused rather than confrontational. Earlier capturing of evidence, according to the SCTS, can also aid the prosecution in preparing their case and aid the defence in understanding the evidence earlier. In many cases this can lead to pleas being accepted earlier.

'…research on memory and witness testimony shows that while all witnesses forget information over time, younger children are more susceptible to forgetting than older children and adults; with children more likely to confuse memories from similar sources and more willing to guess the answers to questions when their memory has deteriorated.' – SCTS

**Impact on improving the experiences of child witnesses when giving evidence**

Broadly speaking, responses from the legal profession and justice agencies were firmly in favour of the ethos of the Act and generally felt that it had improved the experience of children required to give evidence in the High Court. Where issues remained these were around the available facilities, which were noted to not always be child friendly: the Society of Solicitor Advocates noted, for instance, that asking children to attend a court building even if they then give evidence in an EBC suite can still be an intimidating experience.

Response from victim support organisations suggested a more nuanced view of the impact of the Act on improving the experience of children. These organisations reflected on the wider challenges in the justice system such as the availability of appropriate facilities for children and vulnerable witnesses and the delays caused by the impact of the Covid pandemic. Further rollout of the Act to children in sheriff court cases, and the implementation of the Bairns' Hoose programme, will go some way to mitigating these concerns.

There are, of course, instances where children will still have to attend court to give evidence in person. Consultation responses on this point were mixed. Several respondents pointed to a recent review of the North Strathclyde Bairns' Hoose. The review heard from participants in sheriff court cases who were still required to attend court in person.

'Any sheriff court cases, even the one last week, the JII is played and the child is then called to answer all the same questions in court…see for the ones who are going to a sheriff court, which is 80 per cent of the kids we interview…we interview them, and then they go to court, and in lots of cases recently, the interview hasn't even been played. The child is just then asked to give their whole evidence.' – Review of North Strathclyde Bairns' Hoose

Other issues included the ongoing impact of the backlog of cases causing children to have to wait for their trial dates.

‘Our members have advised that long delays in court cases are causing children to be re-traumatised. This is often years after taking part in a Joint Investigative Interview. In part the pandemic has caused further delays on top of an already slow justice system. Speeding up court cases should be a priority.’ – Scottish Association for Social Work and Social Workers.

**Challenges to the operation of the Act**

There are some instances in which consultees felt the presumption is not working as well as it could be. Victim support groups and justice partners both raised concerns around the facilities available to children when capturing their evidence by commissioner. Children 1st, Victim Support Scotland (VSS) and the Society of Solicitor Advocates all highlighted issues with the facilities at Edinburgh High Court in particular.

‘…feedback also suggests specific to the Edinburgh site that having the commission suite based within a court building is still raising concerns for witnesses about potentially seeing the accused in person.’ – VSS

The location of the suite within an intimidating and formal court building, and the anxiety – however unlikely – on the part of a witness that they may encounter the accused all contribute to an environment which is not as trauma informed as it could be. Respondents noted that witnesses are sometimes asked to arrive at the same time or that there is not enough space for vulnerable witnesses in specialist witness rooms are overbooked, leading to vulnerable witnesses waiting in crowded and busy shared waiting areas. The Society of Solicitor Advocates raised further concerns about the technology available in the Edinburgh suite which sometimes impeded communication between legal teams. COPFS also raised concerns about the technical issues that can be associated with pre-recorded evidence, particularly in JIIs, where poor sound or visual quality compromises the evidence of the witness. COPFS also stated that courtrooms are not always set up for effective playback of pre-recorded evidence, leading in some cases to times where not all of the jury members can see the witness giving evidence. The Lord President, however, felt that while ‘there will always be scope to increase the number of facilities and improve them, for the most part the facilities work well’.

Other consultees felt that the formal language still used in some EBC hearings made the overall experience child-unfriendly.

‘Research on how Solicitors examine and cross examine children in Scotland shows that Solicitors have historically not altered their questioning technique when questioning a child, regardless of the child’s age. This highlights that provisions require to be in place to protect children from inappropriate, misleading and/or confusing questions’ – Victim Support Scotland

The introduction of Bairns’ Hoose provision will go some way to mitigating a number of the issues raised by consultees. Children will be able to access Bairns’ Hoose

facilities instead of attending court buildings or other buildings which may not be set up appropriately for their needs. Bairns' Hoose facilities will also have on-site provision from support organisations so that vulnerable children can access support in one place. The Pathfinder Phase of Bairns' Hoose is ongoing with six Pathfinder sites announced on the 23rd of October 2023,

Barnardo's Scotland reported in their response that child-friendly language is not always used making the experience less victim-centred than it should be. Barnardo's also gave the example of a recent experience of a child witness during which the lack of care given to her was re-traumatising:

'The child was cited to appear at the High Court to give evidence against the accused. Despite the Barnardo's worker questioning this requirement with other professionals, both in terms of necessity and also the impact on the child, the child had been asked to attend in person. On arriving at the High Court, there was a level of confusion from court officials about where, when and why they were there. After a period of time, it transpired that there had been a deal reached on the charges outside of court, yet the victim had not been informed or told that they were no longer required to attend on the day. This experience was felt to lack compassion and was not child or victim-centred. It was the view of the Barnardo's worker that the Act has certainly not been applied in practice for this child victim.' – Barnardo's Scotland

**Impact of the Act on justice partners and the wider criminal justice system**

Many respondents agreed that a general change in the culture around child and vulnerable witnesses had taken place since the introduction of the Act, with a positive impact on the judicial system. Questioning of children was generally seen to be more sensitive, child-focused, and non-confrontational. Most respondents who gave an opinion about the expansion of pre-recorded evidence to other groups of vulnerable witnesses were in favour of the expansion.

Justice partners generally felt that the Act had been positive for the justice system. The Lord President felt that the provision of pre-recorded evidence made it easier to schedule trials with a greater degree of accuracy, as it was possible to know how long the evidence would take. SCTS agreed referencing the EPR and research contained therein, which indicated that an earlier understanding of the evidence can lead to shorter trials. In their experience, referencing the Lord Justice Clerk's Review into Improving the Management of Sexual Offence Cases which SCTS supported, evidence taken by commission has also led to more cases where the evidence is clearer at an earlier point in the trial process, and therefore more pleas have been entered. The Lord President also felt that the quality of evidence was improved by taking it on commission, and the Faculty of Advocates agreed that commission hearings were less traumatic for witnesses and provided better evidence.

The majority of respondents who commented on the impact of the Act on the court system and justice partners commented on the resource-intensive nature of taking evidence by commissioner. A number of consultees were concerned about the available resources, personnel and funding to support the taking of evidence by commission. Several consultation responses identified a lack of, or a lack of suitable, resources for the taking of evidence by commission. These include not only a

shortage of appropriately trained legal professionals to take evidence, but also a lack of capacity in the existing facilities for taking evidence by commissioner, as well as issues with the existing facilities themselves. Related to capacity was the need for additional funding to support more legal professionals to take evidence, more professionals to have the appropriate training to ensure evidence is taken in a trauma-informed way, and the expansion of more facilities to enable the taking of evidence. These issues are discussed further below.

The Lord President recognised that 'there is considerable justification for prioritising rapid expansion of evidence on commission' but noted that commission hearings are resource intensive and require the support of both suitable facilities and suitable personnel. The Lord President felt that providing a transcript of EBC hearings could be beneficial to judges and other parties, and could go some way to offsetting the additional demands on court system resources by allowing judges to identify and remove inadmissible material before it is heard in court. This would help to reduce time in court and prevent juries hearing inadmissible material and then being told to ignore it. This, however, of course does not cover all the additional resource challenges which will follow from increased provision of pre-recorded evidence.

It was also noted by one respondent that pre-recorded evidence is not always the best option in the interests of justice. One respondent held concerns that pre-recorded evidence does not always have the same impact on juries as live evidence, and a statement recorded ahead of time may not be able to capture issues that later become relevant by the time of trial. There are also cases where witnesses may choose or prefer to give evidence in person, particularly in cases where a witness may have been of an age to be captured by the Act when the case was indicted but have turned 18 or older by the time of the trial. The needs of the witness must remain finely balanced with the best interests of justice.

### Challenges to further rollout of the Act

Respondents generally felt that the ethos of the Act was a positive one and that further rollout should continue. Justice partners, however, were particularly concerned about the financing and resourcing of further rollout. Victim support organisations were concerned that delays in advancing the rollout would mean that fewer vulnerable children received the appropriate support needed to allow them to give their best evidence. Key areas were identified:

- **Resources**

The pressures on the physical estate, as well as the time pressures associated with taking evidence by commission, was a repeated theme among consultation respondents. EBC hearings and GRHs require a greater degree of preparation from legal professionals.

SCTS reported that GRHs and associated administrative steps have increased in accordance with the growth in EBC hearings. SCTS also report that the suites in Glasgow and Edinburgh supporting the High Court are already running at near full capacity, with concern that the existing facilities would not be able to accommodate

the additional demand that would be place on them by the rollout of the Act to Sheriff Court cases.

‘…concurrent running of commissions Monday to Friday in both Glasgow and Edinburgh from October 2022. This has occurred at the same time as an extended court recovery programme, which has required additional trial courts, and procedural sittings and the associated staffing, judicial and legal and justice sector responses. At this juncture meeting the needs of the presumption and ad hoc applications for adults, means the designated Glasgow High Court and Edinburgh evidence by commission facilities are at near capacity.’ - SCTS

Both the Law Society and COPFS also picked up on the need for more EBC suites in order to meet the increased demand for commission hearings that will be associated with the rollout of the Act.

Alongside the need for physical resources to support EBC hearings, respondents noted that the additional time pressures associated with conducting EBC hearings were impacting on the effectiveness of the Act. GRHs and the additional administrative burden of taking evidence by commission all impact on the time required to appropriately prepare for and conduct a commission hearing which supports a child to give their best evidence. The Scottish Association for Social Work and Social Workers also commented that the time it takes for a case to come to trial is re-traumatising for children.

‘Court process can drag on for children who are trying to move on in their lives. This time lapse is also difficult for all witnesses in high court cases including professionals.’ – Scottish Association for Social Work and Social Workers

- **Personnel**

A number of respondents raised concerns about the number of available legal professionals to support a further rollout of the provisions of the Act. The Society of Solicitor Advocates felt that there are ‘insufficient lawyers to allow the Courts to take all proceedings by way of evidence on Commission [sic]’. Taking evidence by commissioner was acknowledged to be much more resource intensive, with the Lord President recognising that judges also need additional time to process the statements to see how the material could feature at commission and at trial. The Lord President and COPFS both reflected that parties must prepare for a commission in the exact same way as they would prepare for a trial; the preparation time is fundamental for the proper conduct of the hearing.

The Law Society of Scotland raised concerns about the number of professionals at all levels of the justice system, stating ‘the increasing use of commissions has placed an already stretched system under ever greater strain’, with more cases and fewer available professionals every year. While not directly linked to the rollout of the Act, the Law Society felt that the demands of the Act could place additional pressure on a judicial system which was already feeling the lack of a suitable number of qualified professionals. Police Scotland and SCTS both raised concerns about the resources available to allow evidence to be taken by commissioner.

Some respondents were concerned about the available facilities and the impact they could have on the quality of evidence given. The Law Society of Scotland felt that the facilities for pre-recording of evidence – including the ability of the people taking evidence to operate in a trauma-informed way – were critical to ensuring that the evidence was of good quality. The Society of Solicitor Advocates felt that there were insufficient lawyers available to take all evidence by commission, and further felt that the quality of evidence was sometimes denuded by the view among some judges that children and vulnerable witnesses should never be subject to cross-examination.

- **Funding**

The general response from consultation respondents was that increased funding would be necessary to support further rollout of the Act. This would ensure that sufficient staff, appropriately trained, are available to take more evidence by commissioner, prepare cases appropriately, and question child and vulnerable witnesses in a trauma-informed way which preserves their ability to give best evidence. It would also allow for additional suites to be built to accommodate the extra evidence by commission hearings that would be required once the provisions of the Act apply in Sheriff Court cases. No consultees offered a view on what amount of additional investment should be made.

The Society of Solicitor Advocates felt that ‘there would require to be massive investment in the Criminal Justice System to ensure that there were enough [p]rosecutors and [d]efence [c]ounsel and [a]gents to allow this reform to be properly successful’. The Law Society felt that Legal Aid provision remained in ‘crisis’ and that sufficient funding would be required to ensure that provision could continue. The Faculty of Advocates also suggested that additional funding would be needed to ensure the success of further rollout of the Act.

- **Delays in the court system**

Respondents recognised that giving evidence by commissioner often allows for evidence to be given earlier in a trial than giving evidence in person. However, existing delays in the court system contribute not only to additional trauma for a witness, but also to the general pressure on existing facilities and legal professionals. Meanwhile, the number of cases coming to court continues to grow, and many case are very complex and require a great deal of preparation and court time.

The Scottish Association of Social Work and Social Workers, alongside VSS, both felt that the rollout should be sped up so that more vulnerable witnesses can benefit from having the presumption of pre-recorded evidence extended to them.

‘In order to achieve equity and consistency in approach and limit re-traumatisation of future witnesses, it is necessary to roll out the presumption to other categories as quickly as possible’ - VSS

## Solutions suggested

There was strong support for further rollout of the Act, despite the potential issues involved in further expansion of the Act's provisions. Most consultees felt that the Act's provisions should be rolled out to other vulnerable witnesses in other courts. Some consultees suggested ways in which the challenges involved in the rollout of the presumption could be mitigated.

Consultees felt that collaborative working with other partners was key to ensuring progression of the rollout. In particular, some consultees felt that greater links with the Bairns' Hoose project would be beneficial to child witnesses, ensuring a number of services are available in one place and reducing the need for witnesses to travel to EBC suites in court buildings and elsewhere.

Finally, some consultees recommended that more wrap-around support from victims' organisations would help to further the aims of the Act, allowing more vulnerable witnesses to give their evidence in a supported and trauma-informed manner.

## Conclusions

In general, respondents to the consultation felt that the Act had had a positive impact on children giving evidence in the High Court. Children are being better supported to give their best evidence that they can through the provision of evidence by commission suites, GRHs and other measures designed to reduce re-traumatisation. On the whole, respondents felt that the Act had had a positive impact on the justice system as well, with high quality and timely evidence taken by commissioner contributing to less time spent in court.

There are, of course, ongoing challenges to the further rollout of the Act's provisions. Many of these have been known to the justice system for some time, including funding and resourcing challenges. The provision of sufficient EBC suites that are suitable for the needs of the witnesses using them was also raised by a number of respondents.

## 8. Is the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019 supporting relevant witnesses to engage in the Criminal Justice System?

### Participation in the Criminal Justice System

The Act does not include a definition of what is meant by enabling relevant witnesses to "participate" in the criminal justice system and nor is the concept defined in existing legislation. It has therefore been necessary to look elsewhere to consider how best to measure participation in this context as the basis against which an evaluation of the effectiveness of the provisions in the Act can be conducted.

For the purposes of this evaluation, we have considered principles of participation developed in a recent study (Jacobsen and Cooper, 2020) conducted by the Institute for Crime & Justice Policy Research (ICJPR) which explored the concept of effective lay participation in courts and tribunals. That study was designed to consider all aspects of lay participation in the courts, encompassing a far broader range of participants than simply vulnerable witnesses such as, for example, jurors and accused. It is also important to note that the Act only deals with one specific aspect of a vulnerable witness' interaction with the criminal justice system, namely the giving of evidence, it is not intended to change or enhance the ability of vulnerable witnesses to participate in the criminal justice system throughout the entirety of their cases such as, for example, when and how information about their case is conveyed to them. As such, not all of the principles identified are relevant and this report restricts its consideration to the following principles of effective participation which are directly relevant to the giving of evidence:

- **providing and/or eliciting information for the court –** This principle applies to the way witnesses can provide information (including evidence) and how the court will enable the witness to provide it.
- **protection of well-being** -This principle relates to the introduction of adaptations for vulnerable witnesses and how they may be sought and applied according to the needs of the vulnerable witness and the case. (Jacobson and Cooper, 2014)

This chapter considers both of these principles to assess the extent to which the Act has supported relevant witnesses to participate more effectively in the criminal justice system.

This chapter considers the key trends emerging from the data and information that was collected for the purposes of this report regarding the key reforms made by the Act, namely the introduction of a presumption in favour of pre-recorded evidence, the requirement to conduct GRHs and the additional powers granted to a commissioner. It considers these trends against the data that exists on the use and application of pre-recorded evidence prior to the introduction of the Act for the purposes of evaluating whether the Act is enabling witnesses to better participate in the criminal justice system based on the two principles set out above.

**Key findings relating to the introduction of the Act and its impact on supporting relevant witnesses to engage in the criminal justice system.**

**The presumption has generated a significant increase in the number of applications for EBC hearings for child witnesses, the number of orders that have been made, the number of EBC hearings that have been held and the number of recordings of evidence given at EBCs that have been played at trial –** Since the introduction of the Act, an average of 25 applications per month have been submitted to pre-record the evidence of child witnesses in the High Court. This is eight times as many applications as the monthly average for EBC hearings in 2017. While data shows that the volume of applications to pre-record the evidence of child witnesses increased in 2018, the average number of applications per month during the review period was twice that of the monthly average in 2018.

**Many more child witnesses are therefore receiving the benefits of being able to pre-record their evidence ahead of trial** – An average of 15 relevant witnesses gave their evidence at an EBC hearing each month during the course of the review period compared to an average of three per month in 2017. This represents a fivefold increase in the number of EBC hearings for child witnesses in the High Court. Four times as many child witnesses gave their evidence through an EBC hearing during the Three-Month Evaluation period than in the whole of 2017. The increased use of EBC hearings was reflected within responses to the consultation which highlighted a step-change in the number of child witnesses that were not required to give evidence live at trial.

**Adult vulnerable witnesses in High Court cases also appear to be benefitting from a much wider use of pre-recorded evidence -** A number of respondents to the consultation highlighted that since the introduction of the Act, a culture change has occurred in the High Court around the taking of evidence by commissioner. This is borne out in the data collected for the Three-Month Evaluation which shows a dramatic increase in applications to pre-record the evidence of vulnerable adult witnesses.

**Ground Rules Hearings have played a key role in taking evidence by commissioner from vulnerable witnesses –** Respondents to the consultation highlighted that GRHs are important in moderating the tone and content of questions directed towards vulnerable witnesses and to enable the Court to consider any additional measures that may be required to support that witness ensuring that "evidence can be taken with the minimum amount of trauma".

It is important to acknowledge, however, that there are some challenges associated with pre-recording the evidence of a vulnerable witness. In addition to the positive conclusions set out above, the evaluation also demonstrated where the Act could be operating more effectively.

**The proportion of applications approved by the Court that progress to EBC hearings has reduced** – Since the introduction of the Act, the percentage of those applications for pre-recorded evidence that are approved by the Court and which progress to an EBC hearing has reduced by 9% compared to the equivalent figure in 2017. Reasons for EBC hearings not going ahead include where a guilty verdict from

at least one accused has been accepted (13%), the evidence of the witness was no longer required (7%), or the EBC was no longer required (e.g. because evidence had been agreed) (16%). Of particular concern however, is that in 35% of cases in which an EBC hearing was granted but not conducted, this was because the relevant witness failed to attend the EBC hearing. This issue was also highlighted in the data collected for the Three-Month Evaluation. The reduction in applications for EBC hearings being approved by the Court should, however, be considered in the context of the significantly higher proportion of applications being submitted to the Court and the many positive reasons why a relevant witness may not be required to give their evidence at an EBC hearing such as where a guilty plea was tendered by the accused.

**Implementing the Act is resource-intensive and places additional pressures on the justice system –** This emerged as a key theme from the responses to the consultation with justice agencies in particular reflecting the additional demands and burdens placed on them by both EBC hearings and GRHs and the need to ensure that the wider impacts on the criminal justice system of further implementation of the presumption are considered. The need for a rollout of which recognises the impact of the presumption on the criminal justice system is key to the approach set out in the Implementation Plan informed through the findings of the EPR and the Scottish Government's engagement with justice partners.

**The facilities for conducting EBC hearings and the technology for playing recordings at trial could be improved –** Some responses to the consultation highlighted concerns about the facilities for conducting EBC hearings, in particular those that were located within existing court buildings. It was felt that the experience of going into a court building to provide evidence could be intimidating for vulnerable witnesses.

**Does the presumption support witnesses to provide information to the court?**

As established in Chapter 3, research has shown repeatedly that requiring child and vulnerable witnesses to provide their evidence at trial can have a material impact on the quality of the evidence that they are able to provide. The daunting and often pressurising environment of the courtroom can affect their ability to recall events and to articulate these clearly and cogently under cross-examination. Moreover, the fact that the trial often takes place many months or years after the incident(s) that the witness is being asked to answer questions about can also impact on the accuracy and reliability of their account. A key reason that the EPR recommended much greater use of pre-recorded evidence, including the taking of evidence by a commissioner, was that it could significantly improve the quality of evidence from vulnerable witnesses enabling the jury to get a more accurate account of events to inform their verdict in these cases.

On the basis of the data collected for this evaluation alone, it is evident then that the Act has supported witnesses to participate in the criminal justice system by significantly increasing the number of witnesses who are able to give their evidence at a time and in a place that supports them to provide their best evidence. This is of course further enhanced by the requirement to conduct GRHs in advance of an EBC

hearing to ensure that all parties are prepared for the hearing and to ensure that the questions remain focused on the issues in dispute.

Respondents to the consultation have, however, expressed concern with delays in extending the presumption to additional groups of vulnerable witnesses. It is important to note, however, that the Courts, upon the application of a party, retain the power to make an order that the evidence of a vulnerable witness be pre-recorded where they consider it appropriate to do so. Indeed data shows that the High Court is already frequently granting applications for taking evidence by commissioner from adult deemed vulnerable witnesses.

It is important to acknowledge, however that there remain challenges with implementation of the presumption particularly in relation to the number of witnesses who fail to attend EBC hearings. It is significant, however, that the prevalence of failure to attend by witnesses is relatively low comparative to the number of EBC hearings that take place. **Over the three year review period, 51 relevant witnesses did not give evidence by commissioner because they failed to attend EBC hearings whereas, 503 relevant witnesses did give their evidence by commissioner.**

**Does the presumption protect the wellbeing of witnesses?**

As with improvements in the quality of evidence, it has also been established that the ability of vulnerable witnesses to pre-record their evidence ahead of trial reduces the stress associated with giving evidence and reduces the risk re-traumatisation.[12] It has already been established above that the volume of EBC hearings for relevant witnesses has substantially increased as a result of the introduction of the Act. This means a better quality of evidence from those witnesses but also means that their wellbeing is better protected during their interactions with the justice system. This is a theme that emerges strongly from the consultation with many respondents pointing to an improved experience for the many witnesses that have pre-recorded their evidence ahead of trial.

Returning to Jacobson & Cooper’s (2014) principle of effective participation, **protection of well-being**, we determine that the significant increases in the volume of EBC hearings both for relevant witnesses and for adult deemed vulnerable witnesses has led to improved participation in the criminal justice system; more vulnerable witnesses are providing evidence at a time and in an environment that supports improved wellbeing comparative to giving evidence in Court.

[12] See chapter 3

## 9. Next steps for implementation of the Vulnerable Witnesses (Criminal Justice) (Scotland) Act 2019

Section 9 of the Act obliges Scottish Ministers to set out next steps that they intend to take in implementing the presumption for a wider cohort of vulnerable witnesses.

As set out at **Chapter 5** of this report, the Scottish Government previously published an Implementation Plan which sets out a phased roll out of the presumption starting with child witnesses giving evidence in cases involving specific offences followed by adult vulnerable witnesses. The timeline for further roll out of the Act as identified in the Implementation Plan has been significantly impacted by the Covid-19 pandemic and the resulting backlog in criminal court cases which has placed significant pressures on the criminal justice system. The Scottish Government remains committed to introducing a presumption in favour of pre-recorded evidence for all groups of vulnerable witnesses identified in the Implementation Plan.

In further implementing the presumption, however, it is important to be cognisant of the challenges facing justice partners, a theme which has emerged strongly from the consultation responses and in the Scottish Government's wider engagement. Another factor which Scottish Ministers must also consider in proceeding with further implementation of the presumption is the availability of EBC suites of sufficient quality and in the right locations to support increases in EBC hearings arising from further implementation of the provisions in the Act.

The Scottish Government is working closely with justice partners to explore these issues with a view to producing a revised Implementation Plan for further rollout of the presumption which sets out clear timescales while taking account of the ongoing pressures facing the criminal justice system and the availability of EBC suite capacity. It is the intention of Scottish Ministers to publish the revised Implementation Plan by the end of March 2024. Work to develop a new Implementation Plan is being progressed through one of the Scottish Government's Transformation Change Programmes (TCP), which brings justice partners together to develop and embed person-centred, trauma-informed justice services.

## 10. Methodology and limitations

This chapter provides an overview of the methodology used to collect the data to meet the reporting requirements as set out at Section 9 of the Act as well as the limitations associated with the data collected.

### Methodology

SCTS and COPFS do not routinely collect the data required as part of the reporting requirements set out in the Act. It has therefore been necessary to work with SCTS and COPFS to devise a methodology for capturing this data for the purposes of enabling Scottish Ministers to evaluate and report on it.

### Identifying the number of "relevant witnesses"

The process decided on for identifying the number of relevant witnesses to whom the section 271BZA presumption applied during the three year review period was predicated on the number of specific applications made to the courts for the use of special measures for those witnesses to whom the presumption applied. Despite the existence of a presumption that relevant witnesses will pre-record their evidence ahead of trial it is still necessary for parties to make an application to the Court for the purposes of making the necessary arrangements for this evidence to be taken and/or used at trial and to determine whether a relevant exception should be applied. Additionally, parties are also required to notify the Court via an exception application where they intend for a relevant witness to provide evidence at trial to enable the Court to satisfy itself that the relevant exceptions have been employed appropriately. It is these application forms submitted to the Court that form the basis for establishing the number of witnesses to which the presumption applied during the review period. Given that the data for calculating the number of relevant witnesses relies on the submission of applications to the Court, it is not inconceivable that a small number of relevant witnesses may have been missed as a result of applications not being submitted or being mislabelled.

Using existing management information, COPFS collated a list of all the relevant witness applications under section 271BZA or exemptions made to the Court during the review period and shared these with SCTS for the purposes of cross-checking this list against their own records for the number of applications for special measures they had received. SCTS does not hold specific data on applications made under section 271BZA therefore a comparison required to be made again special measure applications generally. This list includes applications made by the defence. During the cross-checking exercise conducted by SCTS it was identified that, in some cases, COPFS data did not correlate with that of SCTS in so far as they applied to cases/relevant witnesses to which they had submitted an applications. Any discrepancies in this data were then discussed between SCTS and COPFS with a view to providing greater certainty on the number of relevant witnesses identified.

### Identifying the proportion of relevant witnesses who had their evidence taken by a commissioner

To arrive at the number of those relevant witnesses that had had their evidence taken by a commissioner, it was necessary for SCTS to manually review the court minutes and other data and associated information reasonably available to them for each relevant witness identified to confirm whether an application under s271BZA had been made and specifically whether it related to EBC, and in turn whether an EBC hearing had been granted and in turn conducted. In doing so the number of application for exception, use of prior statement only, whether applications have been moved or withdrawn, were also identified and confirmed in so far as possible. This gave a cumulative number of relevant witnesses to whom the various circumstances that applied was then produced. This figure is current as of 5 December 2023.

### Identifying the proportion of relevant witnesses who, having had their evidence taken by a commissioner had their evidence used at a trial diet.

To establish the percentage of relevant witnesses who, having had their evidence granted by the court and then taken by a commissioner, had their evidence used at a trial diet by the time this report was published, SCTS manually considered the court and other data and associated information reasonably available to them for each case in which a relevant witness(es) had been identified to determine whether the trial had occurred and the evidence played at trial or otherwise. This figure is current as of 5 December 2023.

### Establishing the reason that the evidence of any relevant witness had not been taken by a commissioner by the time the report is prepared, despite a court having made an order authorising its being taken in that way.

The reason why the evidence of relevant witnesses had not been taken by a commissioner was identified through a process of manual collation whereby court minutes and other data and associated information reasonably available to them were interrogated by SCTS to determine the reasons why those individuals who were scheduled to give their evidence by commissioner had not done so. This was then assessed against a list of prescribed reasons agreed between the Scottish Government, SCTS and COPFS to determine the number of those witnesses who fell into each category. This list of reasons is as follows:

(i) the case was resolved by a guilty plea from at least one accused;
(ii) the indictment/case was deserted;
(iii) the witness/a party failed to appear at the Evidence by Commissioner hearing so it did not proceed;
(iv) the witness disengaged during the Evidence by Commissioner hearing;
(v) the Evidence by Commissioner hearing has not yet taken place;
(vi) the Evidence is no longer required;
(vii) the EBC is no longer required; and
(vi) other reason.

Where the reason was uncertain or not readily identifiable by the SCTS this was discussed where possible with COPFS and the applicable reason from the prescribed list agreed identified. Where this was not possible the category of ‘other’ was used.

**Identifying the reasons why evidence taken by commission might not have been played at trial**

The reason why the evidence of relevant witnesses was not played at trial was identified through a process of manual collation whereby court minutes and other data and associated information reasonably available to them were interrogated by SCTS to determine whether a trial had taken place, if so whether it had been played and, if not, the reasons why this evidence had not been played/applied. This was then assessed against a list of prescribed reasons agreed between the Scottish Government, SCTS and COPFS to determine the number of those witnesses who fell into each category. This list of reasons is as follows:

(i) The case was resolved by a guilty plea from at least one accused.
(ii) The indictment/case was deserted.
(iii) The witness gave live evidence or live evidence in part (as applicable) at the trial instead of their Evidence by Commissioner recording being played.
(iv) The trial has not yet taken place.
(v) Other reason.

Where the reason was uncertain or not readily identifiable by the SCTS this was discussed where possible with COPFS and the applicable reason from the prescribed list agreed identified. Where this was not possible the category of ‘other’ was be used.

**Limitations**

As with any evaluation there are of course limitations associated with the data collected in meeting the reporting requirements set out at section 9 of the Act and what insights it can provide about whether it has supported witnesses to participate in the criminal justice system.

As highlighted above, the statistics in this report are not routinely collected by the Scottish Government or its justice partners which means that a bespoke methodology by SCTS and COPFS for the purposes of gathering this data was required, much of which was conducted through manual collation and interpretation which may therefore be subject to human error. In particular, the evidence collected relied on recording applications made to the court for relevant witnesses to have their evidence pre-recorded ahead of trial. This clearly relies on relevant applications being submitted for relevant witnesses to give evidence in cases indicted to the High Court and it may be that, in rare instances an application was not submitted or that it was submitted incorrectly which means that a small number of relevant witnesses may not have been captured in the data provided or included in correctly.

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## Annex 1 – Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019 Report Requirement

### 9. Report on operation of sections 1 and 5

(1)The Scottish Ministers must prepare a report—

(a) evaluating whether the amendments made by sections 1 and 5 have helped witnesses participate in the criminal justice system during the review period, and

(b) setting out the next steps that the Scottish Ministers intend to take in relation to—

(i) the commencement of section 1 for any purpose for which it has not yet been commenced by the time the report is prepared, and

(ii) the exercise of the power conferred by section 271BZD of the 1995 Act.

(2)The report must include the following information—

(a) the number of witnesses that section 271BZA of the 1995 Act applied to during the review period (“relevant witnesses”),

(b) the percentage of relevant witnesses whose evidence had, by the time the report is prepared, been taken by a commissioner,

(c) the percentage of relevant witnesses who, having had their evidence taken by a commissioner, had by the time the report is prepared had their evidence used at a trial diet,

(d )the reason that—

(i) the evidence of any relevant witness had not been taken by a commissioner by the time the report is prepared, despite a court having made an order authorising its being taken in that way,

(ii) the evidence of any relevant witness that was taken by a commissioner had not been used at a trial diet by the time the report is prepared.

(3)In preparing the report, the Scottish Ministers must consult—

(a) the Lord President,

(b) the Scottish Courts and Tribunals Service,

(c) the Crown Office and Procurator Fiscal Service,

(d) the chief constable of the Police Service of Scotland,

(e) the Scottish Legal Aid Board,

(f) the Law Society of Scotland,

(g) the Faculty of Advocates,

(h) persons or bodies who provide support to child witnesses (within the meaning of section 271(5) of the 1995 Act).

(4)The Scottish Ministers must—

(a) lay the report before the Scottish Parliament, and

(b) make it publicly available,

as soon as practicable after the end of the review period.

(5)In this section—

“the 1995 Act” means the Criminal Procedure (Scotland) Act 1995,

“the review period” means the period of 3 years beginning with the day that section 1 comes into force for any purpose.

## Annex 2 – Acronyms

COPFS – Crown Office and Procurator Fiscal Service

EBC – Evidence by Commissioner

ECHR – European Convention on Human Rights

EPR – Evidence and Procedure Review

DASA – Domestic Abuse (Scotland) Act 2018

GRH – Ground Rules Hearing

ICJPR - Institute for Crime & Justice Policy Research

SCTS – Scottish Courts and Tribunals Service

VSS – Victim Support Scotland

## Annex 3 - Vulnerable Witnesses Act Implementation Plan

| *Phase* | *From* | *High Court* | *Sheriff Court (Solemn cases only)* |
|---|---|---|---|
| 1 | **January 2020** | Child witnesses **(both complainers and witnesses**) aged under 18 in High Court cases that involve all charges specified on the list of offences within the Bill. | |
| 2 | *January 2021 – June 2021* | *6 month period of evaluation of operation of provisions in the High Court.* | |
| 3 | **July 2021**[13] | | Child **complainers aged under 16** in Sheriff & Jury cases that involve a charge(s) specified in the list of offences in the Bill. |
| 4 | *July 2022-December 2022* | | *6 month period of evaluation of provisions for above.* |
| 5 | TBC (Date dependent on evaluation of provisions that have been commenced) | | Child **complainers and witnesses under 16** in Sheriff and Jury cases that involve a charge(s) specified in the list of offences in the Bill |
| 6 | TBC (Date will be dependent on ongoing evaluation of provisions that | | Child witnesses aged 16 & 17 in Sheriff & Jury cases that involve a charge(s) specified on the list of offences in the Bill |

[13] *Subject to satisfactory evaluation and confidence that the system will be able to handle this phase at Phase 2.*

| | | | |
|---|---|---|---|
| | have been commenced) | | |
| 7 | TBC (Date will be dependent on ongoing evaluation of provisions that have been commenced) | Deemed vulnerable adult witnesses in High Court sexual offence cases (i.e. complainers in offences listed in paragraphs 36 to 59ZL of Schedule 3 to the Sexual Offences Act 2003) | |
| 8 | TBC (Date will be dependent on ongoing evaluation of provisions that have been commenced) | All remaining deemed vulnerable adult witnesses in High Court cases (i.e. complainers in human trafficking, stalking and domestically aggravated offences) | |

## Annex 4 – Three Month Evaluation Review Metrics

| **Item No** | **Data to be collated** |
|---|---|
| 1. | Total number of indictments registered |
| **Applications** | |
| 2. | Total number of VW applications for EBCs **lodged**. |
| 3. | Total number of VW applications seeking EBC **granted**. |
| 4. | Total number of VW applications seeking EBC **refused.** |
| 5. | Total number of VW applications lodged pre service of indictment. |
| 6. | Total number of VW applications seeking EBC (to which s271BZA applies) **lodged**. |
| 7. | Total number of VW applications seeking EBC (to which s271BZA applies) **granted**. |
| 8. | Total number of VW applications seeking EBC (to which s271BZA applies) **refused**. |
| **Hearings** | |
| **9A** | **Total number of EBC hearings scheduled.** |
| 9. | Total number of EBC hearings (i.e. witnesses) **scheduled**. |
| 10. | Total number of EBC hearings (i.e. witnesses) (to which s271BZA applies) **scheduled**. |
| 11. | Total number of EBC hearings (i.e. witnesses) **called**. |

| | | |
|---|---|---|
| 12. | Total number of EBC hearings (i.e. witnesses) (to which s271BZA applies) **called**. | |
| 13. | Total number of EBC hearings (i.e. witnesses) **completed**. | |
| 14. | Total number of EBC hearings (i.e. witnesses) (to which s271BZA applies) **completed**. | |
| 15. | Total number of EBC hearings (i.e. witnesses) **adjourned on the day of EBC before starting to take evidence**. | Reasons collated by SCTS using 5 agreed categories as follows:<br><br>Categories of reasons:<br>1) Unavailability of a party<br>2) Disengagement of a witness<br>3) Guilty plea<br>4) Case deserted<br>5) Equipment/Venue Issue<br>6) Other |
| 16. | Total number of EBC hearings (i.e. witnesses) (to which s271BZA applies) **adjourned on the day of EBC before starting to take evidence**. | Categories of reasons:<br>1) Unavailability of a party<br>2) Disengagement of a witness<br>3) Guilty plea<br>4) Case deserted<br>5) Equipment/Venue Issue<br>6) Other (lack of time) |
| 17. | Total number of EBC hearings (i.e. witnesses) **adjourned on the day of EBC after starting to take evidence.** | Reasons collated by SCTS using 5 agreed categories as follows:<br><br>Categories of reasons:<br>1) Unavailability of a party<br>2) Disengagement of a witness<br>3) Guilty plea<br>4) Case deserted<br>5) Equipment/Venue Issue |

| | | |
|---|---|---|
| | | 6) Part heard due to inaccurate estimate<br>7) Other |
| 18. | Total number of EBC hearings (i.e. witnesses) (to which s271BZA applies) **adjourned on the day of EBC after starting to take evidence.** | Categories of reasons:<br>1) Unavailability of a party<br>2) Disengagement of a witness<br>3) Guilty plea<br>4) Case deserted<br>5) Equipment/Venue Issue<br>6) Part heard due to inaccurate estimate<br>7) Other |
| 19. | Total number of EBC hearings (i.e. witnesses) **dispensed with/cancelled before day of EBC** | Categories of reasons:<br>1) Unavailability of a party<br>2) Disengagement of a witness<br>3) Guilty plea<br>4) Case deserted<br>5) Equipment/Venue Issue<br>6) Other |
| 20. | Total number of EBC hearings (i.e. witnesses) **dispensed with/cancelled before day of EBC** (to which s271BZA applies)**.** | 1) Categories of reasons: Unavailability of a party<br>2) Disengagement of a witness<br>3) Guilty plea<br>4) Case deserted<br>5) Equipment/Venue Issue<br>6) Other |
| **Venues** | | |

| | | |
|---|---|---|
| 21. | Number of EBC hearings (i.e. witnesses) **taking place in a designated venue** i.e. Glasgow, Inverness Justice Centre, Edinburgh High Court, Aberdeen High Court. | |
| 22. | Number of EBC hearings (i.e. witnesses) (to which s271BZA applies) **taking place in a designated venue** i.e. Glasgow, Inverness Justice Centre, Edinburgh High Court, Aberdeen High Court. | |
| 23. | Number of EBC hearings (i.e. witnesses) **taking place in another venue** e.g. a court building which is not one of the 4 designated EBC suites narrated above. E.g. a court room | |
| 24. | Number of EBC hearings (i.e. witnesses) (to which s271BZA applies) **taking place in another venue** e.g. a court building which is not one of the 4 designated EBC suites narrated above. E.g. a sheriff court | |

## Annex 5 – Consultation questions issued to consultees

| **Q.1** The aim of the Act is to support child and vulnerable witnesses to participate in the criminal justice system by reducing the risk of re-traumatisation associated with giving evidence and supporting them to provide their best evidence. Please share your reflections on how the Act is working in practice for child witnesses giving evidence in the High Court and whether it is achieving its aim in respect of those witnesses? |
|---|
| |

| **Q.2** The Act must be as effective as possible at supporting child and vulnerable witnesses to participate in the criminal justice system. What improvements could be made to ensure the Act delivers fully against this objective such as in relation to facilities, use of Ground Rules Hearings or any other aspect of how it is being implemented? |
|---|
| |

| **Q.3** We want to understand what, if any, impact introducing a presumption in favour of pre-recorded evidence has had on the experience of children giving evidence in the High Court. Please share any reflections that you have on how the experience of children giving evidence in the High Court to whom the presumption applies has changed since the Act was introduced. |
|---|
| |

| **Q.4** We want to understand whether implementing the Act has had implications for the courts and wider criminal justice system. In your view, what impact, if any, has the introduction of the presumption had on the courts and criminal justice system at large?<br><br>If you feel the Act has had a negative impact, please set out any actions that you think would help to address this. |
|---|
| |
| **Q.5** In your view does the phased approach set out in the Act Implementation Plan continue to be an appropriate way of further rolling out the presumption to other cohorts of child and vulnerable witnesses?<br>Yes ☐<br>No ☐<br>Don’t know ☐<br><br>If not, why not? Please provide information to support your views. |
| |

| |
|---|
| |

| **Q.6** Do you consider there to be challenges associated with further roll out of the presumption?<br>Yes ☐<br>No ☐<br>Don't know ☐<br><br>If yes, what are these challenges and how do you think they can be mitigated? |
|---|
| |

| **Q.7** Do you have any other observations or comments about the Act or how it is being applied that you would like to share? |
|---|
| |

## Annex 6 - List of Respondents to the Consultation

Barnardo's Scotland
Children 1st
Chief Constable of Police Scotland
Children and Young People's Centre for Justice
Crown Office and Procurator Fiscal Service (COPFS)
Faculty of Advocates
Law Society of Scotland
Lord President
Scottish Association of Social Work
Scottish Courts and Tribunals Service (SCTS)
Scottish Prison Service
Society of Solicitor Advocates
Scottish Women's Aid
Victim Support Scotland

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