Judicial Institute for Scotland

Equal Treatment Bench Book

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2.Foreword

FOREWORD to the THIRD EDITION

By

The Hon Lord Malcolm,

Chairman, Judicial Institute for Scotland

The equal treatment of all who appear in court is a core judicial responsibility. I therefore welcome and commend this new edition of the Equal Treatment Bench Book to all members of the judiciary in Scotland. While special mention should go to our legal assistant, Sarah Dickson, this is the fruit of much work by many in the Judicial Institute and beyond, and I thank all of them for their commitment to the maintenance of an up to date guide to best practice in this important area. This edition will be kept under review, and any suggestions in this regard will always be welcome.

CMC

Colin Malcolm Campbell

Edinburgh, May 2014

FOREWORD to the SECOND EDITION

By

The Hon Lord Brodie,

Chairman, Judicial Studies Committee

There have been many changes and developments in the law since the first edition of this Bench Book was produced in December 2002. Notably, the Vulnerable Witnesses (Scotland) Act 2004 made radical alterations to court procedure. This second edition attempts to incorporate many recent developments, but the overall aim remains as stated by Lord Wheatley in the foreword to the first edition. The Bench Book records what is understood, after the consultation procedure detailed in Appendix I, to be current best practice. The drafting of the Bench Book was undertaken by members of an Equal Treatment Working Party established by the Judicial Studies Committee and chaired by the Rt. Hon Lady Paton. I am very grateful for the considerable work put in by Lady Paton and her fellow members, whose names can be found in Appendix II. I am confident that colleagues who have the occasion to use the Bench Book will be very grateful too.

By its nature, a Bench Book is always of the nature of work in progress. The Judicial Studies Committee is always ready to receive and act on any suggestions made with a view to improving content or format.

Philip H Brodie

Edinburgh, July 2008

3.General introduction and overview

The first decade of the twenty first century has brought with it an enormous focus on equality and diversity both internationally and domestically. The EU Equality Directives and Regulations were considered ground-breaking at the time of their unveiling and continue to have a profound impact against discrimination in Scotland. The Regulations span across the spectrum of discrimination including race, religion, gender, sexual orientation, disability and age. The Equality Act 2010 is now effective and it imposes important duties on public sector authorities in relation to fair treatment. Scotland has developed a more robust anti-discrimination stance in recent years and this is reflected in the continuing revision of the Equal Treatment Bench Book.

Over many years the population of Scotland has gradually changed to a point where it is now more multi-cultural and multi-ethnic than has ever previously been the case. Many of those whose ancestors originally came from African or Caribbean countries, from the Indian sub-continent, or from elsewhere, are now third or fourth generation Scots: but many of them still preserve their original religious, cultural and ethnic identity, and many of them still prefer to speak the language of the country where their family originated. Moreover, as a country renowned for its educational facilities and for its tourism, Scotland regularly attracts large numbers of people from around the world who may stay here for only a short period or, at most, a few years. Many of them will be unfamiliar with Scottish institutions such as courts of law, and some of them may have only an imperfect knowledge of the English language.

All of the people just mentioned could, whether willingly or otherwise, find themselves involved in the processes of the courts. They might be the victims of a crime, or indeed might be accused of having committed a crime. Equally, they might be called to court as witnesses either in a criminal trial or in civil proceedings. In some instances they may wish to take or to defend civil proceedings themselves.

It is also crucial to remember that other court users with differing characteristics may have a role to play in proceedings before the court. Thus, someone cited for jury service may, for example, be a wheelchair user or may have impaired vision. Serving as a juror is an important civic duty and citizens are not to be readily assessed as unable to undertake that duty, but rather the SCTS and the judge must investigate rigorously the reasonable adjustments that may be required to allow the juror to serve. It is acknowledged of course that the particular circumstances of the instant trial may be such that there is no reasonable adjustment which could be made to allow the juror properly to discharge their role in accordance with the jury oath.

Judges should also bear in mind that a lawyer or other court officer performing a role before the court may have characteristics which raise the need for consideration of reasonable adjustment.

Scottish judges have always been rightly proud of the fact that all who come before the courts are treated with respect and with impartiality, and it is to be supposed that a Scottish judge would never knowingly do or say anything that would be likely to cause hurt or offence far less to place a particular person at an unnecessary disadvantage. When faced with a person from a minority

background, however, there are many challenges and pitfalls which lie in wait even for the most caring and diligent judge arising from the increasingly diverse community in which we function. Positive steps must be taken to ensure that there is real equality and fairness for all in the justice process. For judges who are accustomed to the concept of a first (or Christian) name and a surname, it may be difficult to know how to address a person from a Muslim background with a Muslim name; and similar difficulties may arise if a judge is required to administer the oath to a witness who is, for example, Hindu or Sikh. Likewise, "traditional" indicators of honesty and respect, such as looking a judge in the eye when he or she is speaking, may manifest themselves in quite different ways among those who come from Asian or other cultures.

The aim of this Bench Book is not to preach or patronise, but its function is to offer assistance and advice to judges who are duty bound to ensure that all who come before the courts are dealt with in an understanding and sensitive fashion, regardless of their personal backgrounds. Accordingly, Chapters 4 to 7 deal specifically with matters relevant to the circumstances just described.

A feature of contemporary life which is now dealt with in a much more open and unprejudiced way than was formerly the case is that of sexual orientation and gender identity. This is still something which is capable of misunderstanding and misconception, however, and it is therefore desirable that judges should have as clear an understanding of this topic as is possible. It is accordingly dealt with in Chapter 8.

Apart from all of the foregoing there are other circumstances, regardless of questions of ethnicity or sexual orientation and gender identity, in which some of those who come before the courts may be at a disadvantage when compared with other court users. They may have a physical or mental disability; they may be children; they may have been the victims of, or have been associated with, domestic abuse; they may be witnesses who, for whatever reason, are apprehensive about the prospect of appearing in court; or they may have to, or may choose to, conduct court proceedings in person without the benefit of legal representation. All require to be dealt with in a sensitive and understanding manner: and Chapters 9 to 14 of the Bench Book offer some advice as to how that might best be done.

Discrimination has many guises and thus individuals may not be compartmentalised in accordance with the different chapters in this Bench Book. Instead, judges may need to consider a number of chapters in order to address the issues raised by a particular situation. Further, it is important to note that discrimination does not only arise when a similar situation is treated differently but also when different situations are treated in the same way. It is also worth remembering that one person before the court may enjoy a number of characteristics for which provision may require to be made, for example a child who is Muslim and disabled.

It is, of course, impossible to comply with preferences that people feel inhibited from expressing, and making enquiries unprompted based on appearance or supposition runs the risk of committing the opposite offence. Good practice suggests that bar officers, clerks and, if the issue

arises, judges use an absolutely standard form of words to ask whether a person or persons have any special requirements arising from religion, disability, ethnicity, etc.

4.Ethnicity

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*The Judicial Institute acknowledges the comments of Professor Hugh Goddard, Al-Waleed Bin Talal Centre, University of Edinburgh and Mr Siraj Khan, Department of Islam & Middle Eastern Studies, University of Edinburgh in relation to this chapter of the bench book

Introduction

Data on ethnicity of the population is collected every 10 years in the Scotland Census, which began in 1991. Since the last census 10 years ago, new communities have made Scotland their home. The most recent census was held in 2011, the first results of which were published in December 2012. All ethnic minority groups living in Scotland on 27 March 2011 were included in the 2011 census, regardless of country of birth. The census asks questions on both national identity and on ethnic group to allow people to more fully express different aspects of their identity.

The 2011 census estimated that Scotland's total minority ethnic population (minority ethnic groups do not include Gypsies/Travellers) accounted for 4 per cent of Scotland's total population [National Records of Scotland, Statistical Bulletin – Release 2A, page 10]. This represents an increase of two percentage points since 2001. Scotland has had one of the fastest growing immigrant populations in the UK over past years, with parts of Glasgow and Aberdeen showing greater change in the composition of their population than London [Sarah Kyambi, The Institute for Public Policy Research, *Beyond Black and White: Mapping New Immigrant Communities* (2005)]

The 2011 census provided helpful information about ethnic minorities in Scotland. What follows is simply an illustration of some of the information it provided. The most common country of birth reported in the 2011 census was Scotland, 83% of people in Scotland were born in Scotland [National Records of Scotland, Statistical Bulletin – Release 2A, page 17]. The census also indicated that much higher percentage of individuals from the minority ethnic population live in large urban areas (settlements of over 125,000 people).

The 2011 census [National Records of Scotland, Statistical Bulletin – Release 2A, Table 2] indicates that, of the total population in Scotland, White Scottish comprised 84%; Other White British 7.9%; White Irish 1%; Gypsy/Traveller 0.1%; Polish 1.2%; Any Other White Background 1.9%; Indian 0.6%; Pakistani 0.9%; Bangladeshi 0.1%; Chinese 0.6%; Other Asian 0.4%; Caribbean 0.1%; African 0.6%; Arab, Arab Scottish or Arab British 0.2%; Any Mixed Background 0.4%; Any Other Background 0.1%. Two thousand individuals reported Black, Black Scottish or Black British as their ethnic group.

The 2011 census also showed that there was an ethnic minority population in every Council area in Scotland, with Glasgow having the highest percentage (at 12% of the council's population) followed by Edinburgh and Aberdeen (at 8%) and Dundee (at 6%) [National Records of Scotland, Statistical Bulletin – Release 2A, page 10]. The 2011 census confirmed that Scotland's population is richly diverse.

Cross tabulation of the 2011 census results will begin in 2014. Information on age and employment within the ethnic minority population has not been released at time of publication of the 2014 Equal Treatment Bench Book. The 2001 census indicated that the social and economic circumstances of Scotland's ethnic minority communities differ markedly from Scotland's white community. On average, all of the ethnic minority communities are younger than the White groups [Scottish Executive, Analysis of Ethnicity in 2001 Census – Summary Report (2004) page 7]. With the exception of the Caribbean group, all ethnic minority groups showed more than 20% in the category of 16 years or younger. Unemployment was higher in all ethnic minority groups [Scottish Executive, Analysis of Ethnicity in 2001 Census – Summary Report (2004) page 36]. The groups which showed the highest unemployment were Africans (at 15%); Black Scottish (at 15%) and Other South Asians (at 14%) [Ibid, page 37]. Self-employment was highest amongst the Pakistani group (at 32%) and the Indian group (at 22%). The African group showed the lowest level of self-employment at 8.4%.

It should not be forgotten that there is a wide range of individuals from many different racial groups who can experience prejudice and unlawful race discrimination. For example, in Scotland, complaints of racial discrimination by English people are not uncommon. The last few years has seen a growing body of research indicating widespread discrimination in Scotland against Gypsies/Travellers, including Scottish Gypsies/Travellers. Gypsy/Traveller is the term recommended by the Scottish Parliament Equal Opportunities Committee in its 1st Report 2001 – Inquiry into Gypsy Travellers and Public Sector Policies after taking evidence from Gypsy/Traveller

organisations and individuals. Race discrimination is not restricted to discrimination on the grounds of colour, although it is sometimes simplistically viewed in this way. Neither is race discrimination always an issue between the majority and the minority. It can arise between different minority groups. Unlawful race discrimination can occur on the basis of an individual's own race or on the basis of another person's race.

Anti-discrimination law is a dynamic area of law and is constantly evolving and changing, both as a result of domestic legislation and case law, and as a consequence of European Union law which can affect the interpretation of domestic law and provides for directly effective rights and obligations in the UK.

The Legal Context

The Equality Act 2010

The Equality Act 2010 ("*2010 Act*") has two main purposes, to harmonise discrimination law and to strengthen the law to support progress on equality. It has repealed and replaced most of the existing anti-discrimination legislation, including:

- The Race Relations Act 1976;
- The Sex Discrimination Act 1975;
- The Disability Discrimination Act 1995;
- The Equal Pay Act 1970;
- The Disability Discrimination Act 2005.

The 2010 Act received Royal Assent on 8 April 2010 and the majority of the provisions came into force on 1 October 2010. Its main purposes are stated in the preamble: -

- "*make provision to require Ministers of the Crown and others when making strategic decisions about the exercise of their functions to have regard to the desirability of reducing socio-economic inequalities;*
- *Reform and harmonise equality law and restate the greater part of the enactments relating to discrimination and harassment related to certain personal characteristics;*
- *Enable certain employers to be required to publish information about the differences in pay between male and female employees;*

- *Prohibit victimisation in certain circumstances; to require the exercise of certain functions to be with regard to the need to eliminate discrimination and other prohibited conduct;*
- *Enable duties to be imposed in relation to the exercise of public procurement functions;*
- *Increase equality of opportunity; to amend the law relating to rights and responsibilities in family relationships; and for connected purposes*."

The Protected Characteristics

The 2010 Act consolidates all the previous anti-discrimination laws and renames the different grounds of discrimination as "*Protected Characteristics*" in s 4 which are as follows:

- Age;
- Disability;
- Gender reassignment;
- Marriage and civil partnership ["*Marriage and civil partnership*" is not a relevant protected characteristic for the purposes of paragraphs (b) and (c) of the public sector equality duty: 2010 act, s 149(7)];
- Pregnancy and maternity;
- Race;
- Religion or belief;
- Gender;
- Sexual orientation.

The Public Sector Equality Duty

The public sector equality duty came into force on 5 April 2011 and is defined in s 149(1) in as follows:

"*A public authority must, in the exercise of its functions, have due regard to the need to -*

(a) Eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) Advance equality of opportunity between persons who share a relevant protected characteristic

and persons who do not share it;

(c) Foster good relations between persons who share a relevant protected characteristic and persons who do not share it."

Matters (b) and (c) apply to the protected characteristics of age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation, but they do not apply to the protected characteristic of marriage and civil partnership [2010 act, s 149(7)].

Courts and tribunals, in addition but not limited to local councils and the police, are considered public authorities [See 2010 act, sch 19 for full list of public authorities] for these purposes, although the exercising of "*judicial functions*" or functions exercised on behalf of, or on the instructions of, a person exercising a judicial function are excluded from the duty [2010 act, sch 18(3)].

Section 149(2) states that a person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to all the matters above.

Section 149(6) of the 2010 Act makes clear that complying with the duty might mean treating some people more favourably than others. This would include treating disabled people more favourably than non-disabled people and making reasonable adjustments for them, making use of exceptions which permit different treatment, and using the positive action provisions in ss 158 and 159 where they are available.

The Equality and Human Rights Commission ("*EHRC*") (formerly the Commission for Racial Equality, the Disability Rights Commission and the Equal Opportunities Commission) exists to promote the importance of equality and diversity with a view to eliminating unlawful discrimination in society. The EHRC also has powers to initiate proceedings in its own name as well as intervene in relevant litigation.

The Human Rights Act 1998 ("*1998 act*") also has a significant impact on the extent of protection against discrimination by public bodies in the United Kingdom. The 1998 Act gives domestic effect to the European Convention on Human Rights in particular to Articles 8 (right to respect for private and family life), Article 9 (right to religious freedom) and Article 14 (Right to Non-Discrimination in the enjoyment of the substantive rights). Section 6 requires that public authorities, including the judiciary, comply with the European Convention for the protection of Human Rights and

Fundamental Freedoms.

Policy and Best Practice

Policy

Research has identified significant barriers for people from minority ethnic communities when involved in the justice system. These barriers, which are shared by many large organisations, have been defined in the Macpherson Report as being "*institutional racism*", that is:

"*the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture or ethnic origin. It can be seen or detected in processes, attitudes, and behaviours which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantages minority ethnic people*" [Sir William Macpherson, Stephen Lawrence Inquiry Report (Cm 4262-I, 1999), para 6.34].

Research published in February 2001 [Home Office, *Religious Discrimination in England and Wales*, Study 220, February 2001] focused for the first time on the extent of perceived discrimination on the ground of religious belief in England and Wales, including a section on discrimination in the criminal justice system. The report indicates that the absence of religious facilities, the disrespectful treatment of religious books, and an atmosphere of in-built prejudice led to perceptions of discrimination, although these were described as being occasional rather than routine occurrences.

Best practice

The following guidance notes are provided to assist judges and court staff to adopt best practice in managing the diversity of "*witness ethnicity*" in court.

Familiarisation with court prior to case

Courts cannot assume that witnesses, or an accused, are familiar with court procedures. It is therefore best practice to ensure that the responsibility for court familiarisation visits is clearly allocated and should be offered in every case. Where a witness service exists, they could provide this service. The Witness Service is now available in every Sheriff Court.

Arrangements in Court

Oaths

- On the form of oath for persons of different faiths, see Chapter 6;
- Before a witness is brought into court, it is good practice for the macer or court officer to ascertain from the witness that he or she will take the standard oath. If the witness wishes to affirm or to take the oath in another form, the macer or court officer should communicate that preference to the judge. In the case of affirmation, it will usually be sufficient for the macer or court officer to bring the witness into court and to announce that this witness wishes to affirm. If the witness wishes, for example, to swear on the Qur'an (Or Koran), the judge should be advised before the witness is brought into court and the holy book should be made available;
- Witnesses should be asked what oath they wish to take. Assumptions should not be made.

Respect for religious practices:

- Judges should be aware that religious practices may make certain demands of a witness. It may be, for example, that prayer times will have to be accommodated.For those of the Jewish faith consideration may need to be given to the court rising early on Fridays during the winter months, as well as account taken of feast days when work and travel are not permitted.
- If people are fasting, e.g. a Muslim during Ramadan and Jews on their fasting days, they may not be able to stand for long periods of time.
- Particular items may constitute an '*article of faith*' for instance, the Kirpan in Sikhism. Judges should be aware of the significance of the Kirpan. The Kirpan is a ceremonial dagger or sword carried by orthodox Sikhs. To Sikhs, the Kirpan is an article of faith of their religion and all initiated Sikhs must wear a Kirpan at all times. The Kirpan may be legally carried for religious reasons under s 49(4) of the Criminal Law (Consolidated) (Scotland) Act 1995. At court and in the vicinity of the court, the Kirpan should always be sheathed and worn out of sight.

'*The Veil*'

- A participant in court proceedings may wear a veil or some other garment wholly or partially covering the head and/or face. The court should assume that where the veil is worn, it is done so sincerely unless there is evidence of disguise, impersonation or other

improper motive [See *The Queen v D(R)* [2013] Eq. L.R. 1034 para 18]. In all circumstances the interests of justice are paramount. The question is: what is the significance of seeing the person's face or head during the judicial proceedings [See additionally the concept of 'effective participation and fair hearing' in 'Oaths, Affirmations and Declarations' in the Equal Treatment Bench Book for England and Wales, Page 10. See also *R. v. N.S,* 2012 SCC 72, [2012] 3 S.C.R. 726 for useful discussion and jurisprudence]. It may be unnecessary to see a court officer's face but necessary to see a witness's face when there are issues concerning credibility or identification;

- It may be thought that in most circumstances it would be inappropriate for a juror's head to be covered. For example, in a murder trial in Blackfriars Crown Court, London, a Muslim juror was alleged to have used her hijab headscarf to hide earphones to an MP3 player, and to have been listening to music rather than to vital evidence in the trial [The Scotsman 10 July 2007]. It is suggested that a **juror** who is challenged because of a veil or some other head covering may be excused;
- A **defendant** may wear the niqaab (the term applied to the black veil which covers the entire face, except for the eyes) during the trial but may not when giving evidence [*The Queen v D(R)* [2013] Eq. L.R. 1034, para 86];
- A **witness** may be asked to remove the veil during evidence, or alternatively asked whether measures such as screens, video-links, or clearing the public benches might assist. It would be preferable to have the appropriate procedure resolved at an early stage, for example, at a preliminary hearing;
- A **lawyer** may also be asked to remove a veil or some other head covering if the circumstances suggest that the interests of justice are being impeded for example, if the lawyer's voice cannot be clearly heard. Any of the foregoing requests should be made in appropriate circumstances, for example at an early stage, or when the court has been cleared or adjourned, thus enabling the person approached to have time to consider matters without feeling pressurised [See Guidance given in paragraph 3.3 of the Equal Treatment Bench Book for England and Wales and in a News Release, 24 April 2007, from the Judicial Communications Office for England and Wales].

Other Headware

Orthodox Jewish men and women both wear "*head-coverings*", but none of the concerns mentioned above is engaged. Women may wear a hat, scarf, or wig; men a hat or **yarmulke** (or **Kappel** - Yiddish terms generally used by the so-called "*strictly orthodox*" who may wear large black cloth skull-caps under their hats) or **kippah** (Hebrew term generally used by "*modern orthodox*" men whose head covering is usually knitted or crocheted). It is unlikely that anyone, male or female, would wear an item covering their ears. Some people may be under the misapprehension that they should remove headgear in a formal setting such as a court, and therefore be uncomfortable whatever decision they make; judges and court personnel should be alert to that and reassure them if appropriate.

Respect for the witness

The following points should be borne in mind:-

- It is good practice to ascertain the correct name of the witness and how he or she prefers

to be addressed;

- One cannot assume that the witness has any knowledge or previous experience of court procedures. Judges should be ready to advise witnesses that if they do not understand a question they should say so, in order that it can be rephrased. It is good practice to advise a witness that drinking water is available if required;
- Sex offences: because of cultural or religious differences, it may be very difficult for some witnesses from certain minority ethnic communities to give evidence due to, for example, the need to use certain words. Sensitivity to cultural norms should be shown;
- Racially motivated offences: sensitivity may be required if and when racist language is repeated in court as part of the evidence;
- Some people may be offended by foul language. The judge should consider whether or not to intervene after balancing the importance of having regard to sensitivities of individuals and the importance of achieving justice;
- Some people may not understand the relevance of identifying the accused in court. Pointing may be considered rude in some cultures, but there are other ways of identification;
- Some people may not, because of their cultural or religious norms, wish to shake hands with a member of the opposite sex or, for example, have a bar officer of the opposite sex fix a lapel microphone to their clothing;
- Some people may, because of their cultural or religious norms, avoid direct eye contact. They are not being "shifty", merely habitually reserved. This will naturally be exacerbated if the subject matter is one they would regard as inherently embarrassing or immodest, such as any sexual matters.

Additional points

Assumptions should not be made about different cultural norms. It may be necessary to take account of religious or cultural requirements for a person attending court as a witness.

- A wide variety of different racial groups may need to be catered for. There is an equal diversity of need within the white community. For example, tourists may appear in court, and may find our criminal justice system very different from their own;
- There is increasing recognition that the courts should build good links with local victim, witness, and minority ethnic advocacy groups and encourage their familiarisation with court procedures;
- Alternative books for oaths are readily available in every court;
- Pre-court written materials should be available in a range of formats and in different languages. For example, the Witness Service document "Going to Court" is available in thirteen different languages. A local interpreting service will be able to give guidance on the languages most frequently spoken in your local community.

Appropriate Language

The English language is constantly evolving, and acceptable terminology describing ethnic minorities has developed. It is important that unacceptable language is not used. This is not about so called "political correctness", rather it is part of society's response to the need to recognise and respect, diversity and equality. Language that was formerly used to describe a person's race is sometimes no longer acceptable. It should be noted that there can be differences of opinion over some terms, so whilst some words are clearly unacceptable, for others there may not be any one correct answer about whether the term is right or wrong. Basic guidance is noted below.

Black

It is now considered acceptable to use the term '*black*' to describe people of Caribbean or African descent.

West Indian / African Caribbean / African

The term "*West Indian*" was formerly used as a phrase to describe the first generation of settlers from the West Indies. While the term "*West Indian*" would not always give offence, it is inappropriate unless the individual concerned identifies himself or herself in this way. The term "*African Caribbean*" is now much more widely used, especially in official and academic documents. Where a person's ethnic origin is relevant, that term is both appropriate and acceptable. It does not, however, refer to all people of West Indian origin, some of whom are White or of Asian extraction.

The term "*African*" is often acceptable and may be used in self-identification, although many of African origin will refer to their country of origin in national terms such as Nigerian or Ghanaian.

Young people born in Britain today may choose not to use any of these designations.

Asian

"*Asian*" is a collective term which has been applied in Britain to people from the Indian sub-continent and other parts of Asia, such as Indonesia. In practice, people from the Indian sub-continent may not consider themselves to be "*Asian*". People tend to identify themselves in terms of one or more of the following:

- Their national origin (*"Indian", "Pakistani", "Bangladeshi"*);
- Their region of origin (*"Gujarati", "Punjabi", "Bengali"*);

- Their religion ("*Muslim", "Hindu", "Sikh*").

The term 'Asian' can be appropriate when the exact ethnic origin of the person is unknown. The more specific terms of South East Asian, Far East Asian or South Asian may be preferred.

Young people of South Asian origin born in Britain often accept the same identities and designations as their parents. This is by no means always the case, and some now may prefer to describe themselves as "*Black*" or as "*British Asian*".

Mixed race/Mixed heritage

The term "*mixed race*" is widely used and is considered acceptable by some and not by others. Another term which may be better is "*mixed heritage*". The term "multi-racial" may only be used in relation to communities.

Ethnic minorities/Minority ethnic

The terms "*ethnic minority*" and "*minority ethnic"* are widely used and are generally acceptable as the broadest terms to encompass all those groups who see themselves to be distinct from the majority in terms of ethnic or cultural identity. This term is clearly broader than "*Black minority ethnic*" or the problematical "*visible minorities*" (problematical as it may imply that there are invisible minorities), and brings in such groups as Greek and Turkish Cypriots or Gypsy Travellers.

Judges may also wish to consider whether any reference to a person's race, ethnic or national origin is relevant. If it has no bearing on the proceedings at hand, why does it need to be referred to at all?

General Points

Whilst many judges will have experience of presiding over a diverse and multi-racial court, it is recognised that for others the presence of minority ethnic people is less common. The following additional guidance derived from the Judicial College of England and Wales [Judicial College of England, *Race and the Courts, a Short Practical Guide for Judges*, 1999] may be helpful.

- Treat everyone who comes to the court with dignity and respect – "*do as you would be done by*";
- Everyone has prejudices. Recognise and guard against your own;
- Everyone also views the world from their own individual perspective and some of these views will arise because of cultural background;

- Be well informed – being independent and impartial does not mean being isolated from issues which affect people from minority communities;
- Do not assume that treating everyone in the same way is the same thing as treating everyone fairly;
- Be "*colour conscious*", not "*colour blind*". Fair treatment involves taking account of difference;
- Do not make assumptions: all White people are not the same nor are all Asian people or Chinese people;
- Do not project cultural stereotypes. Most young ethnic minority people are second and third generation British born citizens and may be no different from any other teenager when faced with authority figures;
- Do not perceive people from ethnic minority communities as "*the problem*". If there is any problem, it may lie in the working methods and traditions of some institutions which may put some groups, such as ethnic minorities, at an unfair disadvantage;
- If in doubt – ask. A polite and well-intentioned enquiry about how to pronounce a name or about a particular religious belief or a language requirement will not be offensive when prompted by a genuine desire to get it right. An assumption, however, may cause offence.

All judges use their best endeavours to treat everyone equally and show no bias or prejudice. The judicial oath [s 4 of the Promissory Oaths Act 1868], taken by judges on appointment, dictates the manner in which they must treat all those who come before them and is in the following terms:-

"*I, …, do swear that I will well and truly serve our sovereign [Lady, then the name of the sovereign of this kingdom for the time being], and will do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill-will*".

There must be awareness, however, that within us all there is a potential, unwittingly or unconsciously, to make remarks that might be perceived by some to be prejudicial, offensive or discourteous even if nothing of the sort was intended. A minority group may find unintentional prejudice or discrimination, which is not recognised by the perpetrator as such, just as offensive as if it were intentional.

5.Names and forms of address

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Golden Rule: Ask the Witnesses

For many, names and forms of address are important and as a result people can be sensitive about it, expecting others to pronounce and spell their name correctly and to get the form of address right. It is important that in a diverse society, all members of that society should have this relatively simple expectation fulfilled. It is also an important component in increasing the confidence in the courts for those that come into contact with the judicial process.

Naturally, it may not be possible to know in advance how to pronounce all names or to remember every form of address. Where a judge is in any doubt, the golden rule is to ask the witness and not to make assumptions. The witness should be asked for his or her full name, how it is spelt and pronounced and how he or she would like to be addressed. Do not refer to the first name as "*Christian*", for obvious reasons, or assume that the British family naming system will apply to others from different backgrounds.

The information and forms of address noted below are intended merely as background information. Naming systems often have a connection with the inter-play between community and family life. In Europe for example, parental and personal names are the norm. However, in other cultures where community life may be more structured, names may indicate membership of community or family groups. Members of ethnic minority communities in Scotland may continue to use traditional naming systems or they might adapt these to fit with living in Britain.

Examples

African names

Traditionally, across sub-Saharan Africa, names might well consist of personal names only, and are likely to be gender specific. Naming, generally, reflects the many and diverse groups of people in the area and the various ethnic and cultural backgrounds. The influences of religion (Christian and Muslim) and colonialism, however, have changed naming in the area, and many have adopted Christian or Muslim and family names.

Caribbean names

Older generations often use Biblical names from the Old Testament. Due to the influences of colonialism however, the traditional western naming system of first and last name is common.

Chinese names

Traditionally in Chinese names, the surname comes first, followed by a personal name. This signifies the cultural importance of the family name. In English, the surname and the personal name will appear as two separate words.

Many Chinese people living in Scotland have adopted Western names. This may entail placing the Western name before the Chinese names, or alternatively, dropping the Chinese names altogether and simply giving the Western first and last names.

Eritrean and Ethiopian names

Most Eritrean and Ethiopian names have two parts, a personal name followed by the father's personal name used as a surname. People may also use their grandfather's personal name and then this becomes the surname. Some Eritreans and Ethiopians have adopted a "*static*" surname that does not change with each generation. Women do not traditionally change their last name on marriage, although some have adopted this custom. Children have their father's or grandfather's first name as their surname.

Filipino names

Filipinos have two surnames: The first is their mother's surname and the second is their father's surname. When Filipino women marry, they drop their mother's surname and substitute their husband's second surname. Therefore, children have the same surnames as their mother since her marriage.

Ghanaian names

Ghanaians, irrespective of religion, usually have their own personal name, a middle name which is a tribal, customary, or sometimes a religious name, and a surname that is a family name. They may have, either as their sole personal name or as their middle name, a name that depends on the day of the week on which they were born. When women marry in a church or civil ceremony, they adopt their husband's surname. If they are married by customary law, they generally, although

not always, also adopt their husband's surname. Children take their father's surname but may also add their mother's surname, if their parents so decide.

Greek and Greek Cypriot names

In the traditional Greek system of naming, people use a personal name, with their father's or grandfather's personal name as their surname. The endings of personal names change when used as surnames and may differ when applied to men and women. On marriage a man does not change his name. A woman takes:

- Her husband's personal name as her middle name; and
- Generally, his father's personal name as her surname. She could, unusually, use his grandfather's personal name as her surname.

If a man is using his grandfather's personal name as a surname, his wife will sometimes have a different surname. Many Greeks and Greek Cypriots permanently settled in the UK have adopted a static surname system, with the father's personal name included as the middle name.

Hindu names

The basic pattern for Hindu names is that there are three parts:

- Personal (first) names: Lalita, Raj, Vijay;
- Middle names: Devi, Kumar, Lal;
- Surnames: Sharma (*female*), Vasani (*male*), Patel (*male*).

Personal (first) names: Family and friends use the first name on its own. The first name often indicates gender. The first and middle names are used together as a sign of formality or respect, for example, Lalitadevi or Rajkumar. In informal contexts the ending "*ji*" may instead be added to the personal name to show respect.

Middle names: There are only a few Hindu middle names. They are never used on their own and are not surnames (but see information below under "*Anomalies*"). The middle name is commonly either the father's or husband's name and can be linked to gender.

Surnames: The family name is used as a surname, but may also be a "*sub-caste*" name that indicates the family's traditional status and occupation, and so is shared by a large number of families, for example, Patel. The surname is shared by all members of one division of a caste in a particular area. The wife and children use the same surname as the head of the family.

Anomalies: Some people have dropped the family name to indicate rejection of the caste system. When this happens they use their middle name as a surname, and each member of the family has a different "*surname*", for example, Mrs Devi may be the wife of Mr Lal. Occasionally, people will wrongly give the middle name as a surname because many Indian people are not accustomed to giving their surnames in official situations. If you think this may have happened, ask for the family name.

Addressing Hindus: In formal situations, always address a Hindu by title and full name, for example, Mrs Lalitadevi Sharma. When addressing a Hindu informally, use the first name, for example, Lalita.

Gujarati Hindu names: Gujarati Hindu names consist of:

- A personal name;
- The father's first name; and
- A surname.

When women marry, they add their husbands' first name and surname to their personal name. In familiar use, the suffix:

- "*bhai*" (brother) may be added to men's personal names used alone;

and

- "*bhai*" or "*ben"* to women's names.

Iranian names

Iranians have one or more personal names and a surname. Iranian women do not change their surname on marriage. Children take their father's family name. Most Iranians are Muslims, but some common Iranian names are non-Muslim in origin.

Jewish names

Jewish people often take the naming system of the country in which they live. Most married women take their husband's name. As a general guide Jews use**:**

- British names in day-to-day situations within their own community and in their activities in the wider community; and
- Traditional names for religious purposes at the time of births, marriages and deaths.

The traditional names are a patronomical system in which people are referred to by their given name followed by "*son of*" and the father's name. For example, for religious purposes, a man may be called Isaac son of Abraham. The religious name is usually related to the secular name. A family may sometimes use the given religious name.

Muslim names

Because Islam is the religion of people from many countries and different cultures there are names and name patterns that, although basically Muslim, also reflect other local, sometimes pre-Islamic, cultures. It may be helpful to ask the person:

- What they use as their personal name;
- What they would consider or use as their surname;
- What they want to be called.

Recording Muslim names: When recording Muslim names, there are a number of points to note:

- The order of names is not fixed or significant;
- When Muslims marry, the women do not usually change their names;
- Children do not necessarily have their father's name;
- A surname or family name may not exist.

People of all origins may add certain titles to names to show respect. For example, Bibi and Begum may be added to women's names, and men who are especially devout may have extra religious titles. The last name is not a shared family surname. In most Muslim families, each member has a different name, for example:

- Husband Mohammed Hafiz;
- Wife Jameela Khatoon;
- Sons Mohammed Sharif.

Liaquat Ali

- Daughter Fatima Jan.

This can cause difficulties, for example:

- You cannot assume Liaquat Ali's father is also called Ali;
- Some families may adopt the husband's personal name as a "*surname*".
    - children born to people of Pakistani origin in Scotland invariably adopt their father's "*personal name*" as a surname.

Male Muslim names: Male Muslim names usually consist of a personal name and a religious name. The personal name may come:

- First, as in **Ghulam** Mohammed or **Yusef** Ali; or
- Second, as in Mohammed **Hafiz** or Allah **Ditta**.

The religious name is considered to be the most important part. **Never use the religious name alone.** It is very difficult for a non-Muslim to tell which the religious name is. Therefore, always use the two-part name in full to avoid giving offence. As a guide:

- Allah, Ullah and Mohammed are always religious names;
- Ahmed, Ali and Hussein can sometimes be religious names.

Addressing male Muslims: When formally addressing a male Muslim, always use their title and full name, for example, Mr Yusef Ali (not Mr Ali). When addressing a male Muslim informally, use their full name, for example, Yusef Ali.

Female Muslim names: Female Muslims also have a two-part name, although neither has any religious significance. The first name is always a personal name. The second name can either be:

- A title, for example, Bano, Begum, Bi, Bibi, Khanum, Khatoon, Sultana;

or

- Another personal name, for example, Akhtar, Jan, Kausar, Nesa.

Addressing female Muslims: When addressing a female Muslim formally, always use her title and full name, for example, Mrs Amina Begum or Mrs Fatima Jan. When addressing a female Muslim informally, use her first name, for example, Amina or Fatima.

Nigerian names

Nigerian names operate in a similar way to the Ghanaian system although those of Muslims from northern Nigeria may be different.

Polish names

Polish people have one or more personal names, followed by a surname. Women may have a different (feminine) ending to the same family name, for example, Piotr Malinowski's wife or daughter may be called Krystyna Malinowska. Some people permanently settled in the UK have dropped this usage.

Portuguese names

All Portuguese people have two surnames, the first being their mother's and the second being their father's. They may use both or only their father's. A Portuguese woman can take her husband's surname on marriage by permission of the registrar. Traditionally, women did not do so and many older women from rural areas still do not. Customs are changing, however, and many women now adopt their husband's surname(s), adding it (or them) to her own.

Sikh names

The basic pattern for Sikh names is that there are three parts:

- First name (personal): Baljit, Ravinder;
- Middle name (religious): Kaur *(female)*, Singh *(male);*
- Surname (family): Gill, Sahota.

For religious reasons many Sikhs do not use the family name.

First (personal) names: When a child is named, the Sikh Holy Book is opened at random. The child's name must start with the first letter of the first word on the page opened. Family and friends use the first name on its own. The ending *"j"* may be added to the personal name, in an informal context, to denote respect. The traditional form of address is to use the first and middle names together, for example, Baljit Kaur or Ravinder Singh. Most Sikh personal names do not indicate gender, and may be given to both males and females.

Middle name (religious): The middle name Singh meaning lion *(male)*, or Kaur meaning princess *(female)*, is a religious name indicating that the person is a Sikh.

Surname (family): The family name is a "*sub-caste*" name. It has its origin in Hindu caste grouping, indicating occupation and place of origin. The Sikh religion is anti-caste, so Sikhs traditionally (and still typically in India) do not use the family name. Some Sikhs in the United Kingdom are nevertheless using the family name. Occasionally, the whole family adopt "*Singh*" as the family surname. On marriage, a woman takes her husband's surname only if he uses it; otherwise she calls herself Mrs Kaur. There are also some married Sikh women in the United Kingdom who call themselves Mrs Singh.

Anomalies: There are some anomalies to note, for example:

- Mrs Kaur being married to Mr Singh;
- Some Sikh families may revert to using a family name, while their original records are

under the name Singh or Kaur.

Addressing Sikhs: When addressing a Sikh, always use their title, first and middle names, for example Mr Davinder Singh or Mrs Baljit Kaur. Note that using title and surname, such as "*Mrs Gill*" may be offensive to devout Sikhs because they regard "*Kaur*" as the most important part of their name. Equally, "*Mrs Kaur*" may cause confusion in some situations as more than one "*Mrs Kaur*" may be present. When addressing a Sikh informally, use their first name, for example, Baljit.

Spanish names

At one time, the Spanish system of naming was used in all countries that were once part of the Spanish Empire, including most of Latin America. Since independence, however, many countries have changed the usage, usually simplifying it. All Spanish people have two surnames, the first being their father's surname and the second their mother's surname. When Spanish people marry, men keep both their surnames while women drop their second surname (their mother's) and substitute their husband's first surname. Confusion may arise because:

- The name written last is often assumed to be the surname but, for all Spanish people other than married women, the main surname is the penultimate name;
- Before they marry, Spanish men and women may use both surnames or only the first. After they marry, Spanish women may use both or only the second;
- Married women sometimes use only their husband's surname and omit "*de*", for example, Maria Arroyo de Gonzales becomes simply Maria Gonzales;
- Official records in the UK may show both surnames or either, despite what the person uses.

Turkish names

Turkish people usually have one or more personal names followed by a surname, which is shared by all members of an immediate family.

Turkish Cypriot names

Turkish Cypriots usually have two names, a personal name, by which they are addressed, and a second name. Wives and children customarily adopt their husband or father's personal name as their surname. Hence, most men do not have the same surname as their wives and children.

Vietnamese names

Vietnamese people of non-Chinese origin have three names. Traditionally, the basic pattern is:

- Surname: Nguyen;
- Middle name: Ngoc;
- Personal name: Minh.

Some Vietnamese put their personal name first, followed by their middle name and their surname last. There are variations on this, however, so it may be helpful to ask the person which name is which. On marriage, the woman traditionally keeps her own name. Children are known by their father's surname.

6.Oaths

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Purpose of oath or affirmation

The purpose of administering an oath or affirmation to a witness is to ensure that the witness makes a solemn declaration to tell the truth. Should the witness thereafter fail to tell the truth, he or she may be found guilty of perjury, and certain consequences may follow [See Gordon, *Criminal Law* (3edn,W.Green,2000) Chapter 47]. In today's multi-cultural society, there is increasing recognition that an individual may wish to take an oath in terms of his own religious or cultural beliefs. Although s 5(2) of the Oaths Act 1978 recognizes that a court may be ill-equipped to administer some oaths, in which case the witness should simply be asked to affirm. With the advent of legislation concerning human rights, for example the Human Rights Act 1998, it is all the more important that the court is aware of the requirements of the diverse religious and cultural beliefs of witnesses who may be appearing in court.

Part II of the Oaths Act 1978 ("*1987 act*")applies to Scotland, and provides:

"*3. If any person to whom an oath is administered desires to swear with uplifted hand, in the form and manner in which an oath is usually administered in Scotland, he shall be permitted so to do, and the oath shall be administered to him in such form and manner without further question.*

4.(1) In any case in which an oath may lawfully be and has been administered to any person, if it has been administered in a form and manner other than that prescribed by law, he is bound by it if

it has been administered in such form and with such ceremonies as he may have declared to be binding.

(2) Where an oath has been duly administered and taken, the fact that the person to whom it was administered had, at the time of taking it, no religious belief, shall not for any purpose affect the validity of the oath.

5.(1) Any person who objects to being sworn shall be permitted to make his solemn affirmation instead of taking an oath.

(2) Subsection (1) above shall apply in relation to a person to whom it is not reasonably practicable without inconvenience or delay to administer an oath in the manner appropriate to his religious belief as it applies to a person objecting to be sworn.

(3) A person who may be permitted under subsection (2) above to make his solemn affirmation may also be required to do so.

(4) A solemn affirmation shall be of the same force and effect as an oath."

The 1978 Act does not state which hand should be uplifted. The convention is that people raise their right hand. Further, the 1978 act does not specify in which hand a holy book should be held when the oath is taken.

Orthodox Jews may not want to swear at all and prefer to affirm. Nothing should be inferred from such a refusal - it is not reticence about telling the truth, but because of religious injunctions against oath-taking.

Children

The oath is not usually administered to a child under the age of 12. For appropriate procedures relating to children, see Chapter 10 (Children), Microphones in court for small voices and Seating arrangements: position of child in court.

Persons with learning disabilities

In some cases, it may be appropriate to adopt the same procedure as for a child: see Chapter 10 (Children), Microphones in court for small voices and Seating arrangements: position of child in court.

Form of oath or affirmation

The standard form of oath in both civil and criminal proceedings is:

"*I swear by Almighty God that I will tell the truth, the whole truth, and nothing but the truth.*"

The form of affirmation in both civil and criminal proceedings is:

"*I solemnly, sincerely and truly declare and affirm that I will tell the truth, the whole truth, and nothing but the truth*".

The form of oath may be varied as circumstances require. The use of the Bible or other holy book is not required. With right hand raised, the witness should repeat the words after the judge. It is often convenient to divide the words into four sections (to enable the witness to follow and to repeat accurately) thus: *"I swear by Almighty God / that I will tell the truth / the whole truth / and nothing but the truth*". The sources for the form of words include the Rules of the Court of Session 1994, Form 36.10-A; the Sheriff Court Ordinary Cause Rules 1993, Form G14; and the Criminal Procedure Rules 1996, Form 14.5-A.

It is not strictly necessary to raise a hand to affirm (although some do). The sources for the form of words include the Rules of the Court of Session 1994, Form 36.10-B; the Sheriff Court Ordinary Cause Rules 1993, Form G14; and the Criminal Procedure Rules 1996, Form 14.5-A.

Availability of holy books in the court

A selection of holy books in the court building, for witnesses who might wish to take the oath according to their religious beliefs are available in all courthouse. These include:

- The Holy Bible;
- The Hebrew Bible I.e. the Old Testament;
- The Bhagavad Gita or '*Gita*' (Hindu Sacred Text);
- The Adi Granth (Sikh Sacred Text);
- The Holy Qur'an or 'Koran' (Muslim Sacred Text).

Taking the standard oath does not require the use of the Bible or other holy book.

The last three books must not be handled other than by the witness, and are usually stored with a cloth covering them. This is because it is considered by some that the holy book should be touched only by a person who is a believer and who has cleansed himself. Sometimes witnesses may request to perform a ritual or wash their hands or another part of the body before touching their holy book. This request should be acceded to, although it is hoped that such a request would have been made and granted prior to the witness coming into court. The process only takes a few minutes when the witness cleanses his or her hands, forearms, face, forehead and neck with water.

Many witnesses from ethnic minorities regard the use of their holy book during the oath taking as absolutely essential to the solemnity and effectiveness of the process. Other witnesses may prefer to affirm. Some Muslim jurists have said that Muslims need not take the oath on the Qur'an as it is the uncreated word of God. Accordingly, they are not allowed to take the oath on the Qur'an. In this case, the witness should be offered an oath taken on the "uncreated divine speech of Allah" to tell the truth, or an oath "by Allah who is all-knowing and all-seeing" to tell the truth. The wording would have to be very precise.The court should be aware of and sensitive to the needs of the witness. Court staff should ask a witness or juror before coming into court if he or she will take the standard oath. If the witness wishes to affirm or take the oath in another form, the court staff should communicate that preference to the judge. If the witness wishes, for example, to swear on the Qur'an, the judge should be advised before the witness is brought to court and the holy book made available (witnesses may not be aware that their own holy book is available in court, and may prefer not to draw attention to themselves or to cause inconvenience by asking for it).

If the Qur'an is to be used, it must be brought to court wrapped in a cloth, and placed in an elevated position in the court – for example, on a rostrum on the judge's bench. Care should be

taken not to place it on a platform on which people walk or sit. The Qur'an should not be carried below the waist. When the witness is ready to take the oath, the Qur'an (still wrapped in cloth) is taken from its stand and placed in front of the witness. The cloth is then carefully opened and pulled back although the witness may prefer to take the oath without unwrapping the Qur'an; this should be allowed, if requested. The witness should either hold the Qur'an in their right hand or place their right hand on the Qur'an, in which case the left hand would have to be raised to take the oath. The Qur'an need not be held at all for an Oath in Islamic to be valid because the Muslim witness swears 'by Allah' or by 'the uncreated word of Allah'. However, in order to sanctify the occasion and as it is generally regarded as custom in the UK, it is perfectly valid to do so. For most Muslims, holding a copy of the Qur'an is a physical and outward demonstration to those present that the individual intends, by this action of holding the Qur'an, to emphasise that their oath is sincerely being taken and it is solemn. Further guidance given to macers and bar officers concerning the handling and storage of holy books and scriptures can be found in the Appendix A.

Best practice is, of course, not always possible. All court houses in Scotland have the main Holy Books of the principal religious traditions. Judges through clerks should request replacements if these have been lost or mislaid. If the court does not have the necessary holy book, the witness should be invited to affirm [See s. 5(2) of the Oaths Act 1978].

Refusal to take the oath or affirmation section 259

Where a person "*is called as a witness and either – (i) refuses to take the oath or affirmation, or (ii) having been sworn as a witness and directed by the judge to give evidence in connection with the subject matter of the statement, refuses to do so*", section 259 of the Criminal Procedure (Scotland) Act 1995 provides that the witness's prior statement shall be admissible "*as evidence of any matter contained in the statement*". This innovative statutory provision should be used sparingly, bearing in mind the lack of opportunity to cross-examine or otherwise test the evidence. See observations in MacDonald v. H.M.Advocate, 1999 S.C.C.R. 146. The Appeal Court commented on the innovative nature of s. 259, and emphasized that, prior to resorting to a statement in terms of s. 259, the witness must firstly be directed to answer the questions, and secondly, asked whether he or she had made a previous statement. Then the terms of the statement should be put to the witness. Professor Gordon in his commentary at p. 151, observes that s. 259 raises concerns about the untested nature of the statement and also the fact that a single witness might be regarded as sufficient to prove the statement.

Different types of oath

Witnesses

- **Standard oath** The witness to raise right hand and repeat after judge I swear by Almighty God that I will tell the truth, the whole truth and nothing but the truth.

- **Standard affirmation –**The witness need not raise a hand, but simply repeats afterthe judge**–** I solemnly, sincerely and truly declare and affirm that I will tell the truth, the whole truth and nothing but the truth.

- **African** - Much depends on the cultural traditions of the witness, but many will agree to take the oath or to affirm.

- **Buddhist** Oaths are incompatible with the practice of most Buddhists, who will readily affirm.

- **Chinese** Unless they are Christian Chinese, they should affirm.

- **Hindu (taken on the Gita)** I swear by the Gita that I will tell the truth, the whole truth and nothing but the truth.

- **Jew (taken on the Hebrew Bible -** I.e. what Christians would call the Old Testament.**)** I swear by Almighty God that I will tell the truth, the whole truth and nothing but the truth.

- **Muslim / Followers of Islam (taken on the Qur'an)** I swear by Allah that I will tell the truth, the whole truth and nothing but the truth.

- **Rastafarian** Oftenwilling to take the oath, but may choose to affirm.

- **Sikh (taken on the Adi Granth)** – I swear by Guru Nanak that I will tell the truth, the whole truth and nothing but the truth.

- **Quaker or Moravian Witness (affirmation)** – I, being one of the people called Quakers (the United Brethren called Moravians), do solemnly, sincerely and truly declare and affirm that I will tell the truth, the whole truth and nothing but the truth.

- **Jehovah's Witness** – I swear by Almighty God Jehovah that I will tell the truth, the whole truth and nothing but the truth.

Interpreters

- **Interpreter's oath** – Often best administered by a question to the interpreter, eliciting the response "*I do*" – Do you swear faithfully to perform the duties of interpreter in these proceedings?

- **Interpreter's affirmation** – Do you solemnly, sincerely and truly declare and affirm that you will faithfully perform the duties of interpreter in these proceedings?

Jurors

- **Juror's oath** – askedby clerk of court - Do you swear by Almighty God that you will well and truly try the accused and give a true verdict according to the evidence? Jurors reply "*I do*" [See Form 14.3-A in the Criminal Procedure Rules 1996; and Form 36.10-A in the Rules of the Court of Session 1994.].

- **Juror's affirmation –** the juror to repeat after the clerk of the court - I solemnly, sincerely and truly declare and affirm that I will well and truly try the accused and give a true verdict according to the evidence [See Form 14.3-B in the Criminal Procedure Rules 1996; and Form 36.10-B in the Rules of the Court of Session 1994.].

Curators ad litem

- Curator ad litem's oath **–** Often best administered by a question to the curator, eliciting the response "*I do*" – Do you swear faithfully to perform the duties of *curator ad litem* in these proceedings?

- Curator ad litem's affirmation – Do you solemnly, sincerely and truly declare and affirm that you will faithfully perform the duties of *curator ad litem* in these proceedings?

7.Interpreting services

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*The Judicial Institute acknowledges the comments of Professor Isabelle Perez and Christine Wilson, Heriot Watt University, along with Carly Brownlie, SASLI, and Brenda MacKay, Just Sign, in relation to this chapter of the bench book.

Introduction to chapter seven

An interpreter may be required for interpreting from or into a language other than English or for interpreting for people with language difficulties. There is also ‘Sight Translation’ which is an instantaneous oral or signed interpretation of written text. There may be a need, for example, for sign language [Sign language is a system of communication using visual gestures and signs, as used by deaf people], a lip-speaker [A lip-speaker is a person who has been professionally trained to use easy-to-read lip patterns. Lip-speakers silently repeat the speaker’s message using clear lip shapes, the flow of natural speech, facial expression and gesture to aid the lip-reader’s understanding. Lip-speakers are trained to give appropriate finger-spelling support if requested to do so by the lip-reader] or palantypist [A palantypist uses a small phonetic keyboard to produce an instantaneous phonetic text of what is being said. A computer may be used to convert the phonetic input into words which are displayed on either a TV screen or projected onto a larger screen.] for people who are deaf and do not use sign language.

The word “interpretation” is the appropriate term for interpreting oral or signed evidence and “translation” is the appropriate term for translating the written word. According to Lord Bonomy’s Report, ‘Improving Practice - The Review of the Practices and Procedure of the High Court of Justiciary (2002) at paragraph 16.20:

“There is an increasing need for the services of interpreters. Since April 2002 responsibility for the provision of interpreters, where one is required for the accused in court, has lain with the Scottish Court Service. A protocol entered into by the Service with the police and the Crown specifies how the need for interpretation should be intimated to the Court. Interpreters are engaged through recognised interpreting services. The interpreters provided must all be qualified by holding the Diploma in Public Service Interpreting (DPSI). If it is not possible to instruct an interpreter who has the DPSI, the interpreting service will be asked to recommend one who is suitable for the assignment concerned, and to provide a written assessment of that interpreter in advance of the court hearing. Sign language interpreters require to be registered with the Scottish Association of Sign Language Interpreters (SASLI). It is the responsibility of the Crown to arrange for an interpreter, where one is required to take the evidence of a Crown witness. It is the responsibility of the defence to engage the interpreter, where necessary for consultation with the accused or for the presentation of the evidence of a defence witness.”

Need for judges to be aware of linguistic difficulties

Although judges are not involved in making arrangements for interpreters, it is important that they are fully aware of potential difficulties experienced by witnesses who may have only a limited ability to speak and understand English. When giving evidence, they may not always fully understand what they are being asked. It is one thing to know the basics of a language and to be able to communicate when shopping or working. It is quite another matter having to appear in court, understand questions, and give evidence. It should also be remembered that many ethnic minorities prefer to speak their mother tongue at home. Judges should therefore be alert to different language needs, and should not assume, simply because a witness has lived in Scotland for many years, that he or she does not require an interpreter.

Situations may arise where the judge has to take a proactive role, and make some effort to clarify and resolve the extent of any language difficulty faced by a witness. It is part of the judge’s function to assess an individual’s fluency and comprehension. If a judge hearing a case considers that an interpreter is required, an adjournment should be granted for that purpose. Such an adjournment will not necessarily result in the loss of the hearing or trial diet and it may be possible to make arrangements at fairly short notice, unless the language is an unusual one or the court is in a remote location.

In general, it is useful for a party to give the clerk of court advance notice that an interpreter will

be involved. The judge has to administer the interpreter's oath or affirmation. A judge may also wish to have the clerk of court check whether the interpreter and the accused or witness are indeed able to communicate, and to confirm that there are no cultural dialect or language difficulties that would preclude the interpreter from interpreting.

Criminal Cases

The right to interpretation and translation in court proceedings is 'enshrined' in Article 6 of the European Convention on Human Right. Directive 2010/64/EU on the Right to Interpretation and Translation in Criminal Proceedings places an obligation on Member States to ensure timely interpretation [Article 2(1)] in court proceedings of a sufficient quality to maintain procedural fairness [Article 2(8)]. A right of the suspected or accused person to challenge a decision can arise where interpretation is not provided in accordance with the Directive [Article 2(5)].

Crown witnesses: In criminal cases, the Crown Office and the procurator fiscal service have responsibility for instructing interpreters for Crown witnesses. It is usually the police who advise the procurator fiscal that a witness has different language needs, but a procurator fiscal or an advocate depute may also identify a need.

Defence witnesses: In criminal cases, it is the responsibility of the Defence Agent to ensure an interpreter in is attendance for any defence witnesses.

An accused person: It is the responsibility of the Scottish Courts and Tribunals Service to make arrangements for an interpreter for an accused person. Since 1 April 2002, the Scottish Courts and Tribunals Service, Saughton House, Broomhouse Drive Edinburgh, EH11 3XD, has had overall responsibility for the provision of community, foreign and sign language interpreters for accused persons, both pre- and post-conviction. Individual SCTS clerks at local courts deal with the day to day arrangements. This followed recognition that the involvement of the Crown Office or prosecutor in instructing an interpreter for an accused might be a breach of Article 6 of the European Convention on Human Rights. A copy of the "Arrangements for Instruction of Interpreters for Accused" issued by the Operations and Policy Unit and dated 18 March 2002, can be found in Appendix B to this chapter.

Protocol and code of conduct: A protocol for the instruction of interpreters for criminal court diets has been agreed between the Crown Office and the Scottish Courts and Tribunals Service. A copy of the Protocol can be found in Appendix C to this chapter. A code of conduct for interpreters has also been drawn up and these documents can be found in Appendix D below. It is not appropriate to use the same interpreter for opposing parties in criminal court cases or for the court interpreter to be used for solicitor consultations. It is also inadvisable to use the same interpreter at the time of arrest and for the ensuing court case. For sign language interpreting, two interpreters may be required where proceedings are lengthy. This is not only because of the risk of

repetitive strain injury to the sign language interpreter, but also because interpreters are at risk of 'mental drain' if they are asked to work constantly without breaks, leading to increased risk of interpreting errors due to thought processing between the spoken and visual languages.

Important Update - December 2015

It is important for the Crown (and perhaps the SCTS or defence) to consider any risk of actual or apparent bias when deciding which interpreter to instruct to interpret for a witness (or perhaps an accused). In the case of *McDougall v HMA* [2015] HCJAC 88 the complainer was profoundly deaf and had no speech. During his initial police interview his statement was interpreted by an interpreter who had assisted and supported him for 17 years. The Crown included the interpreter on the list of witnesses attached to the indictment and also instructed the same interpreter to interpret the witness' testimony during the trial. The accused's counsel objected to this prior to the trial on the basis that there was a real risk of prejudice to the accused due to the interpreter's knowledge of the complainer and of his police statement, particularly as the interpreter might be called as a witness by the Crown if any challenge as regards the accuracy of the interpretation of his police interview was made.". Although this objection was rejected by the sheriff on appeal the resulting convictions were quashed on the basis that there was a real risk of apparent bias. In addition the Appeal Court said that the sheriff ought to have regarded the potential for the interpreter being called as a witness as adding weight to the central submissions as to the inappropriateness of using the same interpreter at the trial.

When a case calls for a first or intermediate diet the presiding judge should be informed whether any witness or the accused requires the services of an interpreter. In the light of *McDougall* judges may consider it good practice at that stage to inquire whether any party has any objection or issue to raise around the choice of interpreter

Civil Cases

The interpreting service covers spoken languages interpreting for civil party litigants in the Justice of the Peace Courts, Sheriff Courts and Court of Session. Unrepresented parties who have different language needs are likely to come to the attention of the clerk who should alert the judge.

Interpreters' Qualifications: Code of Conduct

The standard of interpreters provided for court work has steadily improved, and qualifications in interpreting are now required. According to the Code of Practice, the interpreter should:

- hold a valid certificate from Disclosure Scotland at Standard level, or, for complex or sensitive cases, at Enhanced level. The procurator fiscal will advise when Enhanced Level Disclosure is preferred. Sensitive cases may include sexual offences, or cases involving a child witness or suspect; and

- hold the Diploma in Public Service Interpreting (Scottish Legal Option) or an equivalent qualification of a similar standard - for example, a qualification accredited by the Chartered

Institute of Linguists or

- hold a relevant sign language and interpreting qualification.

After administering the interpreter's oath or affirmation, it may be helpful to give the interpreter some guidance as to his or her role, and what he or she should do if any difficulty in the witness's comprehension arises, or if there is no direct translation from the language to English and vice versa. For example, a judge might emphasise that "it is important that what the witness says is interpreted exactly, word for word, and is not abbreviated or paraphrased in any way. If there is difficulty in giving an exact interpretation of either the question or the answer, just let me know." The interpreter should also tell the witness, prior to the questions being put, to answer in short passages, to enable the interpreter to interpret for the court. The proceedings should be slowed down to ensure that the interpreter catches what is being said. Special attention should be paid by all parties to the volume and clarity of speech, and to minimizing background noise. The code of conduct provided by the Scottish Courts and Tribunals Service will assist interpreters in the performance of their duties.

Lipspeakers

In relation to lipspeakers, CACDP Level 3 Certificate in Lipspeaking and Signature Level 3 Certificate in Lipspeaking are the current recognised lipspeaking qualifications.[1] Registered BSL/English interpreters who also hold Level 2 Certificate in Lipspeaking may also be employed as they would have gained knowledge and experience of the legal working environment as an interpreter. Lipspeakers with Level 2 certificates alone are not able to work in the legal domain. At the time of writing (February 2016) there are in Scotland only three lipspeakers qualified at Level 3.'

Gender of Interpreter

In certain situations the gender of the interpreter may be important. For example, a female witness having to describe a sexual assault might be embarrassed to have a male interpreter. The authority or party arranging interpretation should consider such situations before instructing the interpreter.

Need for adjourments

It should be remembered that the task of an interpreter can be a demanding one. An occasional extra adjournment may be necessary for the interpreter if there is a lengthy examination of a witness. Extra adjournments may also be necessary for users of sign language, due to the long periods of focusing required. This will include breaks for interpreters but also for other users - for example witnesses giving evidence in sign language.

Need for judicial supervision at all times

Although a judge may not be familiar with the language of the accused or the witness, he or she should be alert at all times to potential difficulties in interpretation. For example, if a witness gives a lengthy response to a question, but the interpreter gives a very brief interpretation, that brief interpretation may indicate an inexperienced interpreter who is paraphrasing rather than interpreting. It is very important that the witness has his or her answers interpreted rather than the interpreter's view about what the witness is trying to say. The Code of Conduct for Interpreters and Translators lays stress on conveying the exact meaning of what has been said without adding, omitting or changing anything: see Appendix D to this chapter. Accordingly the judge should continually monitor and assess the evidence.

Sophisticated equipment with simultaneous interpretation

While microphones, headphones, and simultaneous interpretation probably provide the best way of interpreting without delaying the progress of a case, such facilities are expensive and therefore relatively uncommon.

Language Line

Language Line has been installed in the Supreme Courts offices, sheriff clerks' and procurator fiscals' offices. If someone approaches a member of court staff and appears unable to speak English, telephone contact can be made with an interpreter in any one of 140 languages. The clerk or procurator fiscal telephones the link and, by use of conference phone facilities, three-way communication can be established.

[1] CACDP (Council for the Advancement of Communication with Deaf People) and Signature are both the same awarding body, based in England. The name was changed to Signature in around 2009.

8.Sexual orientation and gender identity

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*The Judicial Institute acknowledges the comments of James Morton and Nathan Gale, Scottish Transgender Alliance as well as Shona Simon, President of Employment Tribunals (Scotland) in relation to this chapter of the bench book.

Definitions

The following are some helpful definitions. People may choose to identify themselves using any of these labels, or none.

- **Lesbian**: a woman who is sexually attracted to other women.
- **Gay**: someone who is sexually attracted to members of the same sex. Usually applied only to men, but sometimes to women.
- **Bisexual**: a person who is sexually attracted to members of both sexes.
- **Transgender**: an inclusive umbrella term for people whose gender identity or gender expression differs in some way from the sex they were assigned at birth.
- **Gender Identity:** A person's internal and individual experience of gender, which may or may not correspond with their birth sex.
- **Gender Expression:** A person's external gender-related appearance including clothing, speech and mannerisms.
- **Gender reassignment:** A process of reassigning gender to correspond with the self-defined gender identity. Under the Equality Act 2010, people have the protected characteristic of

gender reassignment if they are proposing to undergo, are undergoing or have undergone a process (or part of a process) of gender reassignment. The Act makes it clear that it is not necessary for people to have any medical diagnosis or treatment to gain this protection; it is a personal process of moving away from one's birth sex to one's self-identified gender. Thus it could, for example, involve changes to social gender role, biological sex characteristics, taking steps to change gender in official documentation and the like.

- **Gender Dysphoria:** A recognised medical condition where a person experiences distress about their birth sex not corresponding with their gender identity.
- **Transsexual**: People who intend to undergo, are undergoing or have undergone any part of a process of gender reassignment from male to female or from female to male. Some transsexual people seek medical intervention, including hormone treatment and surgery. Others, for medical or other reasons, do not.
- **Trans Men:** People assigned female at birth who self-identify as men and are undergoing, or have undergone, transition from female to male in order to live as men.
- **Trans Women:** People assigned male at birth who self-identify as women and are undergoing, or have undergone, transition from male to female in order to live as women.
- **Non-binary People:** People who see themselves as not clearly fitting into a male or female identity and therefore are positioned out-with the traditional man/woman gender binary. Such people may instead self-identify as having complex or fluid gender identities or as having no gender.
- **Cross dressing person**: Someone who dresses as a different gender. This could be for emotional satisfaction or just because they feel more comfortable doing so. They are likely to feel a strong recurring need to cross dress but are generally happy with their birth gender and have no wish to permanently alter the physical characteristics of their bodies. (Sometimes referred to as a transvestite person.)
- **LGBT**:lesbian, gay, bisexual or transgender. This is the term in increasingly general use by, for example, the Scottish Government and other public authorities, to refer to people who have one or more of the above identities.

While LGBT people may share common experiences, it is important to remember that, as with all other communities, the LGBT community is extremely diverse. The range of occupations, ages, racial backgrounds, financial situations, family situations, lifestyles, and religious and political beliefs is as great among LGBT people as among the population as a whole.

Criminal Justice and Hate Crime

The Crown Office and Procurator Fiscal service published statistics on hate crimes reported to the procurator fiscal between 2012 and 2013. In comparison to these figures, surveys suggest that hate crime is hugely under-reported. According to the Homophobic Hate Crime: The Gay British Crime Survey 2013 from Stonewall, two thirds of lesbian, gay and bisexual people experiencing a hate crime or incident did not report it to anyone and over three quarters did not report it to the police [page 17].

LGBT Identity

Evidence suggests that most people who are LGBT become aware of their sexual orientation or gender identity very early in life. According to the British Medical Association, 'most researchers

believe that adult sexual orientation is usually established before the age of puberty' [British Medical Association, *Age of consent for homosexual men – a scientific and medical perspective* (1993)]. Many transgender people report having been aware of their gender identity in early childhood. (See Gender Identity Research and Education Society, Early Medical Treatment for Transsexual People, 2006)

It must be borne in mind that many people consider sexuality a spectrum and do not identify as either gay or heterosexual. Some individuals may not identify with any specific labels which attempt to categorise sexual orientation.

While it seems that more people are identifying as LGBT at a younger age, the issue of when and how to make disclosures about one's sexual orientation, or gender identity or history, is still a significant one for many LGBT people. The study by Plant and Plant ["Experiences and perceptions of violence and intimidation of the lesbian, gay, bisexual, and transgender communities in Edinburgh. A Report for the City of Edinburgh Council's Community Safety Unit", 1999, Moira Plant, Martin Plant et all, Alcohol & Health Research Centre, Edinburgh.] of LGBT people in Edinburgh indicates that that young LGBT people still delay "coming out" although there is a trend towards greater openness now compared to two decades or more ago. It is also important to note that people's openness about their sexual orientation or gender identity can vary across different situations. Evidence suggests that people are much less likely to be "out" in work situations than with friends, and are more open with friends than with family members.

LGBT Parents

LGBT families are increasingly common. LGBT people can be parents through a mixed-sex relationship, or may choose to become parents either as part of a same-sex couple (perhaps through artificial insemination or adoption), or in other arrangements, including single parenthood or co-parenting with friends, or by taking on parental responsibility for partners' children.

There is no evidence that the children of LGBT people experience problems associated with their parents' sexual orientation or gender identity, although some may experience some prejudice, for example in the school environment.

Experiences of Prejudice

Several studies have found that the experience of violence and discrimination is widespread among LGBT people, and that their fear of being victims of crime and discrimination is higher than that of the general population. In 2013, Stonewall commissioned YouGov to conduct a survey into the experiences of victims of homophobic crimes. A key finding was that one in six lesbian and gay people have experienced a homophobic hate crime or incident in the last three years [Stonewall, Homophobic Hate Crime: The Gay British Crime Survey 2013, 6].

According to the Trans Mental Health Study 2012 from Scottish Transgender Alliance,

SheffieldHallamUniversity and Traverse Research, almost three-quarter of transgender people have been hate crime victims, with 20% being physically assaulted.

This study and others have also found that LGBT people frequently experience discrimination or ill treatment in employment and the provision of services. From bullying at school, to poor treatment by health professionals, the police, housing associations and insurance providers, many LGBT people have reason to believe that they have not experienced equal treatment, and come to expect that they will experience further discrimination and abuse. These experiences and expectations can have an effect on the way in which LGBT people react in certain situations. They may be unwilling to disclose their sexual orientation or gender identity, and may hide facts which would make it clear. They may be unwilling to report attacks to the police, as they do not expect them to be taken seriously, or fear discriminatory treatment from the police.

Common Misconceptions

An assumption that LGBT people are any more likely to be promiscuous than non-LGBT is a discriminatory stereotype which is both outdated and baseless in fact. Just as with the population at large, some LGBT people are promiscuous, other LGBT people will be in long-term relationships, and others are celibate.

Sexual orientation is not simply defined by a person's sexual behaviour. A person may identify as gay or lesbian without having had any same-sex sexual experience. Bisexual people, may be in long-term mixed sex or same sex relationships and still retain their bisexual identity.

It is important to avoid attributing particular characteristics to someone on the basis of their sexual orientation. Not only is this behaviour based on stereotyping but it can lead to further incorrect assumptions being made, for example that a lesbian may be better able to defend herself in a hostile situation, may be more able to fight off sexual attack or will be more resilient to harassment than a heterosexual woman.

Gender and sexuality are two entirely different facets of a person's identity. Transgender people have as wide a range of sexual orientations as non trans people.

In cases of rape of a male by a male, incorrect assumptions may be made about the sexual orientation of both victim and perpetrator. A study in the United States []Groth, A., et al, Male Rape: Offenders and Victims, American Journal of Psychiatry, 137(7), pp.806-810, 1980.] found that half of all perpetrators of rape of men have had consensual sexual encounters only with women, and an additional 38% with both men and women.

There is no evidence that being gay implies a propensity to commit any particular type of crime. In particular, there is no evidence at all to link homosexuality with paedophilia and any attempt to do so should be recognised as being both inaccurate and likely to cause gross offence. Most sexual abuse of children happens in the home, is committed by someone the child knows well, and is not gender-specific. There is no evidence that gay men are more likely to abuse children than heterosexual men.

HIV is spread by unprotected sex and blood-to-blood contact (e.g. transfusions, sharing needles). While many initial cases of HIV in Britain were among gay men, sex between a man and a woman is now the fastest growing cause of new infections in Scotland, and worldwide, the vast majority of HIV infections are transmitted through sex between a man and a woman.

Another stereotype, which is known to cause great offence, is that homosexual relationships lack commitment and fidelity. Some same sex relationships do not emulate the common features of a mixed sex partnership. Judges should be mindful of this and should refrain from automatically attributing principles commonly featured in mixed sex marriages.

Sexual Orientation and Gender Identity - The Legal Context

The UK Government's Equality Act 2010 makes it unlawful to discriminate against someone because of a 'protected characteristic' which includes gender reassignment, civil partnership, sex and sexual orientation. It sets out the rights that people with these characteristics have to be protected from discrimination in areas such as employment, education, provision of goods and services and the exercise of public functions.

Human Rights Act 1998 and Scotland Act 1998

Under s 6(1) of The Human Rights Act 1998, public authorities must not act in a manner which is incompatible with the European Convention on Human Rights, unless, as a result of one or more provisions of primary legislation, the authority could not have acted differently [s6(2)]. Primary legislation must be interpreted, if possible, in a way which is compatible with the Convention [s3(1)]. Under s 29(2)(d) of the Scotland Act 1998, Scottish Parliament legislation is not law in so far as it is incompatible with the Convention.

Article 14 of the Convention prohibits discrimination in the enjoyment of the other Convention rights. Although sexual orientation is not explicitly included in article 14, the European Court of Human Rights has ruled that the article does apply to discrimination on grounds of sexual

orientation [*Salgueiro da Silva Mouta v Portugal* (2001) Fam LR 2].

Same sex couples now have an enduring right to respect for family life under domestic law as well as Article 8. Previous cases based on this article include *Smith and Grady v UK* (1999) 27 E.H.R.R. CD42 (challenge to dismissal of gay and lesbian armed service personnel on ground of sexual orientation – breach of article 8) and *Karner v Austria (2004)* 38 E.H.R.R. 24, (breach of Articles 8 and 14 to treat cohabiting same sex and missed sex couple differently in connection with tenancy matter). While now largely of historical interest they mark significant developments in the understanding of the application of article 8 in this context. The continuing development of the law in this area is shown by the provisions of the Marriage and Civil Partnership Scotland Act 2014 which gives same sex couples the right to get married.

Articles 8 and 12 (the right to marry) of the Convention formed the basis of a successful challenge at the European Court of Human Rights on the legal position of transsexual people in the UK [*Goodwin v UK* (2002) 35 E.H.R.R. 18, see also I v UK (2003) 36 E.H.R.R. 53.]. To give effect to these judgments, the Gender Recognition Act 2004 was enacted by the UK Parliament.

Public policy

Public policy with respect to LGBT people in Scotland is rapidly advancing. The Scottish Government and other public bodies have a duty to avoid discrimination against LGBT people in the provision of public services. For examples, see the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012; s. 5(2) of the Standards in Scotland's Schools etc. Act 2000 and s. 106 of the Housing (Scotland) Act 2001.

Gender recognition

The Gender Recognition Act 2004 introduced a process to enable transgender people to obtain full legal recognition of their self-identified gender. A gender recognition certificate is available to a person who has a medical diagnosis of gender dysphoria, and who has lived as their self-identified gender for at least two years and intends to do so permanently. It is not necessary to have undergone any medical gender reassignment related treatment in order to obtain gender recognition. As part of living in their self-identified gender, the person will change their name, title and gender on all their day-to-day identity documents and records, such as their bank accounts, driving licence, passport, employment records and medical records. Only their birth certificate remains unable to be changed prior to receiving a full gender recognition certificate. Public service providers, including Police Scotland, the Scottish Prison Service (See for example, the Scottish Prison Service Gender Identity and Gender Reassignment Policy) and the Crown Office and Procurator Fiscal Service, treat transgender people in accordance with the gender in which they have started living regardless of whether or not they have received a gender recognition certificate. On the issuing of a gender recognition certificate, a replacement birth certificate is issued, in the new name and gender, their self-identified gender is confirmed to be their legal

gender for all purposes and they receive increased privacy protection in regard to their gender reassignment history

All documentation other than their birth certificate, such as a driver's licence or passport, can be amended to reflect the trans person's self perceived gender as soon as they begin to live as that gender. It is always best practice to treat transgender people as the gender they identify as unless the law requires otherwise. After gender recognition is obtained, the person must be treated as their newly recognised gender, for all purposes.

Criminal law

Following changes to sexual offences law, s 1 of the Sexual Offences (Scotland) Act 2009 widens the definition of rape to include penetration by the penis of the vagina, anus or mouth of another person. This section replaces the common law offence of rape, which is restricted to vaginal penetration, with a wider offence covering vaginal, anal and oral penetration. As such, it covers conduct which would previously have been prosecuted using the common law offences of indecent assault and sodomy and, unlike the common law offence of rape, covers both female and male victims. It should be recognised that the effects of non-consensual penetration of a man are as traumatising as the rape of a female victim. There may be specific difficulties for LGBT victims of sexual attacks relating to their own and others' perception of their sexuality.

Issues of sexual orientation or gender identity may also arise in criminal proceedings when an LGBT person is the target of crime because of their sexual orientation or gender identity. Anti-social behaviour and harassment are common, and crimes of hatred against LGBT people range from verbal attacks, through sexual or other assault, to murder ["Experiences and perceptions of violence and intimidation of the lesbian, gay, bisexual, and transgender communities in Edinburgh. A Report for the City of Edinburgh Council's Community Safety Unit", 1999, Moira Plant, Martin Plant, Bill Mason, Christine Thornton, Alcohol & Health Research Centre, Edinburgh.]. The Offences (Aggravation by Prejudice) (Scotland) Act 2009 came into effect on 24 March 2010, and extends protection already in place for victims of crime motivated by racial or religious prejudice to cover LGBT and disabled people based on the victim's actual or presumed sexual orientation (towards persons of the same sex or of the opposite sex or towards both), transgender identity or disability. Section 2 states that an offence is aggravated by prejudice relating to sexual orientation or transgender identity if—

(a) at the time of committing the offence or immediately before or after doing so, the offender evinces towards the victim (if any) of the offence malice and ill-will relating to—

(i) the sexual orientation (or presumed sexual orientation) of the victim, or

(ii) the transgender identity (or presumed transgender identity) of the victim

Family law

Until recently, legal recognition of same sex relationships was provided by The Civil Partnership Act 2004. The Marriage and Civil Partnership (Scotland) Act 2014 has given same sex couples the same right to marry as mixed sex couples. All statutory provisions for mixed-sex cohabitants, living together as husband and wife, have been extended to apply also to couples of the same sex.

The Human Fertilisation and Embryology Act 2008 applies to both mixed sex and same sex couples who conceive with the help of donor sperm or embryos. Married same sex couples and civil partners are given the same rights as married mixed sex couples and same sex cohabitants have the same rights as mixed sex cohabitants. Thus from the moment of conception, same sex couples are legally recognised as parents of a child conceived during their relationship.

A transgender person who has obtained gender recognition is free to marry a person of either sex, or to enter a civil partnership with a person of the same sex. A transgender person who is married is now able to remain married while obtaining full gender recognition. If a transgender person is in a civil partnership they can now convert that civil partnership to a marriage and obtain full gender recognition.

A significant minority of LGBT people have children and this had been made easier by the commencement of the Adoption and Children (Scotland) Act 2007. Now cohabiting same-sex couples who are in "an enduring family relationship" will be able to apply to jointly adopt a child [s29]. The law regards the civil partner of a parent of a child as the step-parent of the child [Civil Partnership Act 2004, s. 246.], and under s. 30(3) of the 2007 Act, the civil partner or cohabiting same-sex partner of a parent of a child can apply to adopt that child. Alternatively, a same-sex partner of a parent may apply to court for parental rights and responsibilities for that parent's children. Parental issues involving LGBT people also arise in relation to breakdown of civil partnership, marriage or other relationship. The Salgueiro da Silva Mouta case suggests that articles 8 and 14 of the European Convention may be invoked to prevent discrimination on grounds of sexual orientation in court orders relating to parental responsibilities and rights, residence and contact [Children (Scotland) Act 1995, s. 11.].

The protections from domestic abuse provided to married persons (now including persons in a same sex marriage) and their children by the Matrimonial Homes (Family Protection) (Scotland) Act 1981 are replicated for civil partnership by the Civil Partnership Act 2004. Sections 31 and 34 of The Family Law (Scotland) Act 2006 provides that the protections for a cohabiting partners and their children, under the Matrimonial Homes Act, apply to same-sex and mixed-sex cohabitation.

Anti-discrimination law

The Equality Act 2010 makes it unlawful to discriminate "because of" sexual orientation and gender reassignment in, amongst other areas, employment and vocational training. According to the Equality Act, treating people less favourably than others because of sexual orientation or gender reassignment constitutes direct discrimination. Indirect discrimination occurs where a provision, criterion or practice, which disadvantages people of a particular sexual orientation or who have the protected characteristic of gender reassignment, is applied which is not justified as a proportionate means of achieving a legitimate aim. The ban on such discrimination applies, for example, in the employment context to terms and conditions, pay, promotions, transfers, training and dismissal.

The Equality Act protection extends to discrimination on the grounds of sexual orientation regardless of whether a person's sexual orientation is towards people of the same sex, the opposite sex or both sexes. The law protects all people from sexual orientation discrimination: lesbians, gay men, bisexuals and heterosexuals/straight people. The legislation doesn't only protect people from discrimination based on their actual sexual orientation or gender reassignment. Discrimination on the grounds of assumed or perceived sexual orientation or gender reassignment is also banned and it is not important whether that assumption is correct or not. The law also protects those people who are discriminated against because of the sexual orientation or gender reassignment of the people with whom they associate – their family members and friends.

This legislation also harassment and victimisation because of sexual orientation or gender reassignment unlawful. Harassment is defined as unwanted conduct that violates a person's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment.

Issues of Practice

Equal treatment requires that courts and tribunals apply principles of equality and fairness wherever possible.

Equal treatment requires that courts and tribunals apply principles of equality and fairness.

Deciding whether to disclose sexual orientation or transgender identity or history is a deeply personal decision and one which depends a great deal on the context in which such a disclosure would be made – someone may be happy to come out to close friends but wouldn't be comfortable doing so at work. LGBT people face a daily dilemma – whether to be open about their sexual orientation or gender identity, and risk prejudice, discrimination and the adverse judgements of others, or to keep the issue hidden and face accusations of cover-up, dishonesty, and a lack of candour. Many LGBT people are deeply fearful of the consequences of coming out. Judges should be aware that these factors may place additional burdens on LGBT witnesses, complainers and accused, and should consider what measures might be available to counteract them.

It is impossible to ascertain a person's sexual orientation or gender identity from their appearance and it is important to avoid making stereotypical assumptions. A stereotype is nothing more than a mental short-cut, leading to generalised expectations about character, and predictions about behaviour, without the effort of obtaining and assessing accurate and direct information about the person, people or situation. It is often self-sustaining and rigid. It is resistant to contrary evidence. It can influence judgement and cause injustices. To be stereotyped on the basis of sexual orientation or gender identity is just as offensive as to be stereotyped on the basis of colour. Consequently, judges must be aware of the harm done to people, and to the reputation of the judicial system, by stereotypical assumptions and homespun theories around the issues of sexual orientation and gender identity.

It is particularly important to be wary of assumptions about a person's sexual orientation or gender identity based on their appearance or behaviour. For example, sexual activity of a particular kind is not an indicator of a person's self-perceived sexual orientation.

The legal recognition of alternative family forms, for example families headed by a same-sex couple, does not undermine the institution of marriage. The suggestion that it does depends on acceptance of the proposition that to promote the rights of one category of citizen necessarily undermines those of another. That argument would seem curious if applied to the rights of women versus men, or to the rights of a racial minority versus the majority. In promoting social stability, the courts are increasingly asked to recognise diversity. The one does not preclude the other.

When courts come into contact with transgender people, the requirements of the law may conflict with the needs and interests of the person involved. Wherever possible, however, a transgender person should be treated, identified and addressed in accordance with their self-identified gender.

Prison accommodation raises specific issues for transgender people. It is now Scottish Prison Service policy to accommodate all transgender people in a prison appropriate to the gender in which they are currently living.

Conduct in Court

Judges should be alert to restrain any intrusive questioning about the sexual orientation or gender identity of a witness, a litigant or an accused person unless it is strictly relevant to real issues in the case. Judges should also be willing to use their powers to restrict reporting of names and addresses. In criminal cases, addresses may be given as care of the police in order to protect the identity of witnesses. In civil cases, addresses may be given as care of a solicitor. In each type of case, an address may be written on a piece of paper which is handed to the bench.

There may be circumstances in which it is necessary to consider the making of an order under section 4(2) of the Contempt of Court Act 1981 to preserve the anonymity of the complainer or witness who for various reasons does not wish his or her sexuality, or gender identity or history to be reported by the media.

When dealing with apparent lack of candour about sexuality or sexual identity, judges should remember that being LGBT is an individual experience that may have led to fear or concealment. It is important to identify and reject stereotyping as an evidential shortcut.

Transgender people will usually appear in court presenting in accordance with their self-identified gender. In some cases, disclosure of a person's birth assigned sex may be essential for evidential reasons. In the vast majority of cases, however, such disclosure will not be absolutely necessary, and, in any event, it should be possible to accept the person's apparent identity for nearly all court purposes.

Under section 22 of the Gender Recognition Act 2004, it is an offence for a person who has acquired information in an official capacity, to disclose information about an application for gender recognition or about a person's gender before gender recognition. There is an exception where the person agrees to disclosure, or where disclosure is for the purposes of proceedings before the court.

It is unlikely that a transvestite who cross dresses in private and sometimes in public, will cross dress in court. This may not always be the case, however. In certain circumstances the fact that a person cross dresses may be a relevant and important issue, for example as the background to an offence of violence against that person. For many people cross dressing is an inescapable emotional need. While a person who appears in public cross dressed may be at risk of experience prejudice or violence judges should be mindful that negative inferences are not drawn from behaviour that is perceived by others as provocative or high-risk.

Use of Language

Use of language is a particularly important issue. No one has the right to use the court as a forum for abuse. As in other areas of potential discrimination, people involved in the legal process should, as far as possible, be protected from offensive or clumsy labels, and should be allowed to choose their own language for describing their sexual orientation and gender identity, and the nature of their relationship or domestic arrangements. An exception to this may be where one of the issues in the case concerns the existence of prejudice (for example, where the court considers that the witness's choice of language is relevant in assessing the witness).

As a basic principle, language used to or about LGBT people should reflect how they themselves wish to be addressed or referred to. This applies particularly to the title (e.g. Mr, Ms, etc.) and first and other names of transgender people, as well as the personal pronoun used to refer to them. In the vast majority of circumstances, there will be no need to discuss the transgender status or any former name of a transgender person. The principle of "use preferred language" also applies to the words used to describe someone's sexual orientation, and their relationships and partners. Obviously, if the case concerns the existence of a prejudiced attitude, it will be necessary to address the terms in which this attitude was expressed. Any use of such language in anything other than this context, by anyone in court, should be restrained.

Further information can be found through the websites of the Equality- Network, Scottish Transgender Alliance, Stonewall and LGBT Youth.

9.Intimidated and other vulnerable Witnesses

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Vulnerability

This chapter is concerned with apprehensive witnesses in general, and with intimidated witnesses. An intimidated witness has been defined as someone who "who may experience fear or distress (sometimes relating to the nature of the crime) and/or who may be at risk of intimidation or from threat or harm from the accused, their family or supporters." [Vulnerable and Intimidated Witnesses: Review of Other Jurisdictions, published by Scottish Executive, 2002]. A final section, relevant only in criminal trials, outlines alternative ways of leading evidence from vulnerable persons and persons unfit to give evidence in court in the normal way.

The Vulnerable Witnesses (Scotland) Act 2004

The 2004 Act formalised existing special measures and provides other provisions designed to help child and adult vulnerable witnesses give the best evidence possible in the High Court, Sheriff Court and Children's Hearing Court Proceedings. The Act introduced special measures for child and adult vulnerable witnesses when giving evidence in civil cases in the Court of Session and the Sheriff Court, including fatal accident inquiries. It extended the definition of "vulnerable witnesses" in addition to those with a mental disorder to include anyone where there is a significant risk that the quality of their evidence will be diminished through fear or distress.

The Vulnerable Witnesses (Scotland) Act 2004 introduced an assumption that all children under the age of 18 are vulnerable and are automatically entitled to special arrangements in court unless a judge considers such arrangements unnecessary. Further special provision is made for child witnesses under the age of 12. Guidance packs have been provided for practitioners and explanatory books for child witnesses and their carers.

The 2004 act was enacted following widespread consultation: see for example: Report on the Evidence of Children and Other Potentially Vulnerable Witnesses (Scot. Law Com. 125); and a consultation paper issued by the Scottish Government in May 2002 entitled "Vital Voices: Helping Vulnerable Witnesses Give Evidence".Earlier statutory provisions permitted the use of CCTV, screens, and evidence on commission in criminal proceedings, provided that the court was persuaded that such measures were appropriate: for example, ss. 56-59 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990; ss. 33-35 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 and s. 271 of the Criminal Procedure (Scotland) Act 1995 (as itstood prior to the Vulnerable Witnesses (Scotland) 2004).

Victims and Witness (Scotland) Act 2014

The Victims and Witnesses (Scotland) Act 2014 received Royal Assent on the 17th of January 2014.

The Victims and Witnesses (Scotland) Act 2014 ensures that Scotland complies with Directive 2012/29/EU of the European Parliamentand of the Council of 25 October 2012 establishing minimum standards on the rights, support andprotection of victims of crime.

The aim of the Act is to improve the support available for victims and witnesses. The Act amends the Criminal Procedure (Scotland) Act 1995, the Vulnerable Witnesses (Scotland) Act 2004, the Criminal Justice (Scotland) Act 2003 and the Sexual Offences Act 2003.

The Act brings a number of changes to the law to improve the experience for victims and witness of Scotland's justice system. Some of the changes include:

- Creating a duty for justice organisations to set clear standards of service for victims and witnesses;
- Giving victims and witnesses new rights to receive certain information about their case;
- Introducing a victim surcharge, offenders contribute to the cost in order to support witnesses;
- The introduction of restitution orders;
- Improving support for vulnerable witnesses in court;
- Allowing victims to make oral submissions regarding the release of life sentence prisoners.

Definition and Terms

"Vulnerable witness": Provision is made by the Vulnerable Witnesses (Scotland) Act 2004 ("the 2004 Act") for special measures for the taking and giving of evidence of vulnerable witnesses. The definition of a vulnerable witness for the purposes of criminal proceedings is in section 271 of the Criminal Procedure (Scotland) Act 1995, amended by section 11 of the Victims and Witnesses Act 2014 ("the 2014 Act") and for the purposes of civil proceedings is in section 11 of the2004 Act, amended by section 22 of the 2014 Act.

The definition is the same for criminal and civil proceedings and the following categories of person are to be regarded as vulnerable witnesses:

- Children ("called a child witness"); those under the age of 18 on the date of commencement of the proceedings (previously under the age of 16);
- An adult witness whose quality of evidence is at significant risk of being diminished by reason of mental disorder as defined by section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003, or due to fear or distress in connection with giving evidence.

Section 11 inserts two new categories of vulnerable witness:

- “Deemed vulnerable witness”. This category includes victims of alleged sexual offences, human trafficking, and an offence the commission of which involves domestic abuse or stalking who are giving evidence in proceedings which relate to that particular offence; and
- Witnesses who are considered to be at significant risk of harm by reason only of them giving evidence.

In determining whether a person is vulnerable, the court has to take into account various factors mentioned in section 271(2) of the 1995 Act (for criminal proceedings) and section 11(2) (for civil proceedings). The degree of vulnerability may relate to a variety of factors including personal characteristics, personal circumstances, and the nature of the dispute or offence.

Section 10(e) of the 2014 Act inserts subsection (4A) into section 271 of the 1995 Act which requires the court to consider the best interests of the witness and views of the witness in deciding whether they are vulnerable either because the quality of their evidence is likely to be diminished (subsection (1)(b)) or they are likely to be at significant risk from harm in giving their evidence (subsection (1)(d)).

The EU Framework Decision on the Standing of Victims inCriminal Procedure sets out Scotland’s obligations to victims of crime and witnesses in the courts.

Common law definition

Unlike the statutory provisions relating to a vulnerable witness, at common law there is no restrictive definition of "vulnerable witness". The court also has a common law power to protect any vulnerable witness who would be placed at a disadvantage by having to give evidence in the normal way. These common law powers are not subject to a fixed definition and may apply to any“ persons who are vulnerable to attack, or fear of attack, or intimidation arising out of their giving evidence” [Hampson v H.M. Advocate, 2003 SCCR 13, at para. [7]]. For example, in *Hampson* the key witness and complainer in the case suffered from a paranoid psychosis as well as other mental health issues and was terrified of facing the three men accused of raping her. The appeal court held that the judge did have the power to allow her to testify from behind a screen. In *Hampson v H.M. Advocate* 2003 SCCR 13, at paragraph [7] the Lord Justice General (Cullen) said: “[I]t is well recognised that there are witnesses who would be placed at an unfair disadvantage by the normal procedure, and on that account are regarded as vulnerable and in need of special measures to protect them. Such witnesses may normally be found within one or more of the following groups of person, namely, first children; secondly, persons whose ability to hear, see or communicate is impaired, or who have a problem with their health, whether physical or mental; and thirdly, persons who are vulnerable to attack, or fear of attack, or intimidation arising out of their giving evidence. We have said “within” such a group or groups, since whether an individual witness should be given such protection depends on, *inter alia*, the degree of his or her vulnerability.”

Importance of Information, Support, and Environment

Information

The stress and feelings of disempowerment experienced by a witness waiting to give evidence cannot be overemphasised. Sitting in a strange building for long periods of time with limited or no information is a significant source of anxiety for witnesses. The quality of the evidence ultimately given and the attention paid to the case may be adversely affected. It is important, therefore, that a witness be given regular information about his or her appearance in court. It is doubly important in the case of an intimidated or vulnerable witness, or a complainer in a case. Witnesses appreciate being told how long they are likely to have to wait, and when they are likely to be called to give evidence. They also appreciate being told about matters which may seem routine to court staff but which are of the utmost importance to the witness – for example, that the trial has been delayed and the reason for the delay or that the accused has pled guilty. In the latter case, witnesses may appreciate an opportunity to be in court when the plea is tendered and dealt with. Follow-up information for victims of crime is equally important. Much of the responsibility for providing information lies with others such as the Scottish Courts and Tribunals Service but judges should never assume that witnesses fully understand the judicial process or their role in it. In court, judges should try wherever possible to ensure that witnesses are made aware of what is happening, for example, if an adjournment is required. Judges may also have opportunities to remind court staff and administrative staff about the need to give witnesses information, for example, by checking with the clerk of court that information about a delay has been communicated to waiting witnesses. Wherever possible, judges should encourage court and administrative staff to liaise with agencies who can assist witnesses, such as the Witness Service, and Victim Information and Advice.

Support

Many witnesses have sources of support, and are accompanied to court by family or friends. Others have little support. While such lack of support is largely beyond the responsibility of the judge, it is useful if members of the judiciary familiarise themselves with the role and function of court social workers, Victim Support, Witness Service, and other specialist agencies for example Women's Aid, and Rape Crisis which may also attend court with the people they support as part of a wider support service.

Presence of support figure in court

Before granting any request that a relative or social worker or other support person be permitted to sit near the witness while he or she is giving evidence, it is suggested that (a) the views of other parties should be ascertained; (b) confirmation should be obtained that the support person is not to be a witness in the case; (c) a seating arrangement should be made such that the support

person is sufficiently close to the witness, but does not interfere – either physically or verbally – with the evidence; (d) the support person should be warned by the court not to prompt or seek to influence the witness in any way. In McGinley v H.M. Advocate, 2001 S.C.C.R. 47, where an adult complainer in a case involving alleged sexual abuse requested the presence of her boyfriend as a support person, it was held necessary for the sheriff to give directions stressing the limited role of the support person, and warning him not to interfere with the witness's answers. A vulnerable witness application should be made to the court by the party intending to call an adult witness thought to be vulnerable. The application should include the special measures sought to facilitate the witness giving evidence [See section 271C of the 1995 Act].

The Witness Service

Following pilot projects in Ayr, Hamilton and Kirkcaldy sheriff courts, the Witness Service is now available in every sheriff court and the High Courts. Co-ordinators have been appointed in eleven "core courts" and they are responsible for running the Witness Service in that court and others in the associated cluster. To find contact details for a local Witness Service visit the online directory. Trained staff and volunteers deliver the service in every sheriff court and in the High Court. The Witness Service provides practical and emotional support to witnesses attending court for criminal trials. The Service will, however, provide support to witnesses in civil cases if asked. The Witness Service offers a variety of services including:

- pre-trial courtroom visits;
- information about court etiquette, procedures, and personnel;
- emotional support regarding any anxieties the court appearance may induce; arrangements for waiting accommodation if there are concerns regarding contact with certain persons (such as associates of an accused);
- practical advice on issues such as parking, expenses etc. as well as assistance to fill in the necessary forms;
- an assessment of the witness's needs following the case, including referral to other agencies as required;
- act as a supporter for vulnerable witnesses who require one;
- assist witnesses in accessing information after their case about the result.

They are prepared to accompany a witness into court if need be. They do not discuss the evidence with the witness

Personal problems causing the witness anxiety can be discussed well in advance of the court hearing, and appropriate arrangements made. This individualistic approach was recommended in paragraph 4(e) of the Memorandum on Child Witnesses, Lord Justice General Hope (July 1990) stated that "All children are different, and judges should take each child's particular circumstances into account before deciding what steps, if any, should be taken to minimise anxiety or distress." The Witness Service can also provide support in court, should it be required.

Victim Information and Advice

Victim Information and Advice (VIA) is the dedicated victim information and advice service within the Crown Office and Procurator Fiscal Service. Offices have been established throughout Scotland in area procurator fiscal offices. VIA aims to provide general information about the criminal justice process, and to keep individuals informed about the progress of the case that affects them. It also advises on and facilitates referrals to other agencies for specialist support and counselling as required. Specially-trained staff from a variety of related backgrounds ranging from social workers to ex-police officers ensures that a well-informed, sensitive and individual approach is taken with victims. VIA provides information only on cases reported to the procurator fiscal.

VIA works closely with other statutory agencies (for example, the police and the Scottish Courts and Tribunals Service) and also with voluntary organisations (such as the Witness Service, Women's Aid and Victim Support Scotland). The service is provided to individual victims or to groups of victims. VIA currently deals with the following categories:

- Victims in all serious cases, where the nature of the charge(s) is indicative of solemn proceedings;
- The next of kin in cases involving deaths where criminal proceedings are possible or where a fatal accident inquiry is to be held;
- The next of kin in any case where they have been invited by the procurator fiscal to discuss the circumstances of the death;
- Victims in cases of domestic abuse;
- Victims in cases with a racial aggravation and cases where it is known to the procurator fiscal that the victim perceives the offence to be racially motivated;
- Cases involving child witnesses;
- Victims in cases involving sexual offences;
- Any other victim, next of kin or witness where the procurator fiscal and the VIA officer agree that because of particular vulnerability the provision of services would be beneficial.

Security arrangements

The police force is the most likely agency to become aware that a witness is facing or is likely to face intimidation prior to, during, or after a court appearance. It is important therefore that there is good communication between police, prosecution, and court services, so that relevant information regarding a witness's needs is made available as early as possible to ensure effective planning. An intimidated witness may have to wait in a separate witness room, or be escorted to or from the court building (using a side or back entrance), or the witness may require additional security both outside and inside the court building, and possibly in the court itself. Arrangements such as special transport, police protection, and witness protection schemes, will not necessarily come to the notice of the judge. Further, as outlined below, a judge should be alert to intimidating or threatening presences in court.

Disclosure of a witness's personal details

Witnesses, and particularly witnesses who fear reprisals after giving evidence, are likely to be very concerned about having to state in open court personal details such as their home address, place of work, or school. For example, in criminal trials, a prosecutor may ask a witness if the witness's address for the purposes of the trial is "care of [the local police]"; or the witness might be asked to write an address on a piece of paper, which is then handed up to the judge [See HM Advocate v Mola 2007 SCCR 124]. Ideally, such fears should have been elicited, noted, and acted upon during preparation for the trial, and the questioner should, as a result, ask appropriately modified questions. Nevertheless there may be cases where pre-trial preparation has failed to identify a witness's fears. Judges should therefore be alert for signs of distress or discomfort on the part of a witness when being asked about personal details. If necessary, the judge should intervene. In many cases, the easiest solution is to have the information be written on a piece of paper which is handed to the judge.

Removal of certain persons from court

A judge has power to clear the court. Generally, if it becomes clear that persons in court appear to be acting in a threatening, intimidating or distracting manner with a view to influencing witnesses or jurors, a judge may consider it appropriate to instruct court staff to have those persons removed. Matters may be more difficult where the mere presence of a person or persons, without any overt behaviour, appears to be affecting a witness. The over-riding principle is that a judge is responsible for ensuring that a case proceeds without threatening or intimidating behaviour on the part of anyone in court.

Removal of an accused who misconducts himself or herself

If an accused person so misconducts himself or herself during the course of the trial that the court forms the view that a proper trial cannot take place unless the accused is removed, the court may order that he or she is removed from the court for so long as that conduct makes it necessary, and that the trial proceed in the accused's absence. If the accused is not legally represented, the court must appoint counsel or a solicitor to represent his or her interests during such an absence. See further for Solemn proceedings: s92(2) of the Criminal Procedure (Scotland) Act 1995; summary proceedings: s153(2) of the 1995 Act.

Special measures for taking evidence

Evidence on commission and special measures for taking evidence: civil proceedings

In civil actions at common law, a commission and diligence for the taking of evidence of a witness other than in court may be obtained. Such evidence may be obtained, among other reasons, (a) to lie *in retentis* (that is, kept aside in case it is needed instead of evidence at a proof) because the evidence is in danger of being lost, usually because of age or dangerous sickness, or (b) because the witness is unable to attend court because of age, infirmity or sickness [For a discussion of these, see Greens Annotated Rules of the Court of Session, notes 35.11.2 and 35.11.3; and *Macphail on Sheriff Court Practice*, 3rd ed., paras. 15.18-15.39]. Following what was decided in Hampson v H.M. Advocate 2003 SCCR 13, it may be said that in civil cases, at common law, special measures could be made for any vulnerable witnesses.

Under Part 2 of the Vulnerable Witnesses (Scotland) Act 2004, there are statutory provisions for special measures for the taking of evidence in civil proceedings of vulnerable witnesses within the meaning of that Act. These provisions are evidence on commission in accordance with section 19, live TV link in accordance with section 20, use of a screen in accordance with section 21, use of a supporter in accordance with section 22, and such other measures as Scottish Ministers may prescribe under section 18. The Children's Hearings (Scotland) Act 2011 inserts the provision of giving evidence in chief in the form of a prior statement with section 22A of the 2004 Act.

Special measures for taking evidence: Criminal Cases

At common law, following what was decided in *Hampson v H.M. Advocate*, appropriate special measures could be made for the taking of evidence of any vulnerable person. Unlike the statutory definition of vulnerable witness in section 271 of the Criminal Procedure (Scotland) Act 1995 which was substituted by section 1 of the Vulnerable Witnesses (Scotland) Act 2004 but now is substituted by section 10 of the Victims and Witnesses (Scotland) Act 2014, there is no restrictive definition of vulnerable witness at common law.

Under section 271 of the Criminal Procedure (Scotland) Act 1995, as inserted by section 1 of the Vulnerable Witness (Scotland) Act 2004, elaborate provision is made for special measures for taking the evidence of vulnerable witnesses including accused persons in criminal proceedings.

The special measures are the taking of evidence by a commissioner in accordance with section 271I of the 1995 Act, use of a live television link in accordance with section 271J, use of a screen in accordance with section 271K, use of a supporter in accordance with section 271L, the giving of evidence in chief by prior statement in accordance with section 271M and the exclusion of the public while taking evidence with section 271HB (amended by section 20 of the 2014 Act). Section 19 of the 2014 Act amends the 1995 Act to include temporary additional special measures with section 271HA.

Deemed vulnerable witnesses will be automatically entitled to the use of certain special measures known as standard special measures (previously only child witnesses had this entitlement as a matter of course). These standard special measures are the use of a live television link, a screen

(to avoid the witness seeing the accused), and a supporter. In addition, the procedures for child witnesses are expanded to encompass deemed vulnerable witnesses.

CCTV, Screens, Evidence on Commission, and Prior Statements

Common law powers: screens

As mentioned above, the court has power at common law to protect any vulnerable witness who would be placed at an unfair disadvantage by having to give evidence in the normal way. Unlike the statutory provisions, there is at common law no restrictive definition of "vulnerable witness".

As Lord Justice General Cullen observed in *Hampson* [2003 S.C.C.R 13] "[I]t is well recognised that there are witnesses who would be placed at an unfair disadvantage by the normal procedure, and on that account are regarded as vulnerable and in need of special measures to protect them. Such witnesses may normally be found within one or more of the following groups of person, namely, first, children; secondly, persons whose ability to hear, see or communicate is impaired, or who have a problem with their health, whether physical or mental; and thirdly, persons who are vulnerable to attack, or fear of attach, or intimidation arising out of their giving evidence. We have said "within" such a group or groups, since whether an individual witness should be given such protection depends on, *inter alia,* the degree of his or her vulnerability…There may be circumstances in which, however exceptionally, a witness may be entitled to give evidence anonymously and behind screens for reasons related to his safety". [at para. [7] and [8]. See also *Smith v H.M. Advocate*, 2000 S.C.C.R. 910 in which undercover police officers were permitted to give their evidence without revealing their true identities and while concealed from the public and the press by screens].

A television link (CCTV) or screens in criminal proceedings: section 271(5) and (6)

Section 271C provides that an application may be made in criminal proceedings to the High Court of Justiciary, or the sheriff court, to authorise *inter alia* the use of CCTV or screens for a vulnerable witness. The court may grant such an application on cause shown, having regard in particular to

(a) the possible effect on the witness if required to give evidence without the benefit of any special measure;

(b) whether it is likely that the witness would be better able to give evidence with the benefit of a special measure; and

(c) any other matters which make a witness vulnerable.

Section 271 permits the court to take into account the nature and circumstances of the alleged

offence to which the proceedings relate, the nature of the evidence which the person is likely to give, the relationship (if any) between the person and the accused, and the person's age and maturity. That list is not, however, exhaustive, and the court may have regard to any factor which appears relevant in a particular case. Where a live television link is to be used in proceedings in a sheriff court, but that court lacks accommodation or equipment necessary for the purpose of receiving such a link, the sheriff may by order transfer the proceedings to any other sheriff court in the same sheriffdom which has such accommodation or equipment available.

Section 12 of the 2014 Act amends section 271A of the 1995 Act to expand the meaning of a standard special measure so that, to qualify as a standard special measure, a live television link no longer has to be in another room within the court, and the use of a supporter no longer has to be only in conjunction with either a live television link or a screen (under section 271A (14) of the 1995 Act.

Evidence on commission in criminal proceedings: section 271I

Section 271I of the Criminal Procedure (Scotland) Act 1995 provides that in an application may be made in criminal proceedings to the High Court of Justiciary or the sheriff court to have a vulnerable person's evidence taken on commission, rather than in court. The commissioner must be a High Court judge in High Court proceedings or a sheriff in any other proceedings. The prerequisites and considerations for evidence to be taken on commission are the same as for a CCTV link or screens application. Proceedings before a commissioner appointed shall, if the court so directed when authorising such proceedings, take place by means of a live television link between the place where the commissioner is taking, and the place from which the witness is giving, evidence. Proceedings before a commissioner must be recorded by video recorder.

An accused must not, except by leave of the court on special cause shown, be present in the room where such proceedings are taking place; or if such proceedings are taking place by means of a live television link, in the same room as the witness, but is entitled by such means as seem suitable to the court to watch and hear the proceedings. The recording of the proceedings is received in evidence without being sworn to by witnesses. The commission may be held at the witness's home or some other suitable venue. The witness is sworn, examined, cross-examined, and re-examined, as necessary.

Use of a prior statement in criminal proceedings: sections 259, 260 and 271M

Section 271M applies where the special measure to be used in respect of a vulnerable witness is giving evidence in chief in the form of a prior statement. Prior statements can be used as the witness's evidence in chief in whole or part. Section 271M provides that a statement by a vulnerable witness lodged in evidence is admissible as, or as part of, the witness's evidence in

chief, without the witness being requested to adopt or otherwise speak to it.

Closed court: section 271(1) and section 271HB

Section 20 of the 2014 Act amends the list of special measures in section 271H(1) of the 1995 Act, to add an additional special measure of having a closed court (i.e. excluding the public during the taking of evidence from the vulnerable witness). Section 20 also inserts a new section 271HB into the 1995 Act detailing how this new special measure is to operate. This new section provides that members or officers of the court, parties to the court, counsel or solicitors or other persons otherwise directly concerned in the case, bona fide representatives of news gathering or reporting organisations present or such other persons as the court may specially authorize to be present should not be excluded from the court.

Section 20 also amends section 271F(8) of the 1995 Act so that this special measure does not apply where the vulnerable witness is the accused.

Special Measures in Civil Proceedings

Civil proceedings ["Civil proceedings" include civil proceedings in the Court of Session and the Sheriff Court, fatal accident inquiries, and applications to the sheriff court under Part II of the Children (Scotland) Act 1995] are governed by sections 11 to 23 (Part 2) of the Vulnerable Witnesses (Scotland) Act 2004. Section 11 of the 2004 Act provides the definition as to who qualifies as a vulnerable witness in civil proceedings and sets out the considerations as to whether a person is a vulnerable witness which the court must take into account. The party citing or intending to cite the witness should make a vulnerable witness application.

When assessing what special measure(s) might be appropriate, the court must have regard to (i) the best interests of the witness (taking into account any views expressed by the witness); (ii) the possible effect on the witness if required to give evidence without the benefit of any special measure: and (iii) whether it is likely that the witness would be better able to give evidence with the benefit of a special measure [s 12(7) of the 2004 act]. The provisions also apply to an adult who is a party to the civil litigation [s1 of the 2004 act].

If satisfied that the adult witness is vulnerable and that it would be appropriate to grant a special measure, the court may, in terms of section 12(6), make an order authorising a special measure, such as evidence on commission, CCTV, screens, or a supporter. The arrangements may be reviewed at any stage in the proceedings [s 13 of the 2004 act]. An order authorising a special measure may be revoked only if the court is satisfied that:

"(a) the witness has expressed a wish to give or, as the case may be, continue to give evidence

without the benefit of any special measure and that it is appropriate for the witness so to give evidence, or

(b) that - the use, or continued use, of the special measure for the purposes of taking the witness's evidence would give rise to a significant risk of prejudice to the fairness of the proceedings or otherwise to the interests of justice, and that risk significantly outweighs any risk of prejudice to the interests of the witness if the order is made." [s 13(4)].

10.Children

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A child's anxieties

Children may be apprehensive about coming to court for a variety of reasons. The unfamiliar surroundings, the formality of the proceedings, the subject-matter of the court case, the presence of a feared person or persons, a conflict of loyalties, and the task of having to answer questions put by adults in public, are just some of the factors likely to cause apprehension, particularly during cross-examination. What follows are ways in which such apprehension may be reduced.

Familiarisation with Court and Court Procedures

Visit to court

Best practice is to show a child witness the court premises and the court room before the case begins, court visits are a vehicle for relieving anxiety and are an essential part of reducing stress [See Guidance on Child Witness Court Familiarisation Visits (2003), para 8]. This is especially so during cross-examination, and particularly if an accused person chooses to represent himself or herself [Self-representation is not possible in sexual offence cases: s 288C(1) of the Criminal Procedure (Scotland) Act 1995]

The purpose of the visit is –

- for the child to see the courtroom or a similar room to that where the child will give

evidence;
- to explore possibilities of how the child will give evidence; and
- to identify and attempt to resolve measures of support not already identified and make future arrangements clear to the child.

The party citing the child as a witness is responsible for arranging a court visit in accordance with the Guidance. That party should contact the sheriff clerk (for sheriff court cases), the Justiciary Office (for High Court cases) or the Keeper of the Rolls (for Court of Session cases). Where a legal representative is conducting the visit, it would be contrary to the purpose of the visit to have other legal representatives present observing the visit. If the person conducting the visit is not the legal representative, that person will have to have some discussion with the person citing the child witness in order to be aware of the child's needs and any measures or arrangements to be used. A person may have been identified as the person who will support the child while giving evidence. That person should also be included in the court visit.

The Witness Service

A welcome development in this context is the Witness Service scheme, suggested by Victim Support. Funding became available in 1998, and pilot studies were set up in sheriff courts in Kirkcaldy, Hamilton and Ayr. Trained staff and volunteers now deliver the service in every sheriff court and in the High Court. Any witness wishing to ask questions about court procedures may seek the assistance of the Witness Service volunteers. An orientation visit may be arranged. Personal problems causing the witness anxiety can be discussed well in advance of the court hearing, and appropriate arrangements made. This individualistic approach was recommended in paragraph 4(e) of the Memorandum on Child Witnesses, Lord Justice General Hope (July 1990) stated that "All children are different, and judges should take each child's particular circumstances into account before deciding what steps, if any, should be taken to minimise anxiety or distress." The Witness Service can also provide support in court, should it be required.

Reading material

A further series of illustrated booklets entitled "Being a Witness" (June 2005) gives children, young persons, and carers some guidance in relation to criminal proceedings and children's hearings. The Scottish Government has also produced a DVD for child witnesses available from sources such as Witness Service, Victim Support, the Crown Office, and the Scottish Government.

Child's arrival at, presence in, departure from Court

Hostile factions at court

Both civil and criminal cases may bring together people who are antagonistic towards each other. Members of the press interested in the case may also be waiting in or outside the building. It is particularly important that a child witness should not be subjected to a traumatic experience by having to walk past hostile persons or through large crowds, or by having to wait in a witness-room either with or near hostile persons. Judges, court staff, parents, guardians, police and prison officers should, if possible, communicate and plan in advance, so that appropriate arrangements can be made to avoid subjecting a child to an unpleasant confrontation or experience. In the case of a child accused in a criminal case, it may be necessary to make special arrangements to enter and leave the court building by a secure or side entrance, for reasons of safety and anonymity or to arrange for the child to give evidence from another building by CCTV link, thus avoiding any possibility of having to "run the gauntlet" [See the arrangements made in the trial referred to in "Children in Court: Towards a Child Friendly Court", Dowie and Ogg, 2001 S.L.T. (News) 179, at p. 181]. In all criminal cases from 2007 special measures can be sought so as to enable children to give evidence via CCTV links from a location other than the building where the trial is being held.

A special waiting room for children

Children, whether involved in civil or criminal proceedings, may have to spend some time in a court building. A room equipped with books and toys reduces stress and helps children to wait more patiently ["Children in Court: Towards a Child Friendly Court", Dowie and Ogg, 2001 S.L.T. (News) 179, at pp. 180 and 183.] The location of the room may be important, for, as indicated above, a child should not be forced to wait either with or near hostile factions. If the court premises are limited, temporary arrangements may have to be made to accommodate particular cases, for example, using premises nearby.

Special Arrangements in Criminal Proceedings

The vulnerability of a child

The vulnerability of a child is more often related to the role which the child has played in the case, rather than to age or sex. Relatively young children may be happy to give evidence from the witness box surrounded by lawyers and officials wearing gowns and wigs, provided that their personal sense of invulnerability has not been damaged. Thus in one case, an 8-year-old boy who had witnessed part of an armed robbery, but who had not felt particularly disturbed or threatened by what he had seen, proved a confident witness in open court, requiring no special arrangements. In such circumstances, special arrangements may not be necessary. Where, however, a child is an accused person, or an alleged victim (for example of an assault, or sexual abuse, or a family breakdown), he or she is likely to be particularly vulnerable, and less able to cope with normal court arrangements. Early assessment of the child by, for example, a lawyer, or precognoscer, or another professional, together with good communication in advance of the court hearing, is advisable.

Child as vulnerable witness: special measures in criminal proceedings: Criminal Procedure (Scotland) Act 1995 sections 271A and 271D

A child under the age of 18 is deemed to be a vulnerable witness entitled to certain special measures when giving evidence in criminal proceedings. What is meant by 'under the age of 18' is that the child is under the age of 18 on the date of commencement of the proceedings in which the trial is being or to be held, namely on the date when the indictment or complaint is served on the accused [s 271(1)(a) and (3) of the Criminal Procedure (Scotland) Act 1995]. Note that a child accused is also entitled to special measures (with the exception of screens): s 271F. The special measures include:-

(a) evidence on commission: section 271I of the Criminal Procedure (Scotland) Act 1995;

(b) a live television link (CCTV): section 271J;

(c) a screen: section 271K;

(d) a supporter: section 271L;

(e) a prior statement used as the witness's evidence in chief: section 271M; and

(ea) excluding the public during the taking of evidence: section 271HB (inserted by section 20 of the 2014 Act)

(2) allowing Scottish ministers to create additional special measures by order for a temporary period: section 271HA (inserted by section 19 of the 2014 Act)

A court's common law powers to make or authorise special arrangements for vulnerable witnesses have not been removed by the statutory provisions. [Section 271G of the 1995 Act; and see Practice Note (No.2 of 2005) Child Witnesses: Discretionary Powers, set out in Appendix F]. An illustration of the exercise of common law powers can be found in Hampson v H.M. Advocate, 2003 S.L.T. 94, where permission to give evidence from behind a screen was given to a vulnerable adult who did not qualify in terms of the then existing statutory categories. Common law powers are also exercised when the court orders that gowns and wigs be removed.

Child witness notice in criminal proceedings

A party citing or intending to cite a child witness in a criminal case must lodge a child witness notice, intimating whether special measures are considered appropriate, and if so, what [Section 271A(2) of the 1995 Act]. If no special measures are sought, the notice should state that fact [s 271A(2)(b)]. The party lodging the child witness notice must intimate the notice to the other parties to the proceedings [s 271A(13)]. Where evidence is to be taken by commission, the notice should contain certain matters specified in paragraph 7 of Practice Note (No.3 of 2005) Taking of

Evidence of a Vulnerable Witness by a Commissioner: [see Appendix G].

The notice should contain or be accompanied by:-

(i) a summary of any views expressed by the child witness [Having regard to the child's age and maturity: s 271E(2)(b). A child aged 12 or older is presumed to be of sufficient age and maturity to form a view: s 271 E(3)(a)] and his or her parent (except where the parent is the accused) [Sections 271A(3) and 271E(2)(b): but where the parents' views are inconsistent with the child witness's views, the views of the child witness will be given greater weight: s 271E(3)(b)]; and

(ii) such other information as may be prescribed by Act of Adjournal [The Criminal Procedure Rules 1996 (SI 1996/513) and (Criminal Procedure Amendment No.6) (Vulnerable Witnesses (Scotland) Act 2004) (Evidence on Commission) 2005 (SSI 2005/574)]. The notice must be lodged by the required time. In the High Court, this is no later than 14 clear days before the preliminary hearing; in proceedings on indictment in the sheriff court, no later than 7 clear days before the first diet; and in any other case, no later than 14 clear days before the trial diet. A Notice may be lodged late on cause shown [Section 271A(4)].

Court's consideration of child witness notice in criminal proceedings

(1) Consideration in absence of parties (in chambers)

The court initially considers the child witness notice in the absence of the parties. The court's consideration should take place not later than 7 days after the notice is lodged [s 271A(5)]. This procedure is subject to the decision of *AMI v Dunn* 2013 J.C. 82 where the court held it was open to an accused to oppose the application prior to any grant in chambers by lodging a letter or minute of opposition in court.

Special measure: If a standard special measure [In terms of s 271A(14), the "standard" special measures are: (a) use of a live television link; (b) screens; (c) a support person in conjunction with the use of either CCTV or screens.] is specified in the notice, the court shall, subject to section 271B(3), make an order authorising that measure [Section 271 A(5)(a)(i)]. Section 271B(3) provides that the judge shall not authorise a special measure which requires the child to be present in the court-room or any part of the court building in which the court-room is located unless the judge is satisfied:

(a) that such a presence (i) accords with the child's expressed wish, and (ii) is appropriate; or

(b) the lack of such a presence would give rise to a significant risk of prejudice to the fairness of the trial or otherwise to the interests of justice, and that risk significantly outweighs any risk of prejudice to the interests of the child witness.

If a measure other than a standard measure is specified in the notice, and if the court is satisfied

on the basis of the notice that it is appropriate to do so, the court shall make an order authorising the use of that special measure, which may be additional to the standard special measures [Section 271 A (5)(a)(ii)]. For procedure where the court is not satisfied, see para. 8.15.

No special measure(s): If (i) the child witness notice states that the party citing or intending to cite the child witness considers that the child witness should give evidence without the benefit of any special measures, (ii) the summary of views accompanying the notice indicates that the child has expressed a wish to give evidence without the benefit of a special measure, and (iii) the court is satisfied on the basis of the notice that it is appropriate to do so, the court shall make an order authorising the giving of evidence without the benefit of any special measure [Section 271 A(5)(b)].

It has been noted that the use of special measures may have some disadvantages. For example, if a CCTV link is used, the jury may be unable properly to assess just how young and immature the child truly is. The lawyers asking questions may be less able to achieve a rapport with the child. On occasions there may be technical difficulties focusing the camera so that the speaker is centred on-screen.

(2) Court hearing to discuss child witness notice

Where a court is not satisfied that a non-standard measure is appropriate [Section 271A(5)(a)(ii)], or is not satisfied that it would be appropriate to have no special measure [Section 271A(5)(b)], or where the child witness notice states that no special measures are sought [Section 271A(2)(b)] but the summary of views indicates that the child has not expressed a wish to give evidence without the benefit of any special measure [Section 271A(5)(c)(ii)], the court may –

- appoint the child witness notice to be discussed at a forthcoming preliminary hearing in the High Court (or a forthcoming first diet in the sheriff court) [Section 271A(5A)(a) and (b)]; or
- if no such hearing or diet is available, appoint a diet to be held before the trial diet, and require parties to attend that diet [Section 271A(5A)(c)]. In such circumstances, the court may postpone the trial diet [s 271 A (8)]. The diet appointed for the child witness notice may be conjoined with any other diet to be heard before the trial diet [s 271A(12)].

Such a hearing may take place in chambers if the party citing or intending to cite the child witness so requests, or if the court so orders on its own motion [Section 271A(12)]. Furthermore, where it appears to the court that a party intends to call a child witness, yet no child witness notice has been lodged and no late leave for lodging has been allowed, the court shall order the party to lodge a notice within a specified time [Section 271A(6) and (7)(a)]. Alternatively the court may raise the question of special measures at a forthcoming preliminary hearing or first diet [Section 271A(7)(b)(i)] (or where none is available, at a specially appointed diet) [Section 271A(7)(b)(ii)]. In such circumstances, the court may postpone the trial diet [s 271A(8)]. The diet appointed for the child witness notice may be conjoined with any other diet to be heard before the trial diet [s 271A(12)], and may, having heard parties, either authorise the use of such special measure(s) as the court considers most appropriate, or order that the child's evidence be given without the benefit of any special measure. Again such hearings may take place in chambers.

Court's powers at the criminal hearing to discuss child witness notice

Atthe preliminary hearing, first diet, or special diet, the court, having given parties an opportunity to be heard, (a) *may,*where standard special measures have already been authorised, authorise the use of further special measures [Section 271A(9)(a)] and (b) *shall,* in any other case, authorise special measure(s), which the court considers to be the most appropriate for the purpose of taking the child's evidence [Section 271A(9)(b)(i)], or alternatively shall make an order that the witness is to give evidence without the benefit of any special measure [Section 271A(9)(b)(ii)]. The court may make such an order only if satisfied (a) where the child witness has expressed a wish to give evidence without the benefit of any special measure, that it is appropriate for the child witness so to give evidence, or (b) in any other case, that (i) the use of any special measure for the purpose of taking the evidence of the child witness would give rise to a significant risk of prejudice to the fairness of the trial or otherwise to the interests of justice, and (ii) that risk significantly outweighs any risk of prejudice to the interests of the child witness if the order is made [s 271A(10)].

Further special provision in criminal proceedings for children under the age of 12: section 271B

Section 14 of the 2014 Act amends section 271B(1) to place greater emphasis on the wishes of the child giving evidence at a hearing in relevant criminal proceedings. Where a child under the age of 12 (on the date of commencement of proceedings in which the hearing is being or to held) wishes to be present in the court to give evidence, the court must make an order requiring the child to be present unless the court considers that would not be appropriate. Where a child does not express a wish to give evidence in the court, or expresses a wish to give evidence from some other location, the court may not make an order requiring the child to give evidence in the court, unless the court considers that the child giving evidence from a location other than the court-room would result in a significant risk of prejudice to the fairness of the trial or the interests of justice and that that risk outweighs any risk of prejudice of the child witness.

Changing the special measures at any time during criminal proceedings: section 271D

Section 271D of the Criminal Procedure (Scotland) Act 1995 enables the court to alter existing special measures "at any stage in the proceedings (whether before or after the commencement of the trial or before or after the witness has begun to give evidence)" [Section 271D(1)].

The court may-

- **order** special measures where none had previously been ordered;
- **vary** special measures already ordered [Section 271D (2)(a)]. An order varying an earlier order may add to, or substitute, such special measure as the court considers most appropriate for the purpose of taking the witness's evidence;
- **revoke** special measures already ordered. The court may revoke an earlier order only if satisfied (a) where the witness has expressed a wish to give evidence without special measures, that it is appropriate for the witness so to give evidence; or (b) in any other case, that the use, or continued use, of the special measure(s) would give rise to a significant risk of prejudice to the fairness of the trial or otherwise to the interests of justice, and (ii) that risk significantly outweighs any risk of prejudice to the interests of the witness if the order is made.

This important power may be invoked by any party to the proceedings [Section 271D(1)(a) or (b)], amended by section 18 of the 2014 Act. Previously only the party citing or intending to cite the witness could invoke this power. The court must give the parties an opportunity to be heard, and may then make an order in terms of s 271D(2).

Evidence on commission in criminal proceedings: section 271I

Where evidence is to be taken by a commissioner, the court appoints either a High Court judge (in a High Court trial), or a sheriff, as a commissioner [Section 271I(7) and (8)]. In HM Advocate v Younas, Glasgow High Court, December 2007-January 2008, the Judge appointed himself as a commissioner to take the evidence of a four-year-old boy in a case involving the death of a baby.

The witness may give evidence by CCTV link [Section 271I(1A)]. Proceedings are recorded by video-recorder. The accused is not present in the room where the evidence is being taken, or in the witness CCTV room [Section 271I(3)(a)], but is entitled to watch and hear the proceedings by such means as seem suitable to the court [Section 271I(3)(b)]. At the trial, the recording of the evidencetaken on commission is received in evidence without being sworn to by witnesses [Section 271I(4)]. The proceedings before the commissioner are to be treated as if they were proceedings in court [Section 271I(5)]. A Practice Note has been issued giving detailed guidance as to procedures to be followed when seeking the special measure of evidence on commission. For example, the child witness notice should give full details of the proposed venue (arranged if necessary with the assistance of the Electronic Service Delivery Unit within the Scottish Courts and Tribunals Service), type of commissioner, times suitable to the witness, involvement of CCTV (if any), the need for breaks, the need for disabled access, how the question of identification is to be dealt with, what productions or labels may be put to the witness, whether an interpreter is required, and whether any objections to particular parts of evidence are likely [paras.7 and 8 of the Practice Note No.3 of 2005 Taking of Evidence of a Vulnerable Witness by a Commissioner (see Appendix G]].

Live television link (CCTV) in criminal proceedings: section 271J

Where evidence is to be taken by live television link (closed circuit television or "CCTV"), the court makes such arrangements as are appropriate to enable the child to give evidence from a place outside the court-room [Section 271J(1)]. The place may be within the court building, or any other suitable place [Section 271J(2)(a)]. The place is treated as part of the court-room whilst the witness gives evidence [Section 271J(2)(b)] and the proceedings are treated as taking place in the presence of the accused [Section 271J(3)]. A case may if necessary be transferred from one sheriff court building to another which has the necessary accommodation and equipment [Section 271J(4)]. Such a transfer may be ordered at any stage of the proceedings, whether before or after the commencement of the trial [Section 271J(5)(a)]. A transfer may also be ordered in relation to any part of the proceedings [Section 271J(5)(b)].

How to operate CCTV

In court, the judge has two TV screens. The first screen shows the child sitting in the link room. A small inset on that screen also shows the images being seen by the child on the TV screen in the link room. The judge's second screen gives an overview of the link room, so that all activity (for example, inappropriate prompting from a support person) can be monitored and if necessary controlled. The prosecution, the defence, and the jury, have screens showing the child only. They do not have an overview of the link room. The judge has the control panel for the whole system, with buttons marked "on/off", J (judge), P (prosecution), and D (defence). It is for the judge to press the appropriate button to bring the image of judge, prosecution or defence, as required, to the child's screen; but the image on the screens viewed by prosecution, defence and jury is invariably that of the child. If, in the course of evidence, an objection is raised, the judge should explain to the child that a legal point has to be discussed, and that the television will be switched off for a few minutes. The judge should try to avoid giving the impression that the child has done something bad, or is at fault in some way, causing the interruption. Training is available from the Judicial Institute in relation to the law, theory and mechanics of using remote screens.

Screens in criminal proceedings: section 271K

This special measure involves positioning a screen in court such that the accused is concealed from the sight of the child witness [Section 271K(1)]. The screen is usually made of some solid material, such as wood. However the court must make arrangements to ensure that the accused is able to watch and hear the child witness give evidence [Section 271K(2)]. In practice, a CCTV camera is focused on the child witness, projecting an image onto a visual display unit (VDU) viewed by the accused. The wooden screen concealing the accused from the sight of the child witness does not affect the judge and jury, who have a full view of both accused and child.

Supporter in criminal proceedings: section 271L

A support person ("supporter") may be nominated by or on behalf of a child witness, to be "present alongside the witness to support the witness while the latter is giving evidence" [Section 271L]. If the person nominated is to give evidence at the trial, that person may not act as supporter at any time before giving evidence [Section 271L(2)]. The supporter must not prompt or otherwise seek to influence the witness in the course of giving evidence [Section 271L(3)],and the court may wish to warn the supporter accordingly [See para.6 of Lord Justice General Hope's Memorandum of July 1990 (set out in Appendix E)]. In *McGinley v H.M. Advocate*, 2001 S.L.T. 198, where an adult complainer in a case involving alleged sexual abuse requested the presence of her boyfriend as a support person, it was held necessary for the sheriff to give directions stressing the limited role of the support person, and to warn him not to interfere with the witness's answers. In terms of s 271M(5), "statement" has the meaning given in s 262(1) of the 1995 Act, namely: " a statement includes –

(a) any representation, however made or expressed, of fact or opinion; and

(b) any part of a statement, but does not include a statement in a precognition other than a precognition on oath".

A statement is "contained in a document where the person who makes it – (a) makes the statement in the document personally; (b) makes a statement which is, with or without his knowledge, embodied in a document by whatever means or by any person who has direct personal knowledge of the making of the statement; or (c) approves a document as embodying the statement" [s 262(2)].

The seating arrangement should be such that the supporter is sufficiently close to the child, but does not interfere, either physically or verbally, with the child's evidence.

Prior statement to constitute evidence in chief in criminal proceedings: section 271M

Section 271M permits the prior statement of a child witness (for example, a statement given to a police officer) to be used as the witness's evidence in chief. The previous statement is lodged, and will be admissible as the whole or part of the witness's evidence in chief. The witness does not have to adopt the statement or otherwise speak to it when giving evidence in court [Section 271M(2)]. Section 260 applies to the prior statement, with some modifications [Section 271M(3)]. For example, the statement must be contained in a document; and there is special provision for precognitions on oath and statements made in other proceedings: s. 260(2) to (4) as modified.Section 271M does not affect the admissibility of any statement admissible other than by virtue of section 271M(4).

Child witness abroad: section 273

If a child witness has to give evidence in a criminal trial, but is abroad, an application for a live television link may be made by letters of request in terms of section 273 of the Criminal Procedure (Scotland) Act 1995.

Methods of identifying an accused in criminal proceedings involving CCTV, screens or evidence on commission: section 281A

Section 281A(1) of the Criminal Procedure (Scotland) Act 1995 provides;

"(1) Where in a trial the prosecutor lodges as a production a report naming –

(a) a person identified in an identification parade or other identification procedure by a witness, and

(b) that witness,it shall be presumed, subject to subsection (2) below, that the person named in the report as having been identified by the witness is the person of the same name who appears in answer to the indictment or complaint.

(2) That presumption shall not apply –

(a) unless the prosecutor has, by the required time, served on the accused a copy of the report and a notice that he intends to rely on the presumption, or

(b) if the accused -

(i) not more than 7 days after the date of service of the copy of the report, or

(ii) by such later time as the court may in special circumstances allow, has served notice on the prosecutor that he intends to challenge the facts stated in the report.

(3) In subsection (2)(a) above, "the required time" means-

(a) in the case of proceedings in the High Court –

(i) not less than 14 clear days before the preliminary hearing; or

(ii) such later time, being not less than 14 clear days before the trial, as the court may, in special circumstances, allow;

(b) in any other case, not less than 14 days before the trial."

Other methods of identification of an accused in criminal proceedings involving CCTV, screens or evidence on commission

Other methods of identification are also available. For example –

- Joint minute.
- Where an offence is alleged to have been committed in any special capacity such as the father of a child, and the child refers to his or her father while another adult gives evidence that the accused is the child's father: s 255 of the 1995 Act, and P v Williams, 2005 S.L.T. 508.
- Muldoon v Herron, 1970 J.C. 30: presumably if the prosecutor has failed to serve the necessary notice in terms of s 281A, it is still possible to lead the evidence of police officers who saw the child witness identify the accused as the perpetrator at an identification parade.
- It is also arguable that, where there has been failure to serve the necessary notice in terms of s 281A, it is open to the prosecutor to seek a variation of the special measures in terms of s 271D for the limited purpose of allowing the child to enter the court-room to attempt to identify the perpetrator. However such an approach may have disadvantages: for example, the child still has evidence to give in cross-examination and re-examination, yet the presence of the alleged perpetrator may cause the child to become distressed and unable to continue: cf. observations in Brotherston v H.M. Advocate, 1996 S.L.T. 1154.
- While it is in theory possible for the child to remain in the link room while the camera relaying the court-room image to the child is panned around the court-room and the child is then asked to say if the perpetrator is there, that particular approach has not been tested in practice.

Child witness refusing to co-operate in criminal proceedings: section 259

Section 259 of the Criminal Procedure (Scotland) Act 1995 permits the prior statement of, *inter alios*, a child witness to be admitted in evidence where the judge is satisfied that the child has:

- refused to accept the judge's admonition to tell the truth (or, having been so admonished, refused to give evidence); or
- refused to take the oath or affirmation (or, having been sworn or having affirmed and having been directed by the judge to give evidence in connection with the subject-matter of the statement, refused to do so).This innovative statutory provision should be used sparingly, bearing in mind the lack of opportunity to cross-examine or otherwise test the evidence. See the observations in MacDonald v H.M. Advocate, 1999 S.C.C.R. 146, where the accused was charged with shameless indecency, and three 8-year-old witnesses became distressed and refused to answer questions. The Appeal Court commented on the innovative nature of s 259, and emphasised that, prior to resorting to a statement alone in terms of s 259, the witness must firstly be directed to answer the questions, and secondly, asked whether he or she had made a previous statement. Then the terms of the statement should be put to the witness. Professor Gordon in his commentary, at p. 151, observes that s 259 raises concerns about the untested nature of the statement and also

the fact that a single witness might be regarded as sufficient to prove the statement.

Child as accused person: section 271F(2)

In terms of section 271F(2), an accused person under the age of 16 is entitled to certain special arrangements in court. However he is not entitled to the use of screens [Section 271F(8)(a)].Moreover if his evidence is to be taken by commission, section 271I(3) does not apply.

Special arrangements in civil proceedings

Court's powers at common law in civil proceedings

At common law, a judge has power to regulate proceedings and in particular the manner in which witnesses may give their evidence [Hampson v H.M. Advocate, 2003 S.C.C.R. 13, Lord Justice General Cullen at para.[9]: "It is plain that the court has the power, and indeed the duty, to [regulate its proceedings including the manner in which witnesses may give their evidence] when this is necessary in order to meet the requirements of justice in the particular case."]. For example, a judge has the power at common law to permit a child witness to give evidence seated in the well of the court rather standing or sitting in the witness box. A judge also has power to allow a child witness to sit behind a screen; to order lawyers to remove gowns and wigs if that is thought to be helpful in putting a child witness at ease; to permit a support person to sit near a child witness; probably to grant an application to take a child witness's evidence on commission; and possibly even to clear the court to avoid undue anxiety or distress to the child witness. It is thought that the judge's common law powers do not extend to ordering a CCTV link in a civil case, or permitting the use of a child witness's prior statement to be used as evidence in chief.

Court's statutory powers in civil proceedings

Civil proceedings are governed by sections 11 to 23 (Part 2) of the Vulnerable Witnesses (Scotland) Act 2004 as amended by section 176 of the Children's Hearings (Scotland) Act 2011. In contrast with criminal proceedings (where there is an assumption that a child witness requires special arrangements in court), in civil proceedings the court's duty is to make an order.

A child aged under 12 years is not put on oath, but is simply admonished to tell the truth [Cf. Quinn v Lees, 1994 S.C.C.R. 159]. Since 1 April 2005, it is no longer the function of the judge to conduct a preliminary examination (the competency test) of the child to assess whether he or she is competent to give evidence. Competency is being capable of understanding the question, and of responding with an appreciation of the difference between truth and lies: *cf. dicta* of Lord Hamilton in *L v L,* 1996 S.L.T. 767.Section 24 of the Vulnerable Witnesses (Scotland) Act 2004

(asp3) provides:

"(1) The evidence of any person called as a witness (referred to in this section as "the witness") in criminal or civil proceedings is not inadmissible solely because the witness does not understand -

(a) the nature of the duty of a witness to give truthful evidence, or

(b) the difference between truth and lies.

(2) Accordingly, the court must not, at any time before the witness gives evidence, take any step intended to establish whether the witness understands those matters."

Children aged 12 or 13 may be put oath

The court has to check that the child understands the procedure of taking an oath in court to tell the truth. If the court is satisfied, the oath or affirmation may be administered. Otherwise the court has to obtain the child's promise to tell the truth [Quinn v Lees, 1994 S.C.C.R. 159].

Children aged 14 or over put on oath

The court should normally administer the oath or affirmation. No preliminary investigation is usually necessary.

Microphones in court for small voices

Children often have difficulty projecting their voices, and judges and juries can become frustrated when they cannot hear. Arrangements for electronic amplification (now standard in many court buildings) can avoid or reduce this problem [Cf. para. 4 (f) of Lord Justice General Hope's Memorandum on Child Witnesses, July 1990 (see Appendix E). See now para. 6(g) of Practice Note No 2 of 2005 (Child Witnesses: Discretionary Powers) (see Appendix F)]. Some courts offer "lapel" microphones, attached to the witness's clothing.

Seating Arrangements: Position of child in court

Child as party: Where a child is a party to a civil case, he or she should probably sit beside or behind his or her lawyer, if the court-room layout permits.

Child as witness: If a child is giving evidence in court, the judge might consider coming down from the bench and sitting at the same level as the child. It may, however, be felt that the judge should remain on the bench (a) to maintain an overview of proceedings generally; (b) to be able to observe the behaviour and demeanour of all concerned; and (c) to avoid inadvertently overhearing instructions or comments passing between the child and his or her lawyers [see "Children in Court: Towards a Child Friendly Court", Dowie and Ogg, 2001 S.L.T. (News) 179, at p. 182]. In a criminal trial, a vulnerable child witness is often best seated in the well of the court, directly in front of the jury, facing the judge, with his or her back to the accused. Alternatively, if a child would prefer to remain in the witness box, the questioner (whether counsel, solicitor, or solicitor-advocate) might be best positioned near the bench, so that the child is able to face towards the judge (and jury, if any) and away from the accused.

Child as accused: Where a child is an accused in a criminal trial, there is often a preliminary hearing before the trial judge, to consider what special arrangements should be made for the child. Such arrangements may be made whether or not there are adult co-accused. The child may be permitted to sit beside his or her lawyer, rather than in the dock, and may simply move to another position (still at floor level) when giving evidence [Page 182 of "Children in Court". In the trial described in that article, in Glasgow High Court, a table was placed in front of the dock. The two accused aged under 16 years sat at the table, accompanied by their solicitors. The judge and jury had a clear view of the children. The children's solicitors were able to help them to follow proceedings. The children's counsel sat separately, at the bar of the court. All the child witnesses (including the two accused children) gave evidence seated at another table located in front of the jury box]. The court must have regard to the welfare of the child accused and to the question whether he should be removed from undesirable surroundings [section 50(6) of the Criminal Procedure (Scotland) Act 1995].

Presence of child psychiatrist or psychologist

It may be appropriate to grant an application to have a child psychiatrist or child psychologist present in court to monitor the well-being of a child giving evidence.

Frequent breaks

The judge should ask the child to indicate if or when he or she requires a break. Alternatively, the court may agree at the outset to adjourn every hour or so. In the trial described in the article "Children in Court: Towards a Child Friendly Court", Dowie and Ogg, 2001 S.L.T. (News) 179, at p.182, child psychologists' recommendations to sit for no longer than 40 minutes at a time, with 20 minute breaks, were adopted. Although not applicable in Scotland, a Practice Direction issued by the Lord Chief Justice for England and Wales, Lord Bingham in 2000 suggests: "12. The trial should be conducted according to a timetable which [takes] full account of a young defendant's inability to concentrate for long periods. Frequent and regular breaks [will] often be appropriate." The Practice Direction can be found at [2000] 1 W.L.R. 659.

Gowns and wigs

Many children are familiar with gowns and wigs, having watched television and films. In some cases, therefore, there may be little to be gained by ordering that gowns and wigs be removed. In certain cases, however, a vulnerable child may find the gowns, robes and wigs intimidating. Early assessment of the child is advisable (by, for example, the precognition officer, or a police officer, or a court official who has supervision of the child during court proceedings). Thereafter good communication is essential, and the court has discretion to permit gowns and wigs to be removed during the child's evidence [Para. 3(a) of Lord Justice General Hope's Memorandum on Child Witnesses, July 1990 superseded by para 5(a) of Practice Note (No.2 of 2005) (see Appendix E and Appendix F to this chapter). In the trial referred to in the article "Children in Court: Towards a Child Friendly Court", Dowie and Ogg, 2001 S.L.T. (News) 179, at p.182, the judge, clerk, macer, counsel, and police were all informally dressed.]

Calling the case

In a criminal trial, if a child is an accused person, it may be advisable to arrange to have the case called over the tannoy *without* using the name of the child accused, thus preserving his or her anonymity. "Children in Court: Towards a Child Friendly Court", Dowie and Ogg, 2001 S.L.T. (News) 179, at p.184: "The calling of the case over the court tannoy was adapted to exclude the name of the child accused, the format used being "Continued trial before Lord Carloway court 6".

Clearing the court

In terms of section 50(3) of the Criminal Procedure (Scotland) Act 1995, where a child is called as a witness in a case relating to "an offence against decency or morality", the court may, during the child's evidence, exclude from the court room everyone except –

(a) members or officers of court,

(b) parties to the case, their counsel or solicitors, or persons otherwise directly concerned in the case,

(c) *bona fide* reporters present for the purpose of preparing a contemporaneous report of the proceedings, or

(d) anyone specially authorised by the court to be present (for example, a support person).

In terms of section 92(3) of the 1995 Act, "From the commencement of the leading of evidence in

a trial for rape or the like the judge may, if he thinks fit, cause all persons other than the accused and counsel and solicitors to be removed from the court-room."

In any other case, the judge may clear the court to avoid undue anxiety or distress to the child.

Responsible members of the press are not normally excluded.

Removal of an accused who misconducts themselves

If an accused so misconducts himself during the course of a trial that the judge forms the view that a proper trial cannot take place unless the accused is removed, the judge may order that he or she is removed from the court for so long as that conduct makes it necessary, and that the trial proceed in the accused's absence [Solemn proceedings: s 92(2) of the Criminal Procedure (Scotland) Act 1995; summary proceedings: s 153(2) of the 1995 Act.]. If the accused is not legally represented, the judge must appoint counsel or a solicitor to represent his or her interests during such an absence.

Restricting numbers in court

In Scotland, it is rare for steps to be taken to restrict numbers in court(as distinct from clearing the court). In England and Wales, however, Lord Chief Justice Bingham's Practice Direction in 2000 suggests: "14. The court should be prepared to restrict attendance at [a trial involving a child accused] to a small number, perhaps limited to some of those with an immediate and direct interest in the outcome of the trial. The court should rule on any challenged claim to attend. 15. …The court might restrict the number of those attending in the court-room for the purpose of reporting the trial…where access to the court-room by reporters was restricted, arrangements should be made for the proceedings to be released, audibly and if possible visually, to another room in the same court complex to which the media [has] free access." [[2000] 1 W.L.R. 659]

Conduct During Case

Supporting Child Witnesses Guidance

The "Guidance on the Questioning of Children in Court" [part of the "Supporting Child Witness guidance pack" in 2003 (updated in 2006)] contains suggestions for the conduct of the case. First, it identifies the importance of pre-hearing preparation for identifying the issues in the case. This is important so that the court and the parties are aware of the respective positions of the parties in relation to the evidence that the child may give, thus avoiding duplication of questions. Consideration of necessary arrangements should have been dealt with at the preparation stage.

The Guidance goes on to give advice about conduct of the examination of the child witness.

The Guidance [para. 5] states that it is the duty of the court to ensure a fair hearing, but to protect the interests of a child witness consistent with that duty. It suggests [para. 7] that the court will be sensitive to the need to ensure that children are questioned appropriately. The court has power to disallow questioning that (1) is irrelevant to the issue, (2) has no object other than to insult the witness, (3) is intended to or has the effect of harassing the witness, (4) has as its purpose the making of a comment rather than eliciting a fact and (5) involves repetition of a question already answered.

The Guidance states that it is the duty of the practitioner appearing before the court to ensure that children giving evidence are caused as little anxiety and distress as possible [para 6]. Guidance is given about the conduct of examination, cross-examination and re-examination [paras 17 to 20]. The Guide to Professional Conduct of Advocates and the Solicitors (Scotland) Rules of Conduct for Solicitor Advocates [Fifth edition, October 2008, at para 6.4.2] provide that in the examination and cross-examination of witnesses, the practitioner is in a privileged position which he or she should not abuse.

Simple language

Simple language and clear instructions will assist in putting a child witness at ease. A judge should be ready to explain procedural steps in simple words. If an objection is taken in the course of evidence necessitating submissions outwith the presence of the jury or the child witness, and the child has to leave court (or remain in the CCTV link room with a blank TV screen), the child should not be made to feel at fault in any way. It should be explained that a point of law has to be discussed, and that the child will have to leave court (or wait in the CCTV link room) for a short period. If, in the course of evidence, a child obviously does not understand a word or a question, yet seems too shy to admit it, the judge might wish to intervene with an explanation of the word, or an alternative phrase.

Disclosure of child's personal details

A child may be very concerned about having to state in open court personal details such as home address or school. Such fears should have been elicited, noted, and acted upon during preparation for the trial, and the questioner should, as a result, ask appropriately modified questions. For example, in criminal trials, a prosecutor may ask a child witness if his or her address for the purposes of the trial is "care of [the local police]". Nevertheless there may be cases where pre-trial preparation has failed to identify a witness's fears. Judges should therefore be alert for signs of distress or discomfort on the part of a child witness when being asked about personal details. If necessary, the judge should intervene. In many cases, a workable solution is to suggest that the information be written on a piece of paper which is handed to the judge.

Distress during evidence

If a child witness becomes distressed, an adjournment may be appropriate. The extent to which a judge may personally intervene or offer reassurance to a child is a difficult and often contentious area. In Black v Ruxton, 1998 S.C.C.R. 440 where a sheriff advised a distressed child witness when she returned to court that he was there to protect her and would stop the defence solicitor asking any distressing questions, it was held *inter alia* that it is the duty of the court to protect witnesses against harassing questions while at the same time allowing the defence properly to develop any appropriate line of cross-examination; that it was sometimes a fine line to draw, but that there was nothing wrong in the court telling a witness she would be protected in that way; and further, that, looking at the matter objectively, a reasonable observer would not take the view that the sheriff had pre-judged the issue in any way; and appeal refused. In McKie v H.M. Advocate, 1997 S.L.T. 1018; where a sheriff comforted a tearful 9-year-old witness, the appeal court observed "… it is perhaps unfortunate that [the sheriff] had not gestured to the carer to intervene at the beginning instead of intervening himself …". Consideration may have to be given to the question whether or not to intervene to prevent hostile or aggressive questioning.

Press Reporting In Cases Involving Children

Mandatory prohibition in criminal cases

Section 47(1) of the Criminal Procedure (Scotland) Act 1995 has been amended by section 15 of the 2014 Act. Restrictions on reporting proceedings involving children now apply to a person under 18 rather than under 16 as was previously the case. Section 46 of the 1995 Act puts certain restrictions on newspapers to prevent them revealing the identity of persons under 18 who are involved in criminal proceedings (as the person against or in respect of whom the proceedings are taken, or as a witness). This provision prohibits the publication of protected information, or an address of school as being of such a child. However, the court has discretion to dispense with these requirements if it is satisfied that it is in the public interest to do so. The provisions also apply to sound and television programmes.

Discretionary prohibition in criminal cases

In terms of section 47(3) of the 1995 Act, the restrictions do not apply where the child is concerned only as a witness and no-one against whom the proceedings are taken is under 18. The court *may*, however, direct that the restrictions apply. If the court chooses to do so, the court must specify the child in respect of whom the direction is made. This should be done in open court, duly recorded in any record of proceedings, and authenticated by the clerk's signature [See, for example, Frame v Aberdeen Journals Ltd, 2005 S.L.T. 949].

Dispensing with prohibition, whether mandatory or discretionary, in criminal proceedings

Section 47(3) of the 1995 Act provides that the court may, at any stage of the proceedings, if satisfied that it is in the public interest to do so, dispense with the restrictions in whole or in part. If the court does so, it must specify the child in respect of whom the direction is made, and the extent to which the restrictions are dispensed with. Again the question should be dealt with in open court, duly recorded in any record of proceedings, and authenticated by the clerk's signature. [See, for example, Frame v Aberdeen Journals Ltd, 2005 S.L.T. 949]. Careful consideration should be given before taking this step.

General powers in civil and criminal cases

In terms of section 4(2) of the Contempt of Court Act 1981, the court may "where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in [legal proceedings being held in public], or in any other proceedings pending or imminent, order that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose".

Section 46 of the Children and Young Persons (Scotland) Act 1937 as amended and extended (to television and radio broadcasts) by Schedule 20 to the Broadcasting Act 1990 provides:

"(1) In relation to any proceedings in any court … the court may direct that –

no newspaper report of the proceedings shall reveal the name, address, or school, or include any particulars calculated to lead to the identification of a person under the age of seventeen years concerned in the proceedings, either as being the person by or against or in respect of whom the proceedings are taken, or as being a witness therein;

(a) no picture shall be published in any newspaper as being or including a picture of a person under the age of seventeen years so concerned in the proceedings as aforesaid;

except in so far (if at all) as may be permitted by the direction of the court.

(2) Any person who publishes any matter in contravention of any such direction shall on summary conviction be liable in respect of each offence to a fine …"

It is also worth noting that section 1 of the Judicial Proceedings (Regulation of Reports) Act 1926 provides:

"(1) It shall not be lawful to print or publish, or to cause or procure to be printed or published –

(a) in relation to any judicial proceedings any indecent matter or indecent medical, surgical or physiological details being matter or details the publication of which would be calculated to injure public morals;

(b) in relation to any judicial proceedings for dissolution of marriage, for nullity of marriage, or for judicial separation, [or for the dissolution or annulment of a civil partnership or for the separation of civil partners][1], any particulars other than the following, that is to say:-

(i) the names, addresses and occupations of the parties and witnesses;

(ii) a concise statement of the charges, defences and countercharges in support of which evidence has been given;

(iii) submissions on any point of law arising in the course of the proceedings, and the decision of the court thereon;

(iv) the summing-up of the judge and the finding of the jury (if any) and the judgment of the court and observations made by the judge in giving judgment:

Provided that nothing in this part of this subsection shall be held to permit the publication of anything contrary to the provisions of paragraph (a) of this subsection…"

No person shall publish any matter in respect of proceedings before a sheriff in relation to a child protection order, an exclusion order, review of grounds of referral or an appeal under Part II of the Children (Scotland) Act 1995 which is intended or likely to identify a child concerned in, or any other child connected (in any way) with, those proceedings or any address or school as being that of any such child [Section 44(1) of the 1995 Act]. Under section 44(2) it is an offence to publish such material. Section 44(1) of the Children (Scotland) Act 1995 has been amended by Article 2 of the Children and Young People (Scotland) Act 2014 (Consequential and Saving Provisions) Order.

Appointment of Curator ad Litem & Safeguarder During Court Case

Protection of child's interests during court proceedings

A *curator ad litem* is a guardian appointed by the court to protect the interests of a party lacking full capacity in a litigation. Such an appointment may be made at the court's discretion [*Kirk v. Scottish Gas Board,* 1968 S.C. 328; *Brianchon v Occidental Petroleum (Caledonia) Ltd* 1990 S.L.T. 322], and may be made by the court of its own motion [*Drummond's Trs. v. Peel's Trs,* 1929 S.C. 481, at p.518: see generally commentary in the Annotated Rules of the Court of Session, note 13.2.2(B)(4)].

A safeguarder is a person, normally with a relevant professional background in law, social work or teaching, appointed by the court to safeguard the interests of a child in child welfare proceedings.

Role of Appropriate Adults during Court Case

This guidance is intended for use by an appropriate adult when attending court for a live hearing or trial in the presence of a judge, sheriff or JP (the judge). The guidance does not apply to an

appropriate adult attending court as a witness. The guidance is not intended to cover the situation when the judge is off the bench (pre-trial or during an adjournment), though it may incidentally touch on this issue. This guidance relates only to best practice, in a live court situation, with a vulnerable accused who has a mental disorder (including people with a learning disability) and communication difficulties.

The judge is under a very important legal obligation to ensure that the accused receives a fair trial. This includes being satisfied that the accused understands and follows what happens at all stages of the hearing or trial procedure. To facilitate this understanding the judge may authorise steps that include the following:- The appropriate adult should provide reassurance to the accused during the proceedings.

1. In advance of the trial, the judge, defence team and appropriate adult may agree arrangements including the length of evidence sessions and the frequency and duration of any breaks.
2. The appropriate adult should sit close to the accused who will be in the dock and explain when necessary, as quietly as possible, what is happening and being said during the proceedings. If the accused does not understand an aspect of the proceedings the appropriate adult should explain this to him or her. The appropriate adult should not provide a running commentary on the evidence. This could distract the jury (if present), other witnesses and the accused.
3. The appropriate adult should report to the defence team (solicitor, solicitor advocate and/or counsel), any difficulty or distress the accused is experiencing during the proceedings. This may best be done during an adjournment or if urgent by passing a short written note to the accused's solicitor. It is the responsibility of the defence team to assess and convey the content of this note to the judge, if appropriate. Any distress may be obvious in which case the judge will deal with it directly by inquiry of the defence team and/or adjournment.
4. If the accused elects to give evidence, (a decision made by the defence legal team in conjunction with the accused), **the appropriate adult plays no active role while the accused is in the witness box giving evidence**. Responsibility for ensuring that the accused understands the questioning while he or she is giving evidence is entirely for the judge.
5. If the evidence of the accused is interrupted by an adjournment, the appropriate adult cannot discuss with the accused the evidence the accused has given or will give to the court, before or after the adjournment. No witness, including an accused, can discuss his or her evidence with any other person during an adjournment.
6. If the accused, as a vulnerable witness, requires special measures to facilitate giving evidence, the defence team will apply to the court for these in the usual way, before trial. The decision to grant these, or not, is the responsibility of the judge who hears the application.
7. There is no rule that prevents an appropriate adult being a supporter, by way of a special measure, while the accused gives evidence. Equally the supporter may be someone other than the appropriate adult. If the appropriate adult *does* fulfil the role of supporter, the appropriate adult cannot communicate, in any way, with the accused while he or she is giving evidence in chief, during cross examination or re-examination. During this stage of the trial the accused is alone before the judge and/or jury like any other witness. To intervene during the evidence of the accused in any way would result in a warning from the trial judge not to do this and, if wilfully persisted in, would risk constituting a contempt of court.

If the judge makes a ruling that modifies or contradicts this guidance that ruling must be obeyed.

The Views of Children in Civil Proceedings

Special provision has been made in relation to actions which may affect children, enabling their views to be taken into account in certain circumstances, whether or not they are cited as witnesses. Section 11(7) of the Children (Scotland) Act 1995 provides:

"Subject to subsection (8) below in considering whether or not to make an order under subsection 1 above, and what order to make, the court…(b) taking account of the child's age and maturity, shall so far as practicable – (i) give him an opportunity to indicate whether he wishes to express his views; (ii) if he does so wish, give him an opportunity to express them; and (iii) have regard to such views as he may express."

Appropriate provision for intimation to children has been made by rules of court [The Rules of the Court of Session 1994, rr. 49.8(1)(h), 49.8(7), and Form 49.8-N; and see the sheriff court Ordinary Cause Rules 1993, rr. 33.7(1)(h), 33.7(7), and Form F9.]. The court may dispense with intimation where the child is too young. Note that There is a statutory presumption that a child aged 12 or over is of sufficient age and maturity to form a view: s. 11(10) of the Children (Scotland) Act 1995. Where a judge receives a written communication from a child, that communication may, at the judge's discretion, be kept confidential, and may be placed in an envelope not forming part of the process. Where a judge interviews a child it may be necessary to explain the difficulties of confidentiality, should the child not wish his or her views to be known to other parties.

11.Persons with Disabilities

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Introduction to Chapter Eleven

This chapter deals with persons coming to court who have a disability. The term 'disability' is defined by the section 6(1) of The Equality Act 2010 which states that a person has a disability if the person has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

Figures published by Scottish Government indicate that nearly one in five people of working age (1 million, or 19%) in Scotland are disabled. It is important, therefore, to have regard to the needs and concerns of members of this group who have to come to court.

Generally, questions exploring a person's disability are not appropriate unless it is to consider what reasonable adjustments should be made, or it is relevant to an issue in the case.

Statutory Duties

The Scottish Courts and Tribunals Service (SCTS) has a statutory duty to comply with the Equality Act 2010 which requires courts to take account of the needs of persons with disabilities in providing facilities and services. The SCTS has duties in terms of Part III of the Act entitled 'Services and Public Functions'. Thus, there is a duty on the SCTS to anticipate the needs of disabled people and make appropriate reasonable adjustments. For example, if a witness is deaf, the witness should be provided with a British Sign Language / English interpreter for their court appearance.

Discrimination arising from Disability

Section 15(1) of the Equality Act 2010 states that (a) treating a disabled person unfavourably because of something arising as a consequence of that disability is discrimination if (b) the person concerned cannot show that the treatment is a proportionate means of achieving a legitimate aim. A response to section 15(1)(a) is that the person did not and could not reasonably have been expected to know that the person had the disability. Thus, the Act places a duty on the Scottish Courts and Tribunals Service to ensure that the needs of disabled individuals are considered in advance. The judge must consider the needs of each disabled person individually. Disabled persons involved in the court process must be assisted to engage fully in the process of achieving justice. Each person who appears before the court with a disability must therefore be treated as an individual, with specific needs that are particular to them. When enquiring, the Judge should ask about the nature of the special need rather than the extent of the disability. For example, 'Can you hear what is being said?' Rather than, 'Are you hard of hearing?'

The judge should observe those sitting in the court to ensure that those participating in the proceedings are able to do so to the fullest extent. For example, an elderly person may need to remain seated when giving evidence or a hearing loop should be offered where the participant is hard of hearing. The judge should explicitly state that if a problem arises during the proceedings, then it should be brought to his or her attention as soon as possible.

Duty to make reasonable adjustments

Under Part III of the 2010 Act it is unlawful to discriminate against persons with a disability in the provision of access to courts. The Act imposes a positive duty on service providers, such as the SCTS, to make reasonable adjustments to ensure equal access to a service for disabled people, where it would otherwise be impossible or unreasonable difficult for the disabled person to make use of the service. The duty is owed to disabled persons at large and not just individual disabled persons. The duty goes beyond simply avoiding discrimination. It requires service providers to anticipate the needs of potential disabled service users for reasonable adjustments. Agents should be encouraged to tell the court if their client or a witness needs an adjustment made. It is a continuing duty and may require more than one adjustment.

The duty has three parts. A service provider must:

- where a provision, criterion or practice puts disabled people at a substantial disadvantage those who are not disabled, take reasonable steps to avoid that disadvantage for example allowing a court user to bring her registered assistance dog to court.
- where a physical feature puts disabled people at a substantial disadvantage compared with people who are not disabled take steps to avoid that disadvantage or adopt a reasonable alternative method of providing their service, for example providing a portal ramp where a disabled person can't climb a step or holding a hearing in a different building if a wheelchair user is unable to access the court building.
- where not providing an auxiliary aid or service puts disabled people at a substantial disadvantage compared with people who are not disabled, provide that auxiliary aid or service for example arranging a BSL interpreter or palantypist for a deaf court user.

Failure to make reasonable adjustments

Section 21 of the Equality Act 2010 states that failure to comply with any one of the reasonable adjustment requirements amounts to discrimination against a disabled person to whom the duty is owed.

Human Rights

Courts will also have to have regard to the human rights of persons with disabilities under the European Convention on Human Rights. It is unlawful for a court, as a public authority, to act in a way that is incompatible with the Convention: section 6, Human Rights Act 1998.Article 14, which contains the prohibition against discrimination, can operate only when another article, for example Article 8 the right to respect for family life, is also engaged. Article 14 prohibits discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. This includes disability.

Terms to avoid; terms to use

It is advisable to avoid terms that appear to focus on the disability rather than the person. Appropriate terms and phrases, are as follows:-

- "sight impaired" or "people who are blind". "person who has…", or "person with…" "hearing impaired" or "people who are deaf". "deaf without speech".
- "person with epilepsy".

- “disabled person” or “person with a disability”. “person with learning disability”.
- “person with cerebral palsy”. “wheelchair user”.

The terms “disabled person” and “person with a disability” are both in use. People vary in their preferences.

The anticipatory nature of the reasonable adjustment duty requires the SCTS to give early consideration to what steps can be taken to improve access for disabled people. The SCTS has a duty actively to consider how to improve access for disabled persons: whether premises or other physical features require alteration, whether practices, policies and procedures require adjustment and whether any auxiliary aids and services are required. It is unsatisfactory if it is only when the person with a disability comes to the court that any problem in relation to that person’s convenience becomes apparent to the court staff or the judge. Where some facility is required other than “special measures”, it is important for the parties in proceedings to bring any need to the attention of the court as soon as possible. There are opportunities for consideration of special measures to be made by the court to be brought by application to the court in relation to vulnerable witnesses. This may be done at common law or by virtue of provisions made by the Vulnerable Witnesses (Scotland) Act 2004 such as at preliminary, first or intermediate diets in criminal proceedings or at pre-proof hearings or motions in civil proceedings. The provisions for special measures for vulnerable witnesses are dealt with in paragraphs in Chapter 12.

Appointment of a curator ad litem

The court may appoint a curator *ad litem* [See generally, *Macphail on Sheriff Court Practice*, 3rd edition, paras. 4.23-4.28.] to a party in a case at its own instance or on the motion of an interested party [Drummond’s Trustees v Peel’s Trustees 1929 S.C. 484, 519 per Lord Moncrieff]. Such a curator may be appointed to a person of such mental disorder that he or she is unable to instruct a solicitor or, in certain circumstances, to a child.

In an action of divorce or separation, the court must appoint a curator *ad litem* to a defender who has a mental disorder. In any other case it is in the discretion of the court to determine whether such an appointment should be made. The curator *ad litem* acts in the interests of the party to whom he or she has been appointed. He or she is an officer of the court appointed to ensure that the case is properly conducted and to protect and safeguard the interests of the ward. It should be appreciated that a curator *ad litem* is entitled to be paid.

Duties of the parties to the proceedings

The SCTS has an anticipatory duty to make provision for people with a disability. Parties and their legal advisers should also be asked to inform court staff in advance of any particular needs of

persons coming to court. This is important for any special arrangements that have to be made or considerations of which court staff and the judge should be aware.

In a criminal case, when a person is cited to give evidence for the Crown, he or she is sent a leaflet "Being a witness" that gives general information about attending court and giving evidence. A person identified as a vulnerable witness is sent, by the Victim Information and Advice service, a copy of a guide for vulnerable witnesses on being a witness. The guide asks the witness to advise the Crown of any special needs and invites the witness to contact the procurator fiscal about any concerns or special needs. The leaflet contains local information about access to the court building for witnesses with a disability together with a contact number for the sheriff clerk's office (which is responsible for such arrangements). The Crown Office and Procurator Fiscal Service ("COPFS") and the SCTS have published a Joint Statement on Crown Witnesses. There is a shared responsibility on prosecutors and clerks of court to "co-operate in relation to sensitive cases and witnesses with special needs where special arrangements may be required".

Each sheriff court has its own code of practice, drawn up by the sheriff clerk and procurator fiscal, that sets out how the commitments in the Statement will be achieved in practice. COPFS has established a Victim Information and Advice service for all courts throughout Scotland in local procurator fiscal offices.

In a civil case, there is no equivalent leaflet to "Being a Witness". It is incumbent, therefore, on parties and their advisers to inform court staff in advance of any needs of persons coming to court.

Matters to consider

In planning in advance, in chambers or at pre-trial hearing, consideration may have to be given, for example, to-

- asking about the needs of any party with a disability (whether giving evidence as a witness or not) or any witness with a disability;
- arranging for the evidence of a witness with a disability to be taken elsewhere than in the courtroom: for example, in the home of the witness with a disability;
- checking whether any court in the building has been fitted with an induction loop (which assists persons whose hearing is impaired);
- checking that arrangements have been made for a sign language interpreter, lip-speaker or palantypist for a person whose hearing is impaired, or a speech and language therapist; arranging for the person with a disability to be shown round the court and have procedures explained beforehand;
- permitting an adult authorised by the court to support a witness with a disability in the witness box;
- allocating sufficient court time to allow for therapeutic breaks for a party or witness, or the sign language interpreter;
- permitting a witness with a disability to give evidence at a time when he or she is at his or her best. [See *R v Isleworth Crown Court Ex p. King* [2001] A.C.D. 51where appellant in person with a medical disability did not have a fair trial because a judge had not taken that disability into account when requiring him to conduct his case late into the afternoon];

making extra time available for the case to be heard.

Arrangements for the Court

General

It may only be when the person with a disability comes to the court that any need for reasonable adjustment becomes apparent to the court staff or the judge.

Probably the first person to be told will be the macer or court officer; and he or she will inform the clerk of court. Then the judge will be informed.

It is open to the judge to allow any unrepresented party including one who is elderly, infirm or perhaps inarticulate, to have a friend or family member accompany them during a court hearing. This 'friend' may take notes and give advice but may not act on behalf of the person being supported.

Arrangements to be considered on the day

The appearance at court of the person with a disability may, therefore, be the first opportunity at which it will have to be considered whether for example-

- particular arrangements have to be made for improving access; the case has to be transferred to another courtroom;
- arrangements have to be made for hearing the evidence of a witness somewhere other than in the courtroom, such as the witness's home or in chambers;
- arrangements have to be made for an interpreter, lip-speaker or palantypist for people who are deaf1, or a speech and language therapist;
- consideration has to be given to having short breaks for the convenience of the person with a disability or interpreter;
- sufficient court time is made to allow for breaks for a person with a disability, or interpreter;
- arrangements have to be made for a person with a disability to be shown round the court and have procedures explained beforehand;
- an authorised adult should be allowed to support the witness in the witness box; arrangements can be made for the person to give evidence at a time when they are at their best, e.g., first thing in the morning;
- making extra time available for the case to be heard;
- where the court has an induction loop for people whose hearing is impaired, making sure the sound loop is switched on, the person's hearing aid is tuned in and that background noise is eliminated. It should be checked that a person with impaired hearing who is in a

witness room or the jury room cannot hear what is going on in the courtroom.

- A potential juror may have a disability. Some modern jury boxes can accommodate a wheelchair and have induction loops for those whose hearing is impaired. In older courts, the physical environment of the building may make it difficult to accommodate a particular disability, but consideration has to be given in each individual case to what reasonable adjustments should be made. Considerations have to go beyond the jury box and include the jury room, lavatories and dining areas.

Considerations for those with a mental disorder

Mental disorder is a broad term covering learning disability, Autistic Spectrum Disorder (ASD), Aspergers Syndrome, mental illness, personality disorder, acquired brain injury, dementia and a number of other mental health conditions. A person with a mental disorder may require reasonable adjustments to be made for their needs or an application for special measures to be considered.

Learning disability is a condition which starts before adulthood with lasting effect. A person with learning disabilities may be limited in their ability to learn, understand and communicate, take care of their personal needs and fully develop their social skills. '[People with Learning Disabilities and the Criminal Justice System, 2011]' provides further information.

Learning disability should be distinguished from *specific learning difficulties* such as language impairment, dyslexia, dyspraxia, ADHD and other conditions which occur independent of intellectual impairment. Specific learning difficulties may affect language and communication skills, memory and concentration and similarly require reasonable adjustments to be made.

Autistic Spectrum Disorder and AspergersASD is a lifelong neurodevelopmental disorder. It is described as a spectrum disorder or condition because, although all people with ASD share certain significant difficulties in communication, social interaction and imagination/flexible thinking, these affect each person differently. Aspergers Syndrome is a form of ASD where people have average or above average intelligence. People with Aspergers may have good expressive language skills and vocabulary which mask poor understanding. They may have difficulty interpreting the communication signals of others causing them considerable anxiety and confusion and may have inflexible interests in highly specific topics. 1% of the population are on the autistic spectrum.

People with ASD seem to be overrepresented in the criminal justice system as victims and witnesses and less frequently as perpetrators, due to risk factors such as social naivety, repetitive interests, high levels of anxiety, difficulties in predicting consequences and diminished insight into what others think.

Mental illness can result from life experiences, genetic background or a combination of the two. Psychotic illness include schizophrenia and bipolar affective disorder. *Schizophrenia* is often characterised by delusions, auditory or visual hallucinations, thought disorder and paranoia as well as changes in emotions and behaviour such as apathy, withdrawal, irritability or over excitement.

Bipolar affective disorder is also a psychotic condition involving extreme changes in mood from severe depression to mania with regular moods in between. Symptoms can include impaired concentration, delusions, grandiose thinking, acting irrationally, talking rapidly and increased irritability.

The more common mental illnesses such as *depression and anxiety* can equally affect someone's day to day functioning. They can cause distortion in perception and thinking and affect the person's ability to process information and communicate. Changes in mood can lead to feelings of hopelessness, worthlessness or guilt, self harm or suicidal thinking. *Post traumatic stress disorder* (PTSD) is related to other forms of anxiety disorder but is been caused by exposure to a traumatic event/s and can lead to flashbacks, psychological distress, physical anxiety responses as well as impacting on everyday living

Acquired brain injury can result from a variety of causes including road traffic accidents, assaults, domestic and industrial accidents and substance abuse. It can affect cognitive functioning, communication, memory, concentration and emotional stability.

Personality disorderoccurs where an individual's personal characteristics or traits cause regular and long term problems in the way they cope with life, interact with others and how they respond to events emotionally. These characteristics are present from adolescence and young adulthood and persist in different settings. There are many different types of personality disorder each with distinctive features. These can include lack of emotion, extreme fear of rejection, reckless and impulsive behaviour, being attention-seeking including self harm, lack of trust in others and pseudo-hallucinations such as hearing voices.

Dementia is an umbrella term for a set of signs and symptoms which indicate there may be changes in the functioning of the brain. The most common types of dementia are Alzheimer's, vascular, Lewy Body and temporal frontal lobe dementia. Dementia can cause a progressive decline in cognitive ability, memory, personality, behaviour and ability to do everyday activities. Specific forms of dementia cause specific deficits e.g. frontal temporal lobe dementia affects problem-solving and judgement and can lead to impulsive and socially disinhibited behaviour.

Co morbid conditions/dual diagnosis. Dependence on alcohol or drugs is not considered to be a mental disorder but many people with mental illness may also have substance abuse problems. Some people may have a dual diagnosis. People with learning disabilities or ASD have a higher incidence of mental illness.

The Advocate's Gateway website provides practical, evidence-based guidance on vulnerable witnesses and defendants, including those with mental illness, learning disabilities, ASD, Aspergers and hearing impairment. It is a resource based on English law, but much of the practical advice is transferable.

Key Points in Maximising Communication

Here are a number of points to bear in mind.

- Speak slowly and allow the person extra thinking time.
- Use simple, common words and phrases familiar to the person.
- Use communication strategies preferred by the individual-for a person with learning disabilities this may be symbols, signs, pictures or other visual aids.
- Keep questions short, one idea at a time. People with limited working memory or communication difficulties may be unable to recall or process a complex question.
- Use unambiguous concrete language, avoiding metaphors and figures of speech which may be interpreted literally.
- Check directly and regularly on the person's understanding of the question. Be alert for possible miscommunication as some individuals may not recognise or admit their lack of understanding.
- Follow a logical chronological order.
- Signpost the subject and explain when it about to be changed
- Keep to who/what/where questions where possible as these are more easily understood. Why/how questions involve abstract concepts.
- If a person becomes distressed, ask them directly what can be done to reduce their anxiety or consider taking a short break.

Where possible avoid:

- 'Tag' questions (David didn't touch you, did he?) as these are very suggestive and linguistically complex. Ask the question directly (Did David touch you?) Questions involving one or more negatives
- Forced choice questions - ask open-ended questions
- Questions in the form of statements asserting something is a fact as they may not be understood as requiring a response.
- Repetition of questions which may suggest to the person that they gave the wrong answer the first time. If questions need to be repeated, explain why e.g. unclear, to be sure you understood.
- Leading questions as an acquiescent witness may feel prompted to respond to the cue of the questioner
- Abstract terms. A vulnerable person may struggle with concepts such as time, so use concrete terms such as 'breakfast time or 'after you went to bed'
- Suggestions that the witness is lying or confused. This may cause an adverse impact on their concentration, accuracy of response and level of anxiety.

Arrangements in Emergencies

In the event of a person needing medical attention, each court has at least one member of staff who is nominated as the first aid officer.

In the event of a court building having to be evacuated because of an emergency, such as a fire alarm, a member of the court staff is nominated and trained to take a person with a disability who requires assistance out of the building.

12.Domestic Abuse

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* The Judicial Institute acknowledges the comments of Brian Dempsey, University of Dundee and Louise Johnston, Scottish Women's Aid in relation to this chapter of the bench book

Introduction to Chapter Twelve

Definition

"Domestic abuse" is any form of physical, sexual or mental and emotional abuse which might amount to criminal conduct and which takes place within the context of a relationship. "The relationship will be between partners (married, co-habiting, civil partnership or otherwise) or ex-partners. The abuse can be committed in the home or elsewhere. This is the agreed definition by Police Scotland and the Crown Office and ProsecutionService. The abuse may involve physical violence or it may involve abuse of a sexual, emotional or financial kind. Often the victim of abuse is subjected to abuse of more than a single kind; and on occasions the abuse of a partner is accompanied by the abuse of one or more children. While most reported domestic abuse is perpetrated by men against female partners, [Domestic abuse recorded by the police in Scotland 2012 – 2013 (October 2013), page 7] there has been a significant increase in reported incidents involving a female perpetrator and male victim in past years [Ibid, 9% of all incidents in 2003-04 to 17% in 2012-13]. Domestic abuse between partners of the same sex has also been reported [Ibid, page 7, Chart 2]. In relation to abuse of children, this is defined as including violence, harassment, threatening conduct and any other conduct that gives rise, or is likely to give rise, to physical or mental injury, fear, alarm or distress; and abuse of a person other than the child which affects, or might affect the child. Such conduct includes speech and presence in a specified area [See s 11 of

the Children (Scotland) Act 1995 as amended by s 24 of the Family Law (Scotland) Act 2006].

Consequences

Quite apart from the immediate effects of physical or sexual abuse, domestic abuse can lead to significant and wide-ranging consequences for those abused which should not be under-estimated. Those consequences can include mental health problems, self-harm including suicide (in extreme cases), alcohol or drug abuse, homelessness, poverty and reduced employment opportunities. It is sometimes maintained that a person who is being abused has the remedy in her own hands: she can simply leave the abusing partner. But that ignores the fact that in some instances the most serious levels of violence occur when a person leaves, or attempts to leave, the partner. Judges should also be aware of the fact that in some instances, where the person attempts to leave, this can result in behaviour of the accused that whilst not violent is equally dangerous, for instance stalking. It also ignores the fact that an abused person may simply have nowhere else to go. All of the foregoing problems will, of course, be exacerbated where the person is responsible for the children of the relationship. A limited amount of relief is available to some women who wish to leave abusing partners by the provision of refuges operated by organisations such as Scottish Women's Aid but there are less specific services for men and their children available. Some measures are available to enable a person remain in the home. The Glasgow Domestic Abuse Court has the aid of ASSIST, whose workers contact alleged victims of domestic abuse and offer choices and advice which allow the victim to decide whether to return home or not.

Different cultures

It is sometimes said that ethnic minority communities provide a greater extended family and social community than is to be found in other parts of society. This is a consideration which may be of significance in some cases. It would be wrong, however, to proceed on the basis that an abused person from an ethnic minority community is bound to have family and community support. It would also be wrong to proceed on the basis that in some communities domestic violence and abuse are, or may be, culturally acceptable. An adult or child who has been abused is entitled to the full protection afforded by the law regardless of his or her ethnic or cultural background.

Domestic Abuse in the Court Process

Where the issue may arise

Domestic abuse may be the subject of a charge or charges in criminal proceedings; it may form the

subject-matter, or at least the background, to family proceedings; and it may form the subject-matter, or the background, to proceedings before a children's hearing which may then progress, by one means or another, into court.

Points to bear in mind

Where allegations of domestic abuse are to be explored in any court proceedings, careful arrangements should be made to keep the complainer and alleged perpetrator separate from each other both before and during the proceedings. In appropriate cases, evidence may be given in a manner which affords some protection to the witness [see Chapter 12 (Intimidated and other vulnerable witnesses)].

It is not unknown, for a person claiming to be a victim of alleged domestic abuse to be reluctant to give evidence in support of the charge or charges, or at least to seek to diminish substantially the seriousness of whatever is alleged to have occurred. Whilst it is extremely difficult for any victim of domestic abuse to give evidence, evidence suggests that this is particularly so for male victims and victims in a same sex relationship [Dempsey, B, Men's Experience of Domestic Abuse in Scotland: What we Know and How we can know more (AMIS, Edinburgh, 2013)]. There can be several reasons for this phenomenon. In some cases the accused will have been allowed bail following first appearance in court, and as a consequence the accused and the partner may have continued to cohabit during the period until the date of trial. In such a situation they may actually have achieved some form of reconciliation with the result that the abused partner is unwilling to say anything that might result in the other being punished for what he did, possibly many months earlier.

Another possible explanation for a failure by a complainer to speak up in court is that a history of abuse, or threats to his or her children about giving evidence, has left the complainer so terrified that they fear the consequences if they speak up against the abusing partner. It should not therefore be assumed that a witness who does not give evidence supportive of a charge brought against his or her partner is simply being difficult or obstructive. The reality may be more complicated.

The Domestic Abuse (Scotland) Act 2011

Judges should be aware of the provisions of the Domestic Abuse (Scotland) Act 2011. Under Section 3, a person who is applying for an interdict or who has obtained an interdict, can also apply to the court for determination on whether the interdict is a 'domestic abuse' interdict. The court may make the determination if satisfied that the interdict is, or is to be, granted for the protection of the applicant against a person who is (or was)—

(a) the applicant's spouse,

(b) the applicant's civil partner,

(c) living with the applicant as if they were husband and wife or civil partners, or

(d) in an intimate personal relationship with the applicant

Before making a determination, the court must allow person against whom the interdict is, or is to be, to make representations before the court. A power of arrest can also be attached to the interdict under the Protection from Abuse (Scotland) Act 2001.

The 2011 Act also modifies Section 8 of the Protection from Harassment Act 1977 for harassment amounting to domestic abuse under Section 1. The complainer is no longer required to prove that there has been a course of conduct because one single incident of harassment can amount to 'conduct' under Section 8A(3)(b) of 1977 act.

13.Victims of sexual crime

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* The Judicial Institute acknowledges the comments of Brian Dempsey, University of Dundee in relation to this chapter of the bench book.

Introduction to Chapter Thirteen

Victims of sexual crime are often traumatised, and find it difficult to give evidence in court. Research suggests that the court appearance may be as distressing and disempowering as the original crime. This distress is sometimes referred to as “secondary victimisation”: see Michele Burman *et al*,Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study (2007). Some of the measures noted below may assist in diminishing apprehension and upset. Scotland must comply with the EU Framework Decision on the Standing of Victims in

Criminal Procedure, for details, see Victims in the Criminal Justice System published by the Scottish Executive in November 2002.

Information for victims

It is important that a complainer in a case involving allegations of sexual crime be given as much information as possible, as regularly as possible. Information to be communicated includes whether or not an accused is to be prosecuted, when and where a trial is likely to take place, when a complainer is likely to be called to give evidence, and ultimately the outcome of the trial. If a trial is postponed, or if there is to be a re-trial, a full explanation should be given to the complainer. If a plea of guilty is to be tendered, the victim of the crime may wish to be present in court to hear the plea dealt with. While much of the responsibility for providing information lies with others, judges should be aware of the problems facing victims and of the types of agency able to assist. The Victim Information and Advice unit of the Crown Office and Procurator Fiscal Service (COPFS) provide this type of information to victims of sexual crime. Best practice suggests that wherever possible that a complainer is made aware of what is about to happen procedurally. For example, before administering the oath, a judge might wish to explain to a complainer that the court has been cleared of everyone except those with official business.

Familiarisation with the court and procedures

A complainer may benefit from a pre-trial visit to court premises before the case begins. Such visits are normally arranged by through the prosecution but are available to all witnesses via the Witness Service, which offers visits, general guidance and assistance.

Representation for an Accused Person

Compulsory representation for an accused charged with certain sexual offences

The Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 inserts section 288C(1) in the Criminal Procedure (Scotland) Act 1995, prohibiting an accused person charged with certain sexual offences [See s 288C(2), 1995 Act For the full list which includes, for example, all of the offences in Sexual Offences (Scotland) Act 2009]and other offences where the court is satisfied they have a "substantial sexual element" [s 288C(4) 1995 Act] from conducting his or her defence in person at the trial. Where an accused does not have a solicitor, section 288D of the 1995 Act provides that the court must appoint a solicitor for the accused, who must either take the accused's instructions or if instructions are not given, act in the best interests of the accused. The solicitor has authority to act for the accused as though he/she were engaged by the accused and may instruct counsel. Section 4 of the 2002 Act amends section 291 of the 1995 Act to prevent a person accused of a sexual offence from precognoscing the complainer on oath.

Arrangements in the court

Clearing the court

In terms of section 92(3) of the Criminal Procedure (Scotland) Act 1995, "[f]rom the commencement of the leading of evidence in a trial for rape or the like the judge may, if he thinks fit, cause all persons other than the accused and counsel and solicitors to be removed from the court-room". Note that where a child is called as a witness in any proceedings in relation to an offence against, or any conduct contrary to, decency or morality, the court has the additional power in terms of s 50(3) of the Criminal Procedure (Scotland) Act 1995 to direct that all persons other than members or officers of the court, parties to the case, their counsel or solicitors or persons otherwise directly concerned in the case, and bona fide representatives of the press, should be excluded from court during the taking of the evidence from the child. It is standard practice to clear a court where a complainer is about to give evidence about rape, assault with intent to rape, assault with intent to ravish, indecent assault, public indecency, incest, sodomy, and other sexual offences (including attempts at these offences). When the complainer comes into court, a judge should, before administering the oath or affirmation, advise the complainer that the court has been cleared of everybody except those with official business. As responsible members of the press are not normally excluded, [*HMA v M* 2007 SLT 462]. It may be appropriate also to advise the complainer that the press, if reporting the case, are unable to report the complainer's name, or to identify him or her in any way [Section 11 of the Contempt of Court Act 1981].

Presence of support figure

Before granting any request that a relative or social worker or other support person be permitted to sit near the witness, it is suggested that:

- the court ascertains the relationship between the witness and the support person;
- the views of other parties should be ascertained;
- confirmation should be obtained that the support person is not to be a witness in the case;
- a seating arrangement should be made such that the support person is sufficiently close to the witness, but does not interfere – either physically or verbally – with the witness's evidence;

The support person should, if necessary, be warned by the court not to prompt or seek to influence the witness in any way. See, for example, McGinley v. H.M. Advocate, 2001 S.C.C.R. 47, where an adult complainer in a case involving alleged sexual abuse requested the presence of her boyfriend as a support person: it was held necessary for the sheriff to give directions stressing the limited role of the support person, and to warn him not to interfere with the witness's answers.

Removal of an accused who misconducts himself

If an accused so misconducts himself during the course of the trial that the court forms the view that a proper trial cannot take place unless the accused is removed, the court may order that he or she is removed from the court for so long as that conduct makes it necessary, and that the trial proceed in the accused's absence. Solemn proceedings: s 92(1) of the Criminal Procedure (Scotland) Act 1995; summary proceedings: s 153(2) of the 1995 Act]. If the accused is not legally represented, the court must appoint counsel or a solicitor to represent his or her interests during such an absence.

Distress during evidence

If a witness is distressed the court has the power to adjourn to allow the witness time to settle and compose before resuming the case.

Television Link (CCTV), Screens, Evidence on Commission, Prior Statements

Common law powers: screens

The court has power at common law to protect any vulnerable witness who would be placed at an unfair disadvantage by having to give evidence in the normal way. In particular, the court has power to permit such a witness to give evidence from behind a screen [Hampson, 2003 S.C.C.R 13].Unlike the statutory provision, there is at common law no restrictive definition of "vulnerable witness".

Statutory protection in criminal proceedings

The Vulnerable Witnesses (Scotland) Act 2004 defines a vulnerable witness as someone aged under 18 (a child witness) or;

"(b) where the person is not a child witness, there is a significant risk that the quality of the evidence to be given by the person will be diminished by reason of –

(i) mental disorder (within the meaning of section 328 of the Mental Health(Care and Treatment) (Scotland) Act 2003), or

(ii) fear or distress in connection with giving evidence at the trial." [Section 271(1) if the Criminal Procedure (Scotland) Act 1995] or;

"Deemed vulnerable witness" - This category includes victims of alleged sexual offences, human trafficking, and an offence the commission of which involves domestic abuse or stalking who are giving evidence in proceedings which relate to that particular offence; and

Witnesses who are considered to be at significant risk of harm by reason only of them giving evidence.

The court must take into account various factors when assessing whether a person is a vulnerable witness [Section 271(2) of the 1995 Act]. If a witness is deemed vulnerable, he or she is entitled to certain special measures when giving evidence in criminal proceedings. The special measures include:

(a) evidence on commission: section 271I of the Criminal Procedure (Scotland) Act 1995;

(b) a live television link (CCTV): section 271J;

(c) a screen: section 271K;

(d) a supporter: section 271L;

(e) a prior statement used as the witness's evidence in chief: section 271M; and

(ea) excluding the public during the taking of evidence: section 271HB (inserted by section 20 of the 2014 Act)

(2) allowing Scottish ministers to create additional special measures by order for a temporary period: section 271HA (inserted by section 19 of the 2014 Act)

A party citing or intending to cite a vulnerable witness in a criminal case must make a vulnerable witness application not later than 14 clear days before the trial diet [Section 271C of the 1995 Act]. In the course of a trial, the court may alter existing special measures even if the witness has begun to give evidence [Section 271D(1) of the 1995 Act]. Such alteration may comprise ordering special measures when none exist; or varying or revoking measures already in place [Section 271D(2) of the 1995 Act].When using special measures such as CCTV, screens, or evidence on commission, consideration should be given to the best means of providing the witness with an opportunity to identify an accused, see Section 281A of the 1995 Act.

Measures in Civil Proceedings

The issue of sexual crime may arise in civil proceedings. The alleged victim may qualify as a vulnerable witness [Section 11(1) of the Vulnerable Witnesses (Scotland) Act 2004]and be entitled to special measures such as screens, CCTV, evidence on commission, and a supporter.

14.Persons without legal representation

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Introduction to Chapter Fourteen

Persons may conduct their own cases in both the civil courts and the criminal courts. They may do so either by choice or because they have not been granted legal aid. Such persons may face particular difficulties.

Some persons who are not legally qualified may act for litigants in certain types of action [r. 2.1(1) of the Summary Cause Rules 2002 (S.S.I. 2002/ 132), default of standard security (Home Owner and Debtor Protection (Scotland) Act 2010)],small claims and debt actions. See further the Briefing Paper on Lay Support and Lay Representation in Civil Cases.

General points

Unrepresented persons may have limited or no familiarity with courts or court procedure. They may be confused, worried, nervous or even scared. Literacy and numeracy issues may also exacerbate difficulties.

Judges may wish to advise an unrepresented person that there are organisations that may be able to help them to make their case. For example, Scottish Association of Law Centres, Citizens Advice

Bureaux, Consumer Advice centres, Consumer Protection departments, In-Court Adviser Projects, Money Advice Scotland and trading standards departments. It may also be helpful to advise an unrepresented party that they can apply to have a lay support person help them in court. Lay support is the Scottish equivalent to an English 'McKenzie friend' (*McKenzie v McKenzie* [1970] 3 All W.L.R. 472). A lay support person may take notes, provide moral support, assist in organising papers and quietly offer advice or suggestions but may not address the court on the party litigant's behalf [Chapter 12A Court of Session Rules]. To ensure fairness to unrepresented persons it may be necessary to provide greater explanation of what is happening in court than would be provided to agents or counsel. Adjournments may also be necessary to give unrepresented persons time to fulfil these requirements. Judges may also need to be more involved in identifying the issues in the case, explaining legal terms if they must be used, prompting unrepresented persons to form points to witnesses into questions and making them aware of the reasons for the decision, their right to appeal and how they can do this.

Party Litigants in Civil Proceedings

Introduction

Any natural persons other than children, certain persons with mental incapacity, or persons voluntarily resident or carrying on business in hostile territory [See *Van Uden v Burrell* 1916 SC 391 , Macphail, Sheriff Court Practice, 3rd ed., para. 4.118] may conduct their own cause in either the Court of Session or the sheriff court. Such persons are known as party litigants. It has been held, however, that, when a practising solicitor represents either himself or his firm, he does not fall to be regarded as a party litigant for the purpose of any expenses which may be awarded in his favour [*Macbeth, Currie & Co v Matthew* 1985 S.L.T. (Sh Ct) 44].

Some party litigants have a degree of self-confidence, and some knowledge of law and procedure. For most party litigants, however, the prospect of having to appear in court, and of having to present a case before a judge, can be daunting and frightening. Quite apart from having an understandable apprehension as to what is going to happen, such litigants are likely to suffer serious disadvantages compared with parties who are represented by counsel or by a solicitor. It is important that those disadvantages should be well understood, and that all reasonable steps should be taken in order to minimise their consequences so far as is practicable.

General difficulties faced by party litigants

Most party litigants cannot be expected to have much, or indeed any, knowledge of law or procedure [See Martin Wilson v North Lanarkshire Council and Board of Management of Motherwell College [2014] CSIH 26, para 12-14]. Some assistance on matters of procedure can be given by clerks of court, but they are not empowered to offer legal advice or to keep party litigants advised on the progress of their cases. Slightly more assistance and advice may be available to a party litigant in courts where an in-court advice service is available. For a list of services and more information on individual projects see Scottish Legal Aid Board. In-court advisers are Scottish

Government funded advisers who provide advice and support to unrepresented persons. The services generally advise on small claims and summary causes in particular housing and debt issues but in any event its scope falls far short of complete representation.

Party litigants are also likely to have no experience to guide them in relation to what professional court users would regard as very ordinary, practical, matters – where to sit in court; when to sit and when to stand; how to address the judge; and so on. They may not be skilled at expressing themselves either orally or in writing; and they are unlikely to have any understanding of how to present evidence by the examination and cross-examination of witnesses. Indeed, experience shows that many party litigants seek to deal with such matters by the making of statements rather than by asking questions. Some party litigants may not understand the necessity of having important facts spoken to by the evidence of other witnesses, and may be surprised when they are told that it is not good enough for them simply to say: "If you phone up Mr Smith he will confirm what I have been saying". Sometimes the desirability of having expert testimony will not be understood; and on other occasions the need to have documentary and other productions in court will not be appreciated.

More fundamentally, of course, a major problem faced by most party litigants is that they simply do not have the legal knowledge to enable them to formulate a claim or a defence in a way which might entitle them to the remedy which they seek. To take a simple example, a party litigant may be seeking damages in respect of allegedly faulty goods but may not refer to any particular section of the Sale of Goods Act 1979, and indeed may not even refer to that, or any other, statute. See, for example, *Mannifield v Walker* 1990 S.C.L.R. 369 where Sheriff Principal observed that in a small claim with a party litigant the Sheriff would be best to conduct the hearing informally subject to the need to identify the legal basis of the claim. All of this can give rise to a further problem in that some party litigants have the impression that, by taking a case to court, they will be guaranteed a day on which they can present evidence in support of their case and obtain a judgment on that evidence. They do not understand that a case may be dismissed as incompetent, irrelevant, or lacking in specification without a single word of evidence having been heard; and a few party litigants now seek to maintain that such a disposal constitutes an infringement of their rights under article 6 of the European Convention on Human Rights. See for example *Ewing v Times Newspapers Limited* 2010 SLT 1093 which was a unsuccessful attempt to assert that requiring a party litigant to find caution denied him access to justice in violation of his art. 6 ECHR rights to fair hearing.

Statutory difficulties faced by party litigants

Quite apart from the general difficulties which have been outlined above, party litigants are also subject to a number of statutory restrictions under the Rules of the Court of Session, and the Ordinary Cause Rules and other Rules which apply in the sheriff court. Some of those restrictions are essentially the same both in the Court of Session and in the sheriff court, but they are not completely uniform. They are as follows:

(a) Court of Session

Many initiating documents in the Court of Session such as a summons, a petition, a note, an application or a minute may only be signed by counsel, a person having a right of audience or by an agent, and may not be signed by a party litigant. Where a party litigant cannot obtain the signature of counsel or other authorised person, he may request the Deputy Principal Clerk to place the document before the Lord Ordinary for leave to proceed; and the Lord Ordinary's decision as to whether or not to grant leave is final and not subject to review [Rules of the Court of Session 1994, r. 4.2 (5)]. Where leave is granted the party litigant is then permitted to sign the document [Rules of the Court of Session 1994, r. 4.2 (6)].

In relation to the recovery of documents by commission and diligence, special provision is made where that procedure is instigated by a party litigant [Rules of the Court of Session 1994 rr. 35.4(6), and 35.11(7)]. The recovered documents are delivered to the Deputy Principal Clerk who intimates this to the parties and co-ordinates the borrowing of them.

Party litigants are personally liable for the expenses and fees of witnesses they cite [Rules of the Court of Session 1994, r. 36.2(4) (proofs) and r. 37.4 (jury trials)]. In light of this, in order to cite witnesses for a proof or jury trial a party litigant must, not later than 12 weeks before the assigned diet, apply to the court to fix caution for the expenses of witnesses in answering a citation in such sum as the court considers reasonable [Rules of the Court of Session 1994, r. 36.2(5) (proofs) and r. 37.4 (jury trials)]. Citation of a witness to be called by a party litigant may only be effected by a messenger-at-arms and, before any such messenger is instructed, the caution fixed by the court must have been found by the party litigant.

(b) Sheriff court

In ordinary cause proceedings in the sheriff court there is no restriction on an initial writ being signed by a party litigant. The Ordinary Cause Rules 1993 expressly provide that a party may sign an initial writ [Ordinary Cause Rules 1993, r. 3.1(7)]. Those rules, however, provide a restriction, which is absent in the Rules of the Court of Session, on the borrowing of parts of process by a party litigant. In ordinary cause proceedings those parts of process which are capable of being borrowed may be borrowed by a party litigant only with leave of the sheriff and subject to such conditions as the sheriff may impose [r. 11.3(3)(a)]. Nevertheless, a party litigant may inspect a process at any time and may obtain copies, where practicable, from the sheriff clerk [r. 11.3(3)(b)]. Similar provisions exist in relation to summary causes and small claims: Summary Cause Rules

2002, r. 17.3(4) and (5);Small Claims Rules 2002, r. 16.2(4) and (5)]. The rules do not say who should bear the cost of any such copying. In practice, copies are often made available to party litigants at no cost where the amount of copying is relatively small. It is thought, however, that the "where practicable" provision in the rule would probably entitle a sheriff clerk to require some payment if a party litigant sought copies of a very large number of parts of process.

So far as the citation of witnesses is concerned the Ordinary Cause Rules 1993 make similar, though not identical, provision to that contained in the Court of Session Rules for party litigants. In the sheriff court the application to the sheriff to fix caution must be made not later than four weeks before the diet of proof; and citation requires to be effected by a sheriff officer [Ordinary Cause Rules 1993, r. 29.8]. The Ordinary Cause Rules do not contain any provisions in relation to the recovery of documents under commission and diligence comparable to those applying in the Court of Session.

Summary cause and small claim procedures in the sheriff court are to some extent designed for use by party litigants, and as a consequence they do not, with the exception of the borrowing of productions or parts of process, impose on party litigants any restrictions which are not imposed on those represented by counsel or a solicitor. Thus, for example, the summons in a summary cause is to be authenticated by the sheriff clerk or, in certain circumstances, the sheriff [Summary Cause Rules 2002, r. 4.4(1) and (2)]. Signature by the litigant is not required.

Dealing with the Difficulties

It has long been accepted in the courts of Scotland that, because of the difficulties which have just been summarised, a party litigant will generally be allowed considerable latitude or indulgence in the presentation of his or her case, provided that there is no prejudice to the opponent [*Moore v Secretary of State for Scotland* 1985 S.L.T. 38]. This should not mean that judges will allow irrelevant submissions which would not be permitted in the case of counsel or a solicitor. More positive steps should be taken in order to ensure, so far as is practicable, that a party litigant can overcome at least some of the difficulties which lie in his or her path, and that a fair and appropriate hearing can be given at all times [Article 6(1) of the European Convention on Human Rights]. There are various ways in which such positive steps can, and should, be taken. These are set out below.

(1) Written guidance

Some leaflets and booklets, written in relatively simple language, already exist in order to offer appropriate guidance to party litigants engaged in most forms of civil procedure. Details of some of those leaflets and booklets can be found on the SCTS website under the menu tab "Taking Action". The existence of such written guidance, however, does not relieve judges and clerks of court of a duty to assist party litigants whenever it is appropriate and reasonable to do so.

(2) Consider the individual's needs

As in the case of any person appearing in court, care must be taken to ensure that no disadvantage is suffered by a party litigant on account of a disability, language or other difficulty. Thus, for example, if a party litigant is a wheelchair user, and some courtrooms or offices are not readily accessible for a wheelchair, arrangements should be made for court proceedings and any interviews with court staff to take place in a courtroom or other place which is so accessible. Likewise, if a litigant has a hearing impairment, appropriate arrangements should be made to ensure that that does not result in disadvantage. Again a litigant might have a mental disorder (such as a personality disorder or schizophrenia or learning disability). In such circumstances the court might wish to consider appointing *(ex proprio motu)* a curator ad litem who may recommend that an application may be made for a guardian to be appointed under the Adults with Incapacity (Scotland) Act 2000. Some litigants may have already had a guardian appointed to them under that Act. Under section 64(3) the guardian has power to act as the legal representative in relation within the scope of the power conferred by the guardianship order.

A party litigant may have little, or an imperfect, understanding of English. Such a person must be afforded the opportunity to have documents translated and to have the services of an interpreter during any proceedings in court. It will be for the party to engage the services of an interpreter and to meet that person's fees and expenses (though these may ultimately be recoverable from the other party if that party is unsuccessful). Where English is not a party litigant's native tongue, an interpreter should not be insisted upon if it is clear that the party litigant in question has a good understanding of English and can speak it well [*Furnheim v Watson*, 1946 S.L.T. 297, per L.J.C. Cooper at p. 300]. On the other hand, care should be taken not to form an over-optimistic view of a person's linguistic ability: familiarity with simple, conversational, speech may not mean that the person in question will be able to cope with detailed questioning and cross-examination, possibly on matters which are complex and technical. In criminal cases, where an accused's or a witness's native tongue is not English, it is more usual to consider using an interpreter than not as it is vital that he/she fully understands proceedings. See for example *Alexei Alexandrovic Mikhailinchenko v Andrew Christie Normand* 1993 S.C.C.R. 56.

(3) Conduct of hearings, proofs, etc.

In small claims and summary causes a party litigant is likely to come before a sheriff at the first calling of the case. Under ordinary cause procedure in the sheriff court, the sheriff will probably encounter such a person for the first time at an options hearing. In other circumstances a judge may not encounter the party litigant until the stage of a debate or procedure roll hearing or at the beginning of a proof. Where a party litigant appears at an early stage in the proceedings, that may well be a suitable opportunity for a judge to –

- give some explanation about the hearing which is to take place, and
- offer some general information and advice regarding the next stage or stages of the case. For example, at an early hearing which is subsequently to be followed by a proof, it is likely to be helpful if the judge were to offer some explanation about the need to bring witnesses to the proof and to lodge any documentary or other productions which are likely to be required at that stage. A judge might wish to consider tape recording proceedings involving a party litigant which would not normally be tape recorded. This could assist both parties and the judge.

The following are some of the things which a judge should have in mind at all times. Consideration should be given to explaining even the most basic courtroom matters in simple and everyday language. For example:-

- Who the judge is, and how he or she should be addressed.
- Who the other persons in court are, and what are their respective functions,
- That, unless suffering from some physical disability, the party litigant should stand when addressing the court or questioning a witness.
- What the purpose and focus of the particular hearing is, including its consequences and outcomes.
- It may also be necessary to stress that all parties will have a full opportunity to present their case, and that the party litigant should not interrupt when someone else is speaking.

It may also be worthwhile to provide some practical advice for the conduct of the hearing. For example:-

- That, if the party litigant does not understand something, or has a problem in relation to any aspect of the case, the judge should be told at once so that the problem can be

addressed

- That the litigant can make notes throughout the hearing which are normally useful when it is the litigant's turn to speak.
- That if the litigant requires a short break in proceedings for personal reasons this should be explained as well as that these requests are normally granted.
- It may also be advantageous to stress that future hearings are important and cannot be moved unless illness prevents the litigant from attending. As much notice as is possible should be given of the need to cancel and a 'soul and conscience' certificate from a doctor must be sent to the court. It may be necessary to explain what a certificate, certified by the doctor on soul and conscience is.

Party litigants may be unaware that they can apply to have a lay support person assist them in their case [Sheriff Court Rules: Ordinary Cause Rules r. 1.3A, Summary Cause Rules r. 2.2, Summary Applications Rules r. 2.2A, Small Claims Rules 2.2, Court of Session Rules Ch. 12A]. Lay support [The English term McKenzie friend (*McKenzie v McKenzie* [1970] 3 All W.L.R. 472) may also be used from time to time.] can extend to matters such as taking notes, helping order and arrange papers and quietly advising the litigant. Lay supporters may not receive remuneration for their work or address the court on the litigant's behalf.

Further assistance, and consideration for the position of a party litigant, may be required, and may be appropriate, as a particular hearing develops. For example, an unanticipated problem may arise, and those acting for a represented party may offer suggestions as to how it should be dealt with. This is likely to present difficulties for a party litigant. In such a situation a judge may wish to ensure that the party litigant properly understands the nature of the problem on which his or her views are required – explaining it, if necessary, in simple terms – and may then decide to allow a short adjournment so that the party litigant can consider his or her position. In a case where a party litigant is accompanied by a friend or colleague, such a course may be particularly appropriate in that it will provide them with an opportunity to discuss the matter in private before the party litigant is required to respond formally in court.

(4) Reference to legal precedent and other authorities

Party litigants are often confused, and feel themselves at a serious disadvantage, when counsel or a solicitor for another party refers to decided cases or to statutory provisions. Party litigants may have difficulty in understanding why their case should be decided on the basis of what happened in some other person's case and it may be necessary to explain, again in as simple language as is possible, the significance of decided cases as setting out the way in which a particular point of law should be interpreted or applied. In some instances it may also be necessary to consider allowing a short adjournment so that the party litigant can look at the case or statute in question or so that copies of the relevant authorities can be made available for the party litigant. If the case or

statute is plainly of relevance to the case, the interests of justice are likely to require that an appropriate adjournment should be allowed.

(5) Assisting in the presentation of a party litigant's case

Generally, it will be both appropriate and helpful for a judge to offer party litigants some assistance in the presentation of their cases. Although it is often better not to interrupt a party litigant who is making submissions or questioning a witness, since that may make the litigant more nervous and insecure, it may sometimes be appropriate to do so to ensure that a submission, which may not have been very well articulated, is properly explained and understood. It may also be appropriate, where the party litigant is not approaching the questioning of a witness in an appropriate or effective way, for the judge to emphasise to the party litigant the importance of formulating a question and obtaining an answer to that question. The judge might also usefully put some questions to the witness in order to elicit evidence on a particular point. Apart from any assistance which this may give to the party litigant, it may also be fair to the witness by ensuring that evidence is given clearly and in a manner which cannot subsequently be misrepresented. Occasionally it may be necessary for a judge to intervene in order to control or to stop inappropriately aggressive or offensive questioning of a witness.

A much more difficult question arises, however, in circumstances (which are not uncommon) where it appears that a party litigant may have some sort of stateable case, but has failed to express it in the pleadings. The question in such circumstances is whether a judge has a duty, or is even entitled, to assist the party litigant to develop and to express his or her case. The inevitable, though somewhat unsatisfactory, answer to that question is that it will be a matter of degree, and will depend on the circumstances of the particular case. It also has to be said that this is an area where different judges are likely to hold different views. In a simple situation, such as the one , above, where a party litigant does not make any reference to the Sale of Goods Act 1979, it may be appropriate for the judge to decide the case by reference to that statute notwithstanding that it had not been specifically mentioned by the party litigant. It is suggested, however, that a judge should take such a course only where it is perfectly clear that the case must be governed by a particular statutory provision. In such a situation, moreover, the judge should raise that matter in open court, and should guard against any possibility of deciding on a point of which the other side has had no notice [*Kay's Tutor v Ayrshire and Arran Health Board* 1986 S.L.T. 435, 440]. On the other hand, if a party litigant has a case which appears to be plainly irrelevant, it is thought that there is no duty on a judge to offer any suggestions as to how it might be made relevant. That is the outcome of an adversarial system of litigation; and there is no reason why a party litigant should be given advantages which would not be available to a litigant who was professionally represented.

(6) The judgment or decision

Where a judgment or decision is given at the end of a hearing, in the presence of a party litigant, the judge should take particular care to express it in simple, every day, language; and, if it is necessary to use technical legal terms, the meaning of them should be clearly explained to the party litigant. If the decision requires the party litigant to do something (for example, to find caution for future expenses) the significance of that should be fully explained, and the party litigant should be warned of the likely consequences of failure to comply with what has been ordered by the court. If the decision in a case involving a party litigant is to be taken to *avizandum*, the judge should explain in simple terms that a written judgment will be issued at a later stage containing the decision and the reasons for it. It is also likely to be helpful for a party litigant if the judge can give some indication at that stage of the date when the written judgment is likely to be issued. Unless otherwise ordered, Court of Session judgments are issued without the necessity of the attendance of counsel, or a solicitor, or a party. A clerk of session will, where possible, give notice of the date when an opinion is to be issued (usually two days in advance), and a copy of the opinion may be collected on or after the date of issue from the Opinions desk during office hours, on payment of the prescribed fee. If possible, an electronic copy of the opinion will be e-mailed to parties on the date of issue. In the sheriff court a copy of a judgment is automatically sent to a party, free of charge, on the date when it is issued.

Expenses Awarded in Favour of Party Litigant

Where a party litigant is successful in the course of litigation, an award of expenses may be made in his or her favour in the same way as if there had been legal representation. In such a case, however, with a possible exception of a practising solicitor who has appeared on his own behalf or on behalf of his firm, any such award of expenses will be governed by the provisions of the Litigants in Person (Costs and Expenses) Act 1975, [Act of Sederunt (Expenses of Party Litigants) 1976 (S.I. 1976/1606), amended by Act of Sederunt (Expenses of Party Litigants) 1983 (S.I. 1983/1438)]. The Act and Acts of Sederunt made under it set out that a party litigant may be entitled to expenses up to a maximum of two thirds of the sum allowable to a solicitor for the work in question under the appropriate table of fees. No expenses are payable in small claims with a value of less than £200, a maximum of £150 shall be payable in claims of a value up to £1500 and for other claims a maximum of 10% of the value of the claim shall be payable [Small Claims (Scotland) Order 1988 (S.I. 1988/1999), para. 4]. This does not apply to appeals to the Sheriff Principal or to cases where the defender has failed to state a defence, stated a defence and not proceeded with it or acted in bad faith during the proceedings [Sheriff Courts (Scotland) Act 1971, s 36B(3)].In these cases, expenses on the summary cause scale may be ordered.

A party litigant, who has obtained a decree or other order in his or her favour, may not realise that he is entitled to make a formal motion for expenses. It is thought that in such circumstances it would be perfectly proper for the judge to advise the party litigant of the entitlement to seek an award of expenses, and to ask if such an award is sought.

Enforcement of Decrees

Party litigants who have obtained a decree in their favour, for example for payment of a sum of money, are often surprised to discover that, if payment under the decree is not made voluntarily by the other party, it will be for them to institute enforcement procedures themselves, and at their own expense. It is thought that it is unnecessary for judges to point this out at the stage of granting decree, but clerks of court should be prepared to give this information on request.

Appeals

Where a case has been decided against a party litigant by final decree or judgment, an appeal is normally available, and the party litigant will be able to obtain information about how to appeal from the clerk of court.

If a decision is given against a party litigant, however, on some incidental or interlocutory matter, in respect of which leave to appeal is required, the party litigant may not become aware of the need to seek leave until the time for seeking leave has expired. It is therefore suggested that, if such a decision is given, and if the party litigant is obviously unhappy with the decision, the judge should there and then indicate that an appeal against that decision may only be taken with leave, and ask the party litigant if leave to appeal is being sought. In such a situation the judge will no doubt wish to make it clear that the giving of that information does not imply that leave to appeal will inevitably be granted.

Vexatious Litigants

Under section 1 of the Vexatious Litigants (Scotland) Act 1898, a Division of the Court of Session, on an application made by the Lord Advocate, may declare a person to be a vexatious litigant on the ground that that person has habitually and persistently instituted vexatious legal proceedings without any reasonable grounds for doing so. When such a declaration has been made, the person concerned may not thereafter raise any legal proceedings unless leave has been obtained from a judge sitting in the Outer House. Such declarations are made only infrequently [*Lord Advocate v B* 2012 SLT 541]. There is no means of prohibiting a person from defending an action which has been raised against him or her. The Court Reform (Scotland) Bill, Chapter 7 proposes to introduce new powers and orders to deal with vexatious litigants.

Unrepresented Accused in Criminal Cases

General

Because of the availability of criminal legal aid it is relatively uncommon for persons to represent themselves in criminal proceedings other than in respect of very minor offences; but occasionally judges may encounter accused persons who, for whatever reason, elect to represent themselves.

In some instances an accused may be represented at the beginning of a trial but may withdraw

instructions from his counsel or solicitor in the course of the trial. Normally, in such a situation, a brief adjournment should be allowed in order to enable the accused to secure new representation. It is not unknown, however, for an accused person to "hire and fire" a succession of representatives, and it is therefore suggested that there must come a point when a judge is fully entitled to say that enough is enough, and that thereafter the accused must proceed without representation. In such a situation, of course, due regard must be had to ECHR, art. 6(3)(c). It is thought, however, that there is unlikely to be any breach of that article provided that an accused person has been given a reasonable opportunity to secure legal representation of his own choosing. For discussion of what constitutes sufficient opportunity see *Venters v HMA* 1999 S.L.T 1345 (conviction quashed as trial judge failed to give accused sufficient opportunity to replace withdrawing counsel). There are some special features of criminal proceedings which require particular mention.

Explanation to unrepresented accused

At the very beginning of a trial it would be appropriate to describe to the unrepresented accused the procedure that will be followed including: the normal order of examination in chief, cross-examination and re-examination; that he may be able to object to the admission of any evidence and most of the basic practical matters.

At the close of the Crown case, the unrepresented accused should be asked:

Whether he wishes to make a submission of no case to answer; whether he wishes to give evidence personally, in which case he may be cross-examined; and whether he wishes to call any defence witnesses. When all evidence has been led, he should be reminded that he will be given an opportunity to address the judge, in a summary trial, on the evidence, or the jury in solemn proceedings.

Probably the most important feature arises from the fact that, in criminal proceedings, an accused person is presumed to be innocent unless and until guilt has been proved beyond reasonable doubt on the basis of sufficient, corroborated evidence. Accordingly, where an unrepresented accused tenders a plea of guilty, a judge must take steps to ensure that there is a full understanding of the charge or charges and that the accused is freely and truly acknowledging guilt. Moreover, where a case goes to trial, it is suggested that the judge must take active steps to assist the accused in presenting his or her defence. That will particularly be so in a jury trial, where it will be the duty of the trial judge to ensure that an unrepresented accused's position in relation to the evidence and the charges, in so far as that can be determined, has been fairly and adequately put before the jury. That may have to be dealt with in the judge's charge to the jury.

The judge has a duty under Article 6 of the ECHR to ensure overall that the trial is conducted

fairly. It is suggested however that it is not part of a judge's duty, in a trial where an accused is unrepresented, to intervene in the course of the evidence in order to take points or objections which might have been taken had the accused been represented by counsel or by a solicitor. If evidence is given in the course of a trial on a matter which, if objected to, might require there to be a trial within a trial [Thompson v Crowe 2000 J.C. 173] the judge should consider whether to interrupt the proceedings in order to ascertain whether or not circumstances exist which would make such a procedure necessary. In the same way, if an unrepresented accused does not make any motion of no case to answer at the conclusion of the Crown case where it might be appropriate to do so, it would, it is thought, be appropriate for the trial judge to consider whether to invite him to do so and to raise with Crown Counsel or the procurator fiscal question of the sufficiency of the Crown evidence.

Criminal record of accused

It is probably unnecessary, and may indeed be undesirable, that the judge should at any stage of the proceedings advise the accused of the circumstances in which the prosecutor might be permitted to disclose the accused's own criminal record, if any [Criminal Procedure (Scotland) Act 1995, s. 270]. Generally, this section applies where evidence is led by the defence, or the defence asks questions of a witness for the prosecution, with a view to establishing the accused's good character or impugning the character of the prosecutor, of any witness for the prosecution or of the complainer. It also applies where the nature or conduct of the defence is such as to tend to establish any of the foregoing. Where the section applies the court may, on the application of the prosecutor, permit the prosecutor to lead evidence that the accused has committed, or has been convicted of, or has been charged with, offences other than that for which he is being tried, or is of bad character. In proceedings on indictment an application by the prosecutor must be made in the absence of the jury. If an unrepresented accused, however, begins, during the course of a trial, to ask questions, or to lead evidence, of a kind which might permit the prosecutor to seek leave to disclose the accused's record, it is suggested that the judge should intervene at that stage in order to advise the accused of the possible consequences of continuing that line of questioning or evidence.

Protecting the interests of witnesses

It is not unknown for unrepresented accused to approach the questioning of witnesses, and particularly complainers, in an aggressive and offensive way which is quite unwarranted and which is merely intended to humiliate and to traumatise the witness. A judge must, of course, be mindful of an accused person's entitlement to test the evidence by means of cross-examination, and accordingly care must be taken that any intervention is not likely to lead to the possibility of a subsequent conviction being thereafter quashed on appeal. On the other hand, a judge has a duty to protect complainers and other witnesses from questioning which goes well beyond what is

appropriate for the purpose of testing or challenging their evidence. This is a particularly difficult area, but judges must do their best to act in a given case in a manner which will ensure that they do not prejudice an accused person's right to a fair trial while still being prepared to intervene as necessary in the interests of a complainer or other witness.

Sexual offences

Partly because of serious concerns in relation to cases where unrepresented accused persons themselves conducted the cross-examination of complainers and other witnesses in sexual offence cases, the Scottish Parliament passed the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002. The effect of that legislation is that an accused may not personally conduct his defence or any part of it in relation to a charge of a sexual offence [Section 288C of the Criminal Procedure (Scotland) Act 1995]. The court must appoint a solicitor where the accused has not engaged one, dismissed a solicitor, or the solicitor has withdrawn, unless the accused intends to engage another solicitor. A solicitor appointed by the court may not be dismissed by the accused, and is not obliged to comply with an instruction to dismiss counsel [1995 Act, s 288D]

15.Appendix A: Guidance for Court Staff on the Handling and Storage of Holy Books and Scriptures

HANDLING

- All Holy books/scriptures should be treated with respect and handled with care at all times.

- Those Holy books/scriptures, which must be kept in covers, should remain so at all times except when being removed by a witness in court (see storage).

- Staff should be aware followers of certain faiths (for example Sikhism, Islam and Hinduism) place a great deal of importance on hygiene and cleanliness when handling Holy books/scriptures. It is common practice of such followers to wash their hands prior to handling Holy books/scriptures. It is hoped that where a witness requests to wash their hands, this can be done before the witness comes into the courtroom.

Sundar Gutka – Sikh

- Hands must be washed before handling:
- Any person handling this should cover their head with the ramals provided;
- Not be under the influence of drink or drugs;
- The person taking the oath must also cover their head with a ramal and should not have any tobacco or alcohol in his/her possession at that time.

Bhagavad Gita – Hindu

- Nothing should be written on or in it:
- Nothing placed inside it;
- Nothing put on top of it.

Qu'ran – Muslim

- Should never be carried below the waist;
- Should never be held by the left hand;
- Must be unwrapped by a follower of the faith.

Also for ease of reference the cover colours of the respective books are:

- Qu’ran – Green
- Gita – Red
- Gutka – Orange

STORAGE

For the Hindu, Muslim and Sikh religions, great importance is placed on the storage of Holy/books scriptures. The Gita, Gutka and the Qu'ran should therefore be kept in a cover at all times.

All religious books/scriptures should, where possible be stored above shoulder height, on a shelf or in a cupboard, but at all times they must be above ground level and never left on the floor.

All Holy books/scriptures in covers should remain in them at all times. However, prior to taking them into court it is advisable to check that the correct Holy book/scripture is contained within the cover.

16.Appendix B: Arrangements for the Instruction for Accused

With effect from 1 April 2002, when it is necessary to instruct an interpreter for any court appearance of an accused person, responsibility for instructing that interpreter will lie with the Scottish Courts and Tribunals Service (SCTS). Guidance on the operation of this new policy is provided below. The guidance covers the instruction of community, foreign language and sign language interpreters.

1. Background

Prior to 1 April 2002 the Crown Office/Procurator Fiscal Service (COPFS) had responsibility for instructing interpreters for accused, from their first appearance in court up until their conviction. The SCTS had responsibility for instructing interpreters for all court appearances following conviction. It is now considered that the involvement of the prosecutor in instructing an interpreter for the accused may be in breach of Article 6 of the ECHR, and it has, therefore, been agreed that the SCTS will assume responsibility for the provision of interpreters for **all** court appearances of accused persons. This will apply to all cases calling in court on or after 1 April 2002. The COPFS will retain responsibility for instructing interpreters for crown witnesses.

The SCTS has agreed to adopt the policy introduced last year by the COPFS which insists on minimum levels of qualification and experience in interpreters, in order to avoid challenges on the basis of inadequate provision of interpreting services.

It has been recognised that there is limited time available between arrest and the first appearance of an accused in custody, and it has been agreed, therefore, that when an accused person is appearing for the first time from custody, the police will, so far as possible, arrange, on behalf of the SCTS, for a suitably qualified and experienced interpreter to appear at court to assist the accused. The fee of the interpreter in such cases will be paid by the SCTS.

2. Identifying the need for an Interpreter

Responsibility for identifying whether interpreting services are required for an accused lies with the police. They will advise the Procurator Fiscal where such a need is identified. The Procurator Fiscal will in turn advise the Clerk of Court of the need to engage an interpreter by a pro forma letter which will identify:

- Name of accused,
- Type of court diet, e.g. pleading/intermediate/first diet,
- Date of diet,
- Type of interpreter required, i.e. sign language, or language and dialect required,

- Whether there are any special circumstances, such as the availability of an additional technical glossary of terms, or the need for a briefing from the prosecutor, or the need to inspect certain productions.

Once the need for an interpreter has been identified, you should comply with the following guidance.

3. Instructing an Interpreter

You should always instruct interpreters through a recognised interpreting service, to ensure that individuals who require interpreting services are provided with a suitably qualified and experienced interpreter. It is the responsibility of the interpreting service to provide an interpreter who has been assessed by them as suitable for the assignment, in accordance with the minimum requirements specified by the SCTS.

A list of the main relevant interpreting services is provided. These are, in the main, local authority services although a number of private interpreting services which have provided considerable assistance to the COPFS in the past are also listed.

4. Letter of Instruction

You should instruct interpreters using the style letters of instruction provided [see Appendix D]. Separate letters are provided for the instruction of (a) sign language, and (b) foreign language interpreters.

You should direct the letter of instruction to the interpreting service who will be responsible for identifying an appropriate interpreter. The letter of instruction will then be passed by the interpreting service to the individual interpreter identified.

You should ensure that interpreting services are always instructed in writing and that written records are kept of discussions with interpreting services.

It is recognised that interpreters may be required at short notice and that the initial contact with an interpreting service may be by telephone. Even where this is the case, the letter of instruction and enclosures referred to below should be used, and should be passed quickly to the interpreting service, to ensure that the minimum requirements are known and complied with.

The letter of instruction refers to a number of papers which should accompany it, including:

- Code of Conduct - the letter of instruction requires the interpreting service to ensure that the identified interpreter signs the code of conduct and returns the original to the court, with a copy being retained by the service, and by the interpreter.
- A copy of the complaint or charges on the indictment.
- A copy of the briefing note for interpreters and summary of commonly used terms
- Expenses claim form - see para. 9 below regarding payment.

The letter of instruction requests the interpreting service to list in writing the recommended interpreter's qualifications and experience and the basis of the assessment that the interpreter is suitable for the assignment. This should be retained with the court papers as a record of the assessment.

5. Qualifications and Experience of Interpreters

When instructing sign language interpreters you should ensure that the interpreter is a qualified sign language interpreter (as opposed to a trainee) who is registered with the Scottish Association of Sign Language Interpreters. The appropriate style letter of instruction makes this requirement clear.

When a community or foreign language interpreter is required, you should, in the first instance, ask the interpreting service to provide an interpreter who has the Diploma in Public Service Interpreting (Scottish legal option) or its equivalent and who has recent experience of consecutive and simultaneous interpreting in the criminal court context.[1]

There is a shortage of qualified interpreters in some languages, and on occasion the interpreting service approached may be unable to provide an interpreter who has the Diploma and recent experience of interpreting in court. The Scottish Translation, Interpreting and Communication Forum has given an assurance that interpreting services will share relevant information in relation to available interpreters. Therefore, if the interpreting service approached is unable to provide an interpreter who has the qualifications and experience required, the manager of the service should inform you of this. You should then invite that manager to liaise with other interpreting services to ascertain if a suitable interpreter is available elsewhere (if this process has not already taken place). Given the new minimum requirements it may be that interpreters will have to be brought from other regions or from other parts of the United Kingdom to satisfy the minimum requirements and to ensure that the accused has a suitable interpreter in court. If after making appropriate efforts the interpreting service cannot supply an interpreter who is suitably qualified and experienced, a compromise will have to be reached. You should ensure that the service outlines the basis of their assessment of the recommended interpreter in writing and that the

information provided to the court is kept with the court papers.

Difficulties in obtaining suitably qualified and experienced interpreters may be particularly acute in respect of first appearances from custody; the police have undertaken to make arrangements for interpreters in respect of first custody appearances. It should be noted, however, that this is being done as a gesture of goodwill, and there is no legal obligation upon them to do so. In view of the difficulties likely to be encountered, flexibility will be required.

[1] **Definitions**

Interpreting - spoken or signed, as opposed to written, transfer of a message from one language to another.

Simultaneous or whispering interpreting - an immediate interpretation into the other language of everything being said. The interpreter usually sits close to the non-English speaker. In multi-accused cases, microphones and headphones may be necessary.

Consecutive interpreting - the interpreter waits for the message then repeats it in the other language. The interpreter might take notes to help with details e.g. dates, names, numbers.

Summarising interpreting - for example, summarising legal arguments or procedures. Might be used to explain legal concepts/procedures with which the person is not familiar.

NOTE: In the criminal court only simultaneous or consecutive interpreting is ever likely to be appropriate for the accused and witnesses.

6. Briefing of Interpreters

You should ensure that appropriate briefing is given to the interpreter in advance of the court hearing. In most cases this should simply mean copying the complaint, or the charges on the indictment, to the interpreter in advance of court, and providing the interpreter with a copy of the glossary of terms [see Appendix E]. These should be provided with the letter of instruction and the Code of Conduct to be passed to the interpreter by the interpreting service.

In cases where technical or unusual terminology is likely to be used (Health and Safety cases are an obvious example) this will be identified in the initial letter from the Procurator Fiscal to the Clerk of Court, and may involve a further written or verbal briefing by the Procurator Fiscal.

If any objection is raised by the defence to any briefing of the interpreter consistent with this guidance, the Procurator Fiscal will explain to the court that the interpreter is an independent individual providing expert assistance to the court. The signed Code of Conduct may be referred to and should, therefore, be available in court. The briefing is provided to ensure that the

interpreter is in a position to assist the court more effectively, and cannot be said to give rise to any prejudice to any party to the proceedings.

7. Communications between Solicitor and Client

Interpreters instructed to provide services for the accused are sometimes asked by defence solicitors to facilitate communications between solicitor and client at court. The interpreter is under no obligation to assist the communications of solicitor and client, and should not be pressurised to do so. An interpreter engaged by the SCTS should not accept such work without first obtaining permission from the Clerk of Court. Such permission should normally be given when the interpreter is content to assist. The terms of the Code of Conduct should be noted.

8. Attendance at Court

Wherever possible Clerks of Court should arrange to meet interpreters engaged by the SCTS prior to commencement of the court, to ensure that they are present, aware of the court layout, and advised of the likely order of business. When the interpreter has been engaged by the Scottish Courts and Tribunals Service, the Clerk of the Court should receive a copy of the 'Code of Conduct' signed by the Interpreter (Appendix C).

9. Payment of Interpreters

The SCTS is responsible for payment of the interpreter's fee. An expenses claim form should be enclosed with the Letter of Instruction. The expenses which may be claimed are itemised on the expenses claim form. The Clerk of Court should countersign the form to confirm the interpreter's attendance. Thereafter, an officer (not the cashier) should check that the claim has been properly calculated. Then the office manager or his/her appointed depute should authorise and pass the claim for payment.

10. Monitoring of new arrangements

You should ensure that these new arrangements are discussed within your office. Local allocation of duties should be agreed, and you should ensure that all relevant staff clearly understand their responsibilities in the new process.

You should advise Operations and Policy Unit of any significant difficulties experienced with either particular interpreters, or the standard of service generally provided by interpreting services, so that this information can be fed back to the services and to the Scottish Translation, Interpreting and Communication Forum. You should also advise Operations and Policy Unit of any general recurring problems which are experienced as a result of the new arrangements.

11. Conclusion

Any queries or views in relation to the content of this circular should be referred to Operations and Policy Unit.

17.Appendix C: Instruction of Interpreters for Criminal Court Diets - Protocol issued by Crown Office

INSTRUCTION OF INTERPRETERS

FOR CRIMINAL COURT DIETS PROTOCOL

This protocol sets out agreed arrangements between Crown Office, Scottish Courts and Tribunals Service and the Association of Chief Police Officers in Scotland (ACPOS) for the instruction of interpreters for criminal court diets. It is intended to cover the instruction of community, foreign and sign language interpreters and (interpreters required to assist people with sensory impairment).

It is the responsibility of the police to advise the procurator fiscal in the police report whether the accused or any proposed prosecution witness requires the services of an interpreter to give evidence in court. The reporting officer should specify the language and dialect required in the police report and should also provide the name, designation and qualifications of any interpreter used at the investigative stage so that the procurator fiscal and the Scottish Courts and Tribunals Service may ensure that, so far as possible, the same interpreter is not used at any court diet.

It is the responsibility of the procurator fiscal to engage a suitably qualified and experienced interpreter, skilled in the language and dialect specified in the police report, to assist prosecution witnesses in giving their evidence. It is recognised that there is limited time available between arrest and the first appearance of an accused person in custody.

In all cases therefore where accused persons are appearing for the first time from custody the police will, so far as possible, arrange, on behalf of the Scottish Courts and Tribunals Service, for a suitably qualified and experienced interpreter to appear at court to assist the accused. The interpreter engaged for court should not be the same interpreter who assisted the accused during the investigation stage although it is recognised that it may not always be possible to secure the services of a different interpreter who has appropriate qualifications and experience given the limited time available. The fact that the police have engaged an interpreter for the accused's first appearance from custody should be set out in the police report to the procurator fiscal. If difficulties arise in securing the services of an interpreter the police should make early contact with the procurator fiscal. The fee of the interpreter in such cases will be paid by Scottish Court Service and they will instruct the interpreter for the accused for any continued diets in the case.

In respect of all other criminal court diets, both pre-trial and trial diets, it is the responsibility of the Scottish Courts and Tribunals Service to engage a suitably qualified and experienced interpreter, skilled in the language and dialect required to assist the accused. In respect of all other diets the procurator fiscal will advise the sheriff clerk (or in high court cases the deputy principal clerk of justiciary) in writing of the language needs of the accused, namely the language and dialect as set out in the police report, at least 14 days before the scheduled diet.

It is recognised that the role of the interpreter in the criminal court is crucial. The procurator fiscal, Scottish Courts and Tribunals Service and the police will ensure, so far as possible, that interpreters are engaged through recognised interpreting services and that interpreters engaged have appropriate qualifications and experience.

18.Appendix D: Code of Conduct for Interpreters and Translators

Code of Conduct for interpreters, translators and transcribers

This Code of Conduct sets out the standards which are expected of you when accepting assignments from the collaborative Partners.

1. Competence – You are expected to:

· Have a written and spoken command of both languages, including any specialist terminology, current idioms and dialect;

· Be familiar with any cultural backgrounds relevant to the assignment;

· Understand police station and court procedures for those organisations where it is required.

2. Procedure– You will:

· Convey the exact meaning of what has been said without adding, omitting or changing anything; making explanation only where a cultural misunderstanding may be occurring, or where there is no direct equivalent for a particular term. Only in exceptional circumstances should a summary be given (and only if consent is given by all parties) provided the meaning of what is being summarised is not distorted.

· Declare any difficulties you have with dialect or technical terms and if these cannot be satisfactorily remedied, withdraw from the assignment.

· Not give advice, legal or otherwise, to the accused, nor enter into discussion with them (other than to confirm language/dialect match).

· Not delegate work, nor accept delegated work (or work for another party in the proceedings), without the prior consent of the party engaging your/the other interpreter's services.

· Be reliable and punctual at all times.

· Declare immediately any previous involvement in the assignment and any involvement or relationship with the accused or any witness in the case.

· Interrupt the proceedings only:

To ask for clarification;

To point out that a party may not have understood something;

To alert the parties to a missed cultural reference;

To advise the court that there is no equivalent term in the language concerned, to the term being used;

To advise the court that you require a break, due to the potential for lapses in concentration to occur during lengthy periods of simultaneous or consecutive interpreting.

3. <u>Ethical and Professional Issues</u>– You will:

· Respect confidentiality at all times and not seek to take advantage of any information disclosed during your work.

· Act in an impartial and professional manner.

· Not discriminate between parties (to their advantage or disadvantage) either directly or indirectly, on the grounds of race, colour, ethnic origin, age, nationality, religion, gender, disability or sexual orientation.

· Disclose any information, including any criminal record, which may make you unsuitable for any particular assignment.

· Disclose immediately if the person for whom you are interpreting or their immediate family is known or related to you.

· Declare any business, financial, family or other interests which you might have in the matter being handled.

· Not accept any form of reward (whether in cash or otherwise) for interpreting work, other than payment via this Contract.

4. <u>Confidentiality</u>

Any information you obtain in the course of your assignment is confidential and is not to be given by you to anyone who is not a party to the case, whether during the assignment or after it has been finished, unless we give you written permission to do so. You must also comply with the current Data Protection Act legislation.

You will not use any information you obtain in the course of your assignment for any purpose other than as authorised by a Collaborative Partner. The right to all such information rests with us and permission to access and use this information can only be given by a representative of the Collaborative Partner. If you feel that you may require to disclose information obtained in the assignment due to a need for additional support or guidance you should write to the Clerk of Court for permission to disclose such information.

You must keep safe any document provided to you in the course of an assignment; you must make sure they are not copied, in whole or in part, and you must return them to us, at the end of the assignment.

5. <u>Insurance</u>

You are advised to have your own professional indemnity insurance cover as the Authority will not be responsible for any claims made against it, or against you, on the grounds (for example) of incompetent interpreting or unprofessional conduct.

I have read and understood the terms and conditions set out above, and I accept this assignment. I understand that if I breach any of these terms and conditions, particularly those relating to confidentiality, criminal or civil proceedings may result.

Signed……

Name…….

Date……..

19.Appendix E: Memorandum by Lord Justice General Hope on Child Witnesses, 1990

1. **1.** The following memorandum of guidance has been prepared at the suggestion of the Scottish Law Commission: see *Report on the Evidence of Children and Other Potentially Vulnerable Witnesses* (Scot. Law Com. No. 125). Its purpose is to provide assistance to judges in the exercise of their discretionary powers, where a child is to give evidence by conventional means in open court, to put the child at ease while giving evidence and to clear the court of persons not having a direct involvement in the proceedings.

1. **2.** The general objective is to ensure, so far as is reasonably practicable, that the experience of giving evidence by all children under the age of 16 causes as little anxiety and distress to the child as possible in the circumstances.

1. **3.** The following are examples of the measures which may be taken, at the discretion of the presiding judge, with a view to achieving that objective:

(a) The removal of wigs and gowns by the judge, counsel and solicitors;

(b) The positioning of the child at a table in the well of the court along with the judge, counsel and solicitors, rather than requiring the child to give evidence from the witness box;

(c) Permitting a relative or other supporting person to sit alongside the child while he or she is giving evidence;

(d) The clearing from the court room of all persons not having a direct involvement in the proceedings.

1. **4.** In deciding whether or not to take these or similar measures, or any of them, the presiding judge should have regard to the following factors –

(a) The age and maturity of the child

In general the younger the child the more desirable it is that steps should be taken to reduce formality and to put the child at ease while giving evidence.

(b) The nature of the charge or charges, and the nature of the evidence which the child is likely to be called upon to give

Particular care should be taken in cases with a sexual element or involving allegations of child abuse especially where the child is the complainer or an eye witness. Children directly involved in such cases are likely to be especially vulnerable to trauma when called upon to give evidence in the presence of the accused. The giving of evidence of a relatively formal nature, especially in the case of an older child, is unlikely to cause anxiety or distress and in such cases it will rarely be necessary to take special measures in the interests of the child.

(c) The relationship, if any, between the child and the accused

A child who is giving evidence at the trial of a close relative may be especially exposed to apprehension or embarrassment, irrespective of the nature of the charge. The positioning of the child and the support of a person sitting alongside the child while giving evidence are likely to be of particular importance in these cases.

(d) Whether the trial is summary or on indictment

While informality may be easier to achieve in summary cases, the presence of a jury in cases taken on indictment is likely to present an anxious or distressed child with an additional cause for anxiety or distress. This makes it all the more necessary under solemn procedure that steps should be taken to put the child at ease.

(e) Any special factors placed before the court concerning the disposition, health or physique of the child

All children are different, and judges should take each child's particular circumstances into account before deciding what steps, if any, should be taken to minimise anxiety or distress.

(f) The practicability of departing from normal procedure, including the size and layout of the court and the availability of amplification equipment

Whatever steps are taken, a child witness who gives evidence by conventional means must remain visible and audible to all those who have to hear and assess the evidence, including the

jury and the accused.

1. **5.** In all cases before a witness under 16 years is led in evidence an opportunity should be given to those representing the Crown and the defence to address the judge as to what special arrangements, if any, are appropriate. Under solemn procedure such representations should be made outwith the presence of the jury and preferably before the jury is empanelled or at least before the commencement of the evidence.

1. **6.** If a relative or other supporting person is to sit alongside the child, that person should not be a witness in the case and he or she should be warned by the judge at the outset not to prompt or seek to influence the child in any way in the course of the evidence.

1. **7.** The clearing of the court while a child is giving evidence will normally be appropriate in all cases which involve an offence against, or conduct contrary to, decency or morality: see section 166 and section 362 of the Criminal Procedure (Scotland) Act 1975 (now section 50 of the Criminal Procedure (Scotland) Act 1995). In other cases this should only be done if the judge is satisfied that this is necessary in order to avoid undue anxiety or distress to the child. The statutory provisions that *bona fide* representatives of a newspaper or news agency should not be excluded should be applied in all cases.

1. **8.** When taking any of the measures described above the judge should have regard to the court's general duty to ensure that the accused receives a fair trial and is given a proper opportunity to present his defence.

20.Appendix F: Child Witnesses Discretionary Powers

Practice Note (No.2 of 2005)

Child Witnesses: Discretionary Powers

1. This practice note has effect from 1st April 2005 and supersedes the Memorandum on Child Witnesses of 26 July 1990.

2. The purpose of this practice note is to provide assistance to judges in the exercise of their discretionary powers, where a child is to give evidence by conventional means

in open court, to put the child at ease while giving evidence and to clear the court of persons not having a direct involvement in the proceedings. This practice note does not concern the use of any statutory special measures that may be authorised for the giving of evidence by children under the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") as amended by the Vulnerable Witnesses (Scotland) Act 2004.

3. The discretionary powers can be exercised by judges in addition to any statutory special measures that may be authorised for child witnesses under the 1995 Act, or may be used where the court has ordered that a child witness may give evidence without the benefit of any statutory special measure.

4. The general objective is to ensure, so far as is reasonably practicable, that the experience of giving evidence by all children under the age of 16 causes as little anxiety and distress to the child as possible in the circumstances.

5. The following are examples of the measures which may be taken, at the discretion of the presiding judge, with a view to achieving that objective –

(a) the removal of wigs and gowns by the judge, counsel and solicitors;

(b) the positioning of the child at a table in the well of the court along with the judge, counsel and solicitors, rather than requiring the child to give evidence from the witness box;

(c) the clearing from the court room of all persons not having a direct involvement in the proceedings.

6. In deciding whether or not to take these or similar discretionary measures, or any of them, the presiding judge should have regard to the following factors –

(a) The special measures, if any, sought by the child witness notice or otherwise authorised by the court.

(b) The age and maturity of the child. In general, the younger the child the more desirable it is that steps should be taken to reduce formality and to put the child at ease while giving evidence.

(c) The nature of the charge or charges, and the nature of the evidence which the child is likely to be called upon to give.

Particular care should be taken in cases with a sexual element or involving allegations of child abuse especially where the child is the complainer or an eye witness. Children directly involved in such cases are likely to be especially vulnerable to trauma when called upon to give evidence in the presence of the accused. The giving of evidence of a formal nature, especially in the case of an older child, may not require additional discretionary measures to be taken in addition to the statutory special measures that may have been authorised.

(d) The relationship, if any, between the child and the accused. A child who is giving evidence at the trial of a close relative may be especially exposed to apprehension or embarrassment, irrespective of the nature of the charge.

(e) Whether the trial is summary or on indictment. While informality may be easier to achieve in summary cases, the presence of a jury in cases taken on indictment is likely to present an anxious or distressed child with an additional cause for anxiety or distress. This makes it all the more necessary under solemn procedure that steps should be taken to put the child at ease.

(f) Any special factors placed before the court concerning the disposition, health or physique of the child.

(g) The practicability of departing from normal procedure, except as far as is necessary for any authorised statutory special measure, including the size and layout of the court and the availability of any amplification equipment. Whatever steps are taken, a child witness who gives evidence by conventional means must remain visible and audible to all those who have to hear and assess the evidence, including the jury and the accused.

7. In all cases where statutory special measures have not been authorised by the court, before a witness under 16 years is led in evidence an opportunity should be given to those representing the Crown and the defence to address the judge as to whether any additional discretionary special measures are appropriate. Under solemn procedure such representations should be made outwith the presence of the jury and preferably before the jury is empanelled or at least before the commencement of the evidence.

8. The clearing of the court while a child is giving evidence will normally be appropriate in all cases which involve an offence against, or conduct contrary to, decency and morality: see section 50 of the Criminal Procedure (Scotland) Act 1995. In other cases this should only be done if the judge is satisfied that this is necessary in order to avoid undue anxiety or distress to the child. The statutory provisions that bona fide representatives of a newspaper or news agency should not be excluded should be applied in all cases.

9. When taking any of the additional discretionary measures described above the judge should have regard to the court's general duty to ensure that the accused receives a fair trial and is given a proper opportunity to present his defence.

21.Appendix G: Taking Evidence of a Vulnerable Witness by a Commissioner

HIGH COURT OF JUSTICIARY

PRACTICE NOTE

No. 1 of 2017

Taking of Evidence of a Vulnerable Witness by a Commissioner

Introduction

1. This Practice Note has effect from 8 May 2017. It replaces Practice Note No.3 of 2005.

2.. Statutory provision for the availability of special measures for vulnerable witnesses has been a feature of the criminal courts for more than a decade. In spite of that, the day to day practical application of these measures can sometimes leave much to be desired. This is particularly the case with the taking of evidence of a vulnerable witness by a commissioner.

3. The most common deficiency in cases where there is a child witness, a deemed vulnerable witness or other vulnerable witness is a failure by the parties (both Crown and defence) to address their minds at a suitably early stage to the question of whether a commission is necessary for that witness. Early conduct of a commission has benefits not only in the earlier capture of the evidence but also in giving more time for addressing issues such as editing and admissibility.

4. Practitioners can find useful information to bear in mind at:
http://www.theadvocatesgateway.org/

5. The purpose of this Practice Note therefore is to give guidance as to -

(a) when practitioners should consider whether a commission is required;

(b) what practitioners must do in preparation for seeking authorisation to take the evidence of a vulnerable witness by a commissioner;

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

When practitioners should consider whether a commission is required

6. Parties need to consider proactively at an early stage whether any witness is, or may be, a vulnerable witness. In High Court proceedings, if the Crown intends to seek the special measure of a commission that must be intimated to the defence at the earliest opportunity so that

appropriate legal aid cover can be arranged without delay. Similarly, the defence must intimate any such intention to seek a commission as soon as possible.

7. In cases where it is intended to rely on a prior statement as evidence in chief, it is particularly important that the commission should proceed at as early a stage as possible, having regard to the observations of the court in the case of *MacLennan v HM Advocate* 2016 JC 117 at paras 21 and 28.

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

8. In preparing a Vulnerable Witness (VW) notice or application a practitioner is to:

- have regard to the best interests of the witness;
- seek the views of the witness, and/or parent or guardian of the witness, as appropriate, with a view to determining whether taking evidence by commissioner will be the most suitable special measure, or whether another special measure, or a combination of measures, will be better in obtaining the witness's "best evidence";
- take account of any such views expressed by the witness, or a parent or guardian of the witness as appropriate; and
- consider how relevant information relating to the application or any subsequent commission will be communicated to the witness.

9. The VW notice or application is to

- reflect any relevant statutory provisions;
- explain the basis upon which the witness qualifies as a vulnerable witness, and any specific issues relating to the witness;
- state why a commission is considered appropriate for the witness;
- state whether the commission requires to be held in any particular place, or environment, due to the location of the witness or any particular vulnerabilities which the witness may have;
- state whether the witness requires additional special measures;
- state whether the witness will give evidence to the commission by live television link;
- state whether the witness is restricted as to any times of the day, or particular days or dates that he or she can attend a commission as a result of his or her vulnerability;
- state whether the witness is likely to need frequent breaks or any other special requirements, such as disabled access;
- address how any question of identification is going to be dealt with;
- identify any productions or labels that may require to be put to the witness (the use of any products or labels should be kept to a minimum);
- if any prior statement in any form may be put to a witness, identify the statement or the particular passages therein;
- state the communication needs of the witness: identifying the level of the witness' comprehension, and whether any communication aids or other reasonable adjustments are required (in certain cases it may assist the court to be provided with any expert report addressing these issues and any other relevant issues mentioned in paragraph 11); and
- estimate the likely length of the examination in chief and cross examination.

Decision on the application at preliminary hearing

10. If the court appoints the VW notice or application to be disposed of at a hearing the solicitor must, forthwith, inform the Clerk of Justiciary and the Electronic Service Delivery Unit of Scottish Courts and Tribunals Service of the intention to seek authority to have the evidence of a vulnerable witness taken by a commissioner and check the availability of a suitable venue.

11. At the hearing the court will expect to be addressed on all matters set out in the VW notice or application. Parties will be expected to be in a position to assist the court in its consideration of the following matters:

- whether the witness will affirm or take the oath;
- the location of the commission which is the most suitable in the interests of the witness;
- the timing of the commission which is the most suitable in the interests of the witness;
- pre-commission familiarisation with the location;
- where the accused is to observe the commission and how he is to communicate any instructions to his advisors;
- if the commission is to take place within a court building in which the witness and the accused will both be present, what arrangements will be put in place to ensure that they do not come into contact with each other;
- the reasonable adjustments which may be required to enable effective participation by the witness;
- the appropriate form of questions to be asked (the court may consider asking parties to prepare questions in writing);
- the length of examination-in-chief and cross examination, and whether breaks may be required;
- how requests for unscheduled breaks may be notified and dealt with;
- potential objections, and whether they can be avoided;
- the lines of inquiry to be pursued;
- the scope of any questioning permitted under s275 of the 1995 Act, and how it is to be addressed;
- the scope of any questions relating to prior statements;
- where any documents or label productions are to be put to the witness, how this is to be managed and whether any special equipment or assistance is required;
- whether any special equipment (for example, to show CCTV images to the witness) may be required;
- the scope for any further agreement between the parties might shorten the length of the commission or the issues to be addressed;
- where there are multiple accused, how repetitious questioning may be avoided;
- the extent to which it is necessary to "put the defence case" to the witness (parties are invited to have regard to the observations of the Court of Appeal in *R v Lubemba* [2015] 1 WLR 1579 and *R v Barker* [2011] Criminal LR 233);
- how that is to be done;
- whether the parties have agreed how this issue may be addressed in due course for the purposes of the jury;
- any specific communication needs of the witness;
- whether any communication aids are required, e.g. "body maps";
- if a statement in whatever form is to be used as the evidence in chief of the witness, whether and what arrangements should be made for the witness to see this in advance of the commission (i.e. how, where, and when);

- whether any such statement requires to be redacted in any way;
- in such a case, whether, and to what extent, there should be any examination in chief of the witness
- the court may also make directions as to the circumstances in which visually recorded prior statements may be made available to the defence; [2]
- the arrangements to be made in due course for parties to view the resultant DVD prior to a post-commission hearing.

12. The court may make directions about these matters, or any other matters which might affect the commission proceedings, or which may be required for the effective conduct of the commission. If combined special measures are sought, the court will address how this is to work in practice.

13. At the hearing, whether or not a trial has been fixed, the court will consider fixing a post-commission hearing at which the court may address:

- any questions of admissibility which have been reserved at the commission;
- any editing of the video of the commission which may be proposed (parties may request that the clerk allow the recording to be viewed prior to the further hearing to assess the quality of the recording, and the court may specify the conditions under which such viewing may take place);
- the quality of the recording (and where the quality is poor whether transcripts are required); and
- how the evidence is to be presented to the jury.

CJM Sutherland

Lord Justice General

Edinburgh 28 March 2017

[2] HMA
v AM & JM [2016] JC 127

22.Appendix H: Consultation process for the second edition

CONSULTATION PROCESS for the SECOND EDITION

At various stages in the course of drafting the second edition, the undernoted were consulted:

- **Crown Office**
- **Victim Support Scotland**
- **Equality Network**
- **Commission for Equality and Human Rights**
- **Commission for Racial Equality**
- **Scottish Court Service**
- **The Scottish Executive and the Scottish Government**

23.Appendix I: Membership of Judicial Studies Equal Treatment Working Party

MEMBERSHIP OF ORIGINAL WORKING PARTY

Membership of the Judicial Studies Committee Working Party on Equal Treatment – Second edition 2006 – March 2008

Sheriff F. R. Crowe, Edinburgh (Director of Judicial Studies)

Grainger Falconer, Victim Support Scotland

Moira Healey, Mental Welfare Commission

Tim Hopkins, Equality Network

Sheriff N.M.P. Morrison, Q.C., Edinburgh

Lady Paton (Chairman)

Jill Sutherland (Commission for Racial Equality)