Judicial Institute for Scotland

Preliminary Hearings

Bench Book - Appendices

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Contents

Appendix 1: Sections 274, 275, 275A and 275B

274 Restrictions on evidence relating to sexual offences

(1) In the trial of a person charged with an offence to which section 288C of this Act applies, the court shall not admit, or allow questioning designed to elicit, evidence which shows or tends to show that the complainer—

(a) is not of good character (whether in relation to sexual matters or otherwise);

(b) has, at any time, engaged in sexual behaviour not forming part of the subject matter of the charge;

(c) has, at any time (other than shortly before, at the same time as or shortly after the acts which form part of the subject matter of the charge), engaged in such behaviour, not being sexual behaviour, as might found the inference that the complainer—

(i) is likely to have consented to those acts; or

(ii) is not a credible or reliable witness; or

(d) has, at any time, been subject to any such condition or predisposition as might found the inference referred to in sub-paragraph (c) above.

(2) In subsection (1) above—

"complainer" means the person against whom the offence referred to in that subsection is alleged to have been committed; and

the reference to engaging in sexual behaviour includes a reference to undergoing or being made subject to any experience of a sexual nature.

275 Exception to restrictions under section 274

(1) The court may, on application made to it, admit such evidence or allow such questioning as is referred to in subsection (1) of section 274 of this Act if satisfied that—

(a) the evidence or questioning will relate only to a specific occurrence or occurrences of sexual or other behaviour or to specific facts demonstrating—

(i) the complainer's character; or

(ii) any condition or predisposition to which the complainer is or has been subject;

(b) that occurrence or those occurrences of behaviour or facts are relevant to establishing whether the accused is guilty of the offence with which he is charged; and

(c) the probative value of the evidence sought to be admitted or elicited is significant and is likely to outweigh any risk of prejudice to the proper administration of justice arising from its being admitted or elicited.

(2) In subsection (1) above—

(a) the reference to an occurrence or occurrences of sexual behaviour includes a reference to undergoing or being made subject to any experience of a sexual nature;

(b) "the proper administration of justice" includes—

(i) appropriate protection of a complainer's dignity and privacy; and

(ii) ensuring that the facts and circumstances of which a jury is made aware are, in cases of offences to which section 288C of this Act applies, relevant to an issue which is to be put before the jury and commensurate to the importance of that issue to the jury's verdict,

and, in that subsection and in sub-paragraph (i) of paragraph (b) above, "complainer" has the same meaning as in section 274 of this Act.

(3) An application for the purposes of subsection (1) above shall be in writing and shall set out—

(a) the evidence sought to be admitted or elicited;

(b) the nature of any questioning proposed;

(c) the issues at the trial to which that evidence is considered to be relevant;

(d) the reasons why that evidence is considered relevant to those issues;

(e) the inferences which the applicant proposes to submit to the court that it should draw from that evidence; and

(f) such other information as is of a kind specified for the purposes of this paragraph in Act of Adjournal.

(4) The party making such an application shall, when making it, send a copy of it—

(a) when that party is the prosecutor, to the accused; and

(b) when that party is the accused, to the prosecutor and any co-accused.

(5) The court may reach a decision under subsection (1) above without considering any evidence; but, where it takes evidence for the purposes of reaching that decision, it shall do so as if determining the admissibility of evidence.

(6) The court shall state its reasons for its decision under subsection (1) above, and may make that decision subject to conditions which may include compliance with directions issued by it.

(7) Where a court admits evidence or allows questioning under subsection (1) above, its decision to do so shall include a statement—

(a) of what items of evidence it is admitting or lines of questioning it is allowing;

(b) of the reasons for its conclusion that the evidence to be admitted or to be elicited by the questioning is admissible;

(c) of the issues at the trial to which it considers that that evidence is relevant.

(8) A condition under subsection (6) above may consist of a limitation on the extent to which evidence—

(a) to be admitted; or

(b) to be elicited by questioning to be allowed,

may be argued to support a particular inference specified in the condition.

(9) Where evidence is admitted or questioning allowed under this section, the court at any time may—

(a) as it thinks fit; and

(b) notwithstanding the terms of its decision under subsection (1) above or any condition under subsection (6) above, limit the extent of evidence to be admitted or questioning to be allowed.

275A Disclosure of accused's previous convictions where court allows questioning or evidence under section 275

(1) Where, under section 275 of this Act, a court [(or, in proceedings before a commissioner appointed under section 271I(1) or by virtue of section 272(1)(b) of this Act, a commissioner)] on the application of the accused allows such questioning or admits such evidence as is referred to in section 274(1) of this Act, the prosecutor shall forthwith place before the presiding judge any previous relevant conviction of the accused.

(2) Any conviction placed before the judge under subsection (1) above shall, unless the accused objects, be—

(a) in proceedings on indictment, laid before the jury;

(b) in summary proceedings, taken into consideration by the judge.

(3) An extract of such a conviction may not be laid before the jury or taken into consideration by the judge unless such an extract was appended to the notice, served on the accused under section 69(2) or, as the case may be, 166(2) of this Act, which specified that conviction.

(4) An objection under subsection (2) above may be made only on one or more of the following grounds—

(a) where the conviction bears to be a relevant conviction by virtue only of paragraph (b) of subsection (10) below, that there was not a substantial sexual element present in the commission of the offence for which the accused has been convicted;

(b) that the disclosure or, as the case may be, the taking into consideration of the conviction would be contrary to the interests of justice;

(c) in proceedings on indictment, that the conviction does not apply to the accused or is otherwise inadmissible;

(d) in summary proceedings, that the accused does not admit the conviction.

(5) Where—

(a) an objection is made on one or more of the grounds mentioned in paragraphs (b) to (d) of subsection (4) above; and

(b) an extract of the conviction in respect of which the objection is made was

not appended to the notice, served on the accused under section 69(2) or, as the case may be, 166(2) above, which specified that conviction,

the prosecutor may, notwithstanding subsection (3) above, place such an extract conviction before the judge.

(6) In summary proceedings, the judge may, notwithstanding subsection (2)(b) above, take into consideration any extract placed before him under subsection.

(5) above for the purposes only of considering the objection in respect of which the extract is disclosed.

(7) In entertaining an objection on the ground mentioned in paragraph (b) of subsection (4) above, the court shall, unless the contrary is shown, presume that the disclosure, or, as the case may be, the taking into consideration, of a conviction is in the interests of justice.

(8) An objection on the ground mentioned in paragraph (c) of subsection (4) above shall not be entertained unless the accused has, under subsection (2) of section 69 of this Act, given intimation of the objection in accordance with subsection (3) of that section.

(9) In entertaining an objection on the ground mentioned in paragraph (d) of subsection (4) above, the court shall require the prosecutor to withdraw the conviction or adduce evidence in proof thereof.

(10) For the purposes of this section a "relevant conviction" is, subject to subsection

(11) below—

(a) a conviction for an offence to which section 288C of this Act applies by virtue of subsection (2) thereof;

(aa) a conviction by a court in England and Wales, Northern Ireland or a member State of the European Union other than the United Kingdom of an offence that is equivalent to one to which section 288C of this Act applies by virtue of subsection (2) thereof; or

(b) where a substantial sexual element was present in the commission of any other offence in respect of which the accused has previously been convicted, a conviction for that offence, which is specified in a notice served on the accused under section 69(2) or, as the case may be, 166(2) of this Act.

(10A) Any issue of equivalence arising in pursuance of subsection (10)(aa) is for the

court to determine.

(11) A conviction for an offence other than an offence to which section 288C of this Act applies by virtue of subsection (2) thereof is not a relevant conviction for the purposes of this section unless an extract of that conviction containing information which indicates that a sexual element was present in the commission of the offence was appended to the notice, served on the accused under section 69(2) or, as the case may be, 166(2) of this Act, which specified that conviction.

275B Provisions supplementary to sections 275 and 275A

(1) An application for the purposes of subsection (1) of section 275 of this Act shall not, unless on special cause shown, be considered by the court unless made

(a) in the case of proceedings in the High Court, not less than 7 clear days before the preliminary hearing; or

(b) in any other case,

not less than 14 clear days before the trial diet.]

(2) Where—

(a) such an application is considered; or

(b) any objection under subsection (2) of section 275A of this Act is entertained, during the course of the trial, the court shall consider that application or, as the case may be, entertain that objection in the absence of the jury, the complainer, any person cited as a witness and the public.

Appendix 2: High Court Practice Note No. 1 of 2005

Preliminary Hearings

This practice note is replicated overleaf.

HIGH COURT OF JUSTICIARY
PRACTICE NOTE

No. 1 of 2005

PRELIMINARY HEARINGS

Introduction

1. Certain amendments to the Criminal Procedure (Scotland) Act 1995(**a**) ("the 1995 Act") were introduced by the Criminal Procedure (Amendment) (Scotland) Act 2004(**b**). As a result, the 1995 Act now provides for the holding, in almost all cases at first instance in the High Court of Justiciary, of a preliminary hearing(**c**). Appropriate amendments have also been made to the Act of Adjournal (Criminal Procedure Rules) 1996 ("CPR")(**d**). These were introduced by the Act of Adjournal (Criminal Procedure Rules Amendment) (Criminal Procedure (Amendment) (Scotland) Act 2004) 2005(**e**).

2. These provisions introduce significant change to the way in which the business of the High Court is conducted.

3. In cases where the accused intends to plead guilty, but no intimation has been given under section 76 of the 1995 Act, the plea of guilty should be tendered at the preliminary hearing. In taking account, for the purposes of section 196 of the 1995 Act, of the stage in the proceedings at which the accused indicated his intention to plead guilty, the court will have regard to the fact that he did so at or before the preliminary hearing.

4. In cases where the accused pleads not guilty at the preliminary hearing, the court will ascertain the state of preparation of the parties, and determine whether a trial diet may be appointed. The court will not appoint a trial diet unless it is reasonably satisfied that the trial will proceed at that diet.

5. The purpose of this practice note is to give guidance as to—
   (a) what practitioners must do in preparation for the preliminary hearing;
   (b) how the preliminary hearing will be conducted; and
   (c) the issues that the court will expect practitioners to be able to address at the preliminary hearing.

6. In order to meet the requirements of the relevant statutory provisions it will be necessary for practitioners to carry out detailed preparations before the preliminary hearing. If, without reasonable excuse, a practitioner fails—
   (a) to be fully prepared for a preliminary hearing,
   (b) to have full instructions for a preliminary hearing, or
   (c) otherwise to be in a position to engage in discussion of the issues that may arise at the preliminary hearing,

   that state of affairs will be regarded by the court as unacceptable. The court will investigate, and record the reasons for, any such failure.

Written record of state of preparation

7. Section 72E of the 1995 Act requires the prosecutor and the legal representative of the

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(a) 1995 c.46.
(b) 2004 asp 5.
(c) 1995 Act, sections 72 to 72D. Preliminary hearings will take place from 1st April 2005, see S.S.I. 2004/405.
(d) S.I. 1996/513.
(e) S.S.I. 2005/44.

accused to prepare and lodge a written record of their state of preparation with regard to their cases. The written record must be a joint one, although it may contain separate statements of the prosecutor's and the accused's representative's state of preparation(**a**). The prosecutor and the accused's representative must communicate in sufficient time before the preliminary hearing with a view to preparing the joint written record. It is important that there be real and timeous communication(**b**). A form for the written record is prescribed(**c**). The form must be completed fully, unambiguously and in detail. It must be lodged with the Clerk of Justiciary by 2.00 p.m. not less than two days before the preliminary hearing(**d**). For preliminary hearings scheduled to take place in Glasgow, the form should be lodged with the Clerk of Justiciary in Glasgow. In all other cases, the form should be lodged with the Clerk of Justiciary in Edinburgh.

8. The court will expect that, in preparing for a preliminary hearing—

(a) the prosecutor and the accused's representative will each inform the court fully, in the joint written record, about the state of preparation of their case;

(b) the prosecutor and the accused's representative will have timeously lodged before the date of the preliminary hearing, any statutory notices upon which they propose to rely(**e**);

(c) the accused's representative will, before communicating with the prosecutor for the purpose of preparing the joint written record, have obtained from the accused all necessary instructions;

(d) the prosecutor and the accused's representative will each have considered, in detail, the evidence which they may require to lead in the event of the case proceeding to trial;

(e) the prosecutor and the accused's representative will each have taken steps to ascertain whether any of the witnesses who he or she may require to lead in the event of a trial will require special measures by reason of their being a child or a vulnerable person, and will each have lodged all necessary notices and made all appropriate applications in that regard(**f**);

(f) consideration will have been given by the prosecutor and the accused's representative to whether any preliminary plea(**g**), or preliminary issue(**h**), or other matter that might with advantage be disposed of before the trial(**i**), should be raised; and that all appropriate notices in that regard will have been lodged timeously; and

(g) the prosecutor and the accused's representative will have sought to agree as much evidence as possible in accordance with their duties(**j**).

9. If any of the steps mentioned in paragraph 8 above, or any other preparatory step required in the circumstances of the particular case, has not been taken before the preliminary hearing, the court will expect to be fully informed of the reasons.

10. The court will expect the prosecutor and the accused's representative each to inform it, and each other, at the earliest opportunity of any difficulties encountered in preparation for the preliminary hearing which may compromise the effectiveness of that hearing.

(a) 1995 Act, section 72E(2)(a).

(b) To facilitate communication with the court and the prosecutor, the accused's solicitor will be expected to advise the court and the prosecutor of any changes to his or her contact details.

(c) CPR Form 9A.4.

(d) CPR 9A.4.

(e) For example, under: section 67(5) of the 1995 Act (witnesses); section 68(3) of the 1995 Act (productions); section 78 (3) of the 1995 Act (special defences, incrimination and notice of witnesses etc.); section 72(3) of the 1995 Act (preliminary plea); section 72(6)(b)(i) of the 1995 Act (preliminary issue); section 258(2) of the 1995 Act (statement of uncontroversial evidence); section 259(5) of the 1995 Act (exceptions to hearsay rule) or any application under section 272 of the 1995 Act (evidence by letter of request or on commission); section 273 of the 1995 Act (television link evidence from abroad); section 275 of the 1995 Act (exceptions to restrictions under section 274); section 280 of the 1995 Act (certificate of or challenge to routine evidence).

(f) 1995 Act sections 271 to 271M. Until the provisions of the Vulnerable Witnesses (Scotland) Act 2004 are brought into force, the court will expect parties to have made any necessary application under section 271 of the 1995 Act.

(g) Under section 79(2)(a) of the 1995 Act.

(h) Under section 79(2)(b) of the 1995 Act.

(i) Such as is mentioned in section 72(6)(b)(iv) of the 1995 Act.

(j) Under section 257 of the 1995 Act.

Conduct of preliminary hearing

11. The Crown, in consultation with the court, will assign the date, time and place of preliminary hearings, and will cite the accused to attend. Diets will normally be assigned on the assumption that the preliminary hearing will last no longer than one hour. In cases where it is anticipated that the preliminary hearing will last longer, the procedure described in paragraph 30 below must be followed.

12. At most preliminary hearings the accused will require to be present. If for any reason the accused's representative is aware, before the date of the preliminary hearing, that the accused will be unable to attend or may fail to attend the preliminary hearing, the court must be advised accordingly.

13. The clerk of court will call the diet, make a tape recording of the proceedings, and (in consultation with the presiding judge) make a written record of the preliminary hearing(**a**). That written record will be in the form of a detailed minute, a copy of which will be sent to the prosecutor and the accused's legal representative.

14. The court will call upon the accused to plead to the charges in the indictment(**b**).

15. Before the accused is called upon to plead, the court will dispose of any preliminary pleas(**c**) of which notice has been given(**d**). The court will expect the prosecutor and the accused's representative to be prepared to make full submissions on any such plea. Lists of authorities will be required in accordance with paragraph 29 below.

16. The court will expect the prosecutor and the accused's representative to be in a position at the preliminary hearing to discuss all matters mentioned in the joint written record of the state of preparation, and to answer in detail any questions asked by the court relating to the contents of the joint written record.

17. If the accused pleads not guilty, and the state of preparation is such that the court is satisfied that the case is ready to go to trial, the court will appoint a diet for trial. If the case is not ready to go to trial, the court may appoint such further hearing as seems appropriate. The court may make such orders and give such directions as may be necessary for the purpose of managing the case effectively.

Where the accused pleads guilty

18. In taking account, for the purposes of section 196 of the 1995 Act, of the stage in proceedings at which the accused indicated his intention to plead guilty, the court will have regard to the fact that he did so at or before the preliminary hearing.

19. When a plea of guilty is to be tendered and accepted at the preliminary hearing in terms other than as libelled, the court will expect a written note of the terms of the plea to be provided to the clerk of court at least 15 minutes before the case is due to call.

20. When a plea of guilty is tendered, the court will expect the prosecutor and the accused's representative to draw to its attention any reason of which they may be aware for continuing the case before sentencing (for example, to allow the victim or relatives of the victim to attend, or to obtain reports).

21. The court will expect to be informed by the accused's representative of the date on which

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(a) 1995 Act, section 72D(6).
(b) 1995 Act, section 72(4).
(c) Within the meaning of section 79(2)(a) of the 1995 Act.
(d) Under section 72(3) of the 1995 Act.

notice of the accused's intention to plead guilty was first indicated to the prosecutor, and to receive confirmation of that information from the prosecutor.

22. The court will ordinarily expect the prosecutor to be in a position at the preliminary hearing—

(a) to narrate the procedural history of the case,

(b) to give a narrative of the facts, and

(c) to give the court any other information relevant to sentencing (such as a victim statement).

23. If no continuation for the purpose of the preparation of reports is required, the court will also expect the accused's representative to be in a position to make a plea in mitigation at the preliminary hearing.

24. Where a continuation for the purpose of obtaining reports is required, the court will ordinarily—

(a) expect the accused's representative to be in a position to confirm at the preliminary hearing that the prosecutor's narrative of the facts is accepted, and to state any additional facts (relating to the charge or charges) on which the accused proposes to rely in mitigation, but

(b) allow the accused's representative to reserve the plea in mitigation until the continued diet at which the reports are available.

Where the accused pleads not guilty

25. Where the accused pleads not guilty, the court will ordinarily expect the prosecutor and the accused's representative to be prepared to make full submissions at the preliminary hearing in respect of each of the following matters—

(a) any preliminary issues(**a**)of which notice has been given(**b**);

(b) any child witness notice(**c**);

(c) any vulnerable witness application(**d**);

(d) any other matter, identified in the joint written record, which in the opinion of the court could be disposed of with advantage before the trial;

(e) any objection to the admissibility of evidence which has been identified in the joint written record;

(f) any application regarding restrictions on evidence relating to sexual offences(**e**);

(g) any application for an order prohibiting the accused from conducting his own defence(**f**).

26. The court will ascertain whether either the prosecutor or the accused's legal representative intends to raise any objection to the admissibility of evidence which has not been notified in accordance with the statutory requirements(**g**). If there are any such objections, the court will expect the person intending to raise the objection to be in a position to make full submissions on the question of whether leave should be granted to raise the objection and, if necessary, on the objection itself.

27. The court will expect the prosecutor and the accused's representative to draw to its attention

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(a) Within the meaning of section 79(2)(b) of the 1995 Act.
(b) Under section 72(6)(b)(i) of the 1995 Act.
(c) Under section 271A(2) of the 1995 Act.
(d) Under section 271C(2) of the 1995 Act. Until the provisions of the Vulnerable Witnesses (Scotland) Act 2004 are brought into force, the court will expect parties to be in a position to make full submissions in relation to any application under section 271 of the 1995 Act.
(e) Under section 275 of the 1995 Act.
(f) Under section 288F of the 1995 Act.
(g) For requirements, see section 72(3) of the 1995 Act.

in the joint written record, and be in a position to discuss fully at the preliminary hearing, in addition to the matters mentioned in paragraphs 25 or 26 above, any other matters which, if not dealt with at the preliminary hearing, might result in waste of court time, inconvenience to witnesses or jurors, or delay in the progress of the case.

28. Where at the preliminary hearing it appears that any matter not identified in the joint written record is one which in the opinion of the court could be disposed of with advantage before the trial(**a**), the court will consider whether it should be disposed of at the preliminary hearing or at a further diet(**b**).

29. If any preliminary plea or any matter of the sort mentioned in paragraphs 25 to 28 above is to be the subject of submissions at the preliminary hearing (or at any subsequent hearing before the trial diet), the prosecutor and the accused's representative must, two days before the hearing in question, lodge with the clerk of court a list of any authorities on which they propose to rely in their submissions. The list of authorities should contain specific reference to the passages in the authorities on which reliance is to be placed. Copies should be provided for the use of the court of any authorities that may not be readily available to the court.

30. If, at any time before the preliminary hearing, the prosecutor or the accused's representative forms the opinion that the time allocated for the hearing in question (see paragraph 11 above) is insufficient to enable all of the matters which are to be discussed at the hearing to be dealt with, the Clerk of Justiciary should be so advised as soon as possible. If the Clerk of Justiciary agrees with that opinion, he will advise the prosecutor and the accused's representative and, if appropriate, the judge who is scheduled to conduct the preliminary hearing. In the event of the Clerk doing so, the court will expect the prosecutor and the accused's legal representative to give careful consideration as to whether an application should be made to alter the date of the hearing or whether the better course would be to allow the hearing to proceed on the allocated date.

31. If, at the preliminary hearing, the prosecutor or the accused's representative proposes that a further diet should take place before the trial diet is appointed, either for the purpose of dealing with extended submissions on any preliminary plea or on any of the matters mentioned in paragraph 25 above, or for any other reason, they should be in a position to inform the court of—

    (a) the reasons for seeking such a diet;

    (b) the form of diet that is sought; and

    (c) the time which it is expected the further diet will require.

32. If, at the preliminary hearing, the prosecutor or the accused's representative submits that, for any reason other than the appointment of a further hearing in terms of paragraph 31 above, a trial diet should not be appointed, they should be in a position to explain and discuss—

    (a) the reason or reasons for not appointing a trial diet;

    (b) what steps have been taken or are to be taken to address any difficulty or difficulties standing in the way of appointing a trial diet;

    (c) how much time it is anticipated will be necessary to resolve the difficulty or difficulties; and

    (d) how they propose that the case should proceed.

33. Where the prosecutor or the accused's representative proposes to take objection to the admissibility of evidence on a ground in respect of which the court may require to hear

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(a) 1995 Act, section 72(6)(b)(iv).

(b) Under section 72(9)(a) of the 1995 Act.

evidence, the court will ordinarily expect to be informed at the preliminary hearing of—

(a) the nature and ground of the objection;

(b) the identities of the witness who would give evidence at a trial within a trial; and

(c) the time likely to be occupied by hearing such evidence and disposing of the objection,

so that consideration may be given to the appointment of a hearing to dispose of the objection by the trial judge before the trial diet.

34. The court will expect the prosecutor and the accused's representative to be in a position to answer in detail questions about whether—

(a) a statement of uncontroversial evidence has been served(**a**);

(b) a challenge to any such statement has been served(**b**);

(c) any such challenge has been accepted;

(d) an application that such a challenge be disregarded has been or is to be made(**c**);

(e) it is expected that any outstanding challenge will be resolved before trial;

(f) a joint minute of agreement has been entered into(**d**);

(g) any further steps have been taken with a view to agreeing evidence(**e**).

35. The court will expect the prosecutor and the accused's representative to be in a position to state whether reliance may be placed on any such document as is mentioned in section 260(5) of the 1995 Act. Copies of any such document should be made available to the court and all other parties before the preliminary hearing, and in any event must be available during the trial.

36. The prosecutor and the accused's representative must each be in a position to state at the preliminary hearing—

(a) whether they have intimated a full list of the witnesses they intend to call to all other parties, and if not, why not, and when any further lists of witnesses will be intimated;

(b) which Crown and defence witnesses they require to be present at the trial diet; and

(c) whether there are any perceived difficulties regarding the attendance of witnesses, through other commitments or anticipated reluctance to attend or for any other reason.

37. In the event of difficulty being encountered, after the preliminary hearing, in citing, or otherwise securing the attendance of a Crown or defence witness, the fact that such difficulty has been encountered, and the nature of the difficulty, should be intimated as soon as practicable to the Clerk of Justiciary and the other party.

38. The prosecutor and the accused's representative must each be in a position to state to the court whether, in respect of any witness whom they propose to have in attendance at the trial, there are any special requirements (such as a special form of oath, the need for an interpreter, or the need for facilities in respect of a disability).

39. Where any person required as a witness is unable, or likely to be unable, to attend a proposed trial diet because of illness or injury, the party wishing to have that person attend the trial as a witness shall produce at the preliminary hearing a medical certificate vouching the proposed witness's inability to attend court to give evidence. Any such certificate—

(a) shall be given on soul and conscience;

(b) shall, where necessary, explain what symptoms the witness suffers that prevent

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(a) Under section 258(2) of the 1995 Act.
(b) Under section 258(3) of the 1995 Act.
(c) Under section 258(4A) of the 1995 Act.
(d) Under section 256(2) of the 1995 Act.
(e) See section 257 of the 1995 Act.

attendance at court or the giving of evidence;

(c) shall contain a prognosis estimating when the witness is likely to be fit to give evidence; and

(d) shall state whether the witness is fit to give evidence on commission and, if so, under what conditions.

40. In the event of it becoming apparent, after the preliminary hearing, that a proposed witness is likely to be unable to attend the trial diet because of illness or injury, a medical certificate vouching that fact shall be provided to the court as soon as practicable. Any such certificate shall comply with sub-paragraphs (a) to (d) of paragraph 39 above.

41. The prosecutor must be in a position to inform the court at the preliminary hearing of any applicable statutory time limit which affects the commencement of the trial, and the date on which such statutory time limit is due to expire. Where an application for extension of any statutory time limit is made at the preliminary hearing, the prosecutor and the accused's representative must each be in a position to provide the court with full information about the procedural history of the case, including that of any previous indictment against the accused which has been deserted.

42. The parties are responsible for ensuring that any arrangements necessary to enable evidence to be led are in place. In particular—

(a) they must be in a position to inform the court at the preliminary hearing of any information technology which they propose to use to present evidence at the trial diet;

(b) they are responsible for checking with Justiciary Office before the date of the preliminary hearing that any equipment they propose to use at the trial is compatible with the courtroom facilities;

(c) they are responsible for ensuring that the necessary equipment is available in court at the trial diet; and

(d) they are responsible for ensuring that a competent operator will be in attendance at the trial diet.

Appointment of trial diet

43. At the preliminary hearing the court will not appoint a trial diet unless it is satisfied by the information made available to it at the preliminary hearing that the trial will be ready to proceed at that date.

44. Where the court is so satisfied, the trial diet will be appointed by the court in the course of the preliminary hearing.

45. The prosecutor and the accused's representative at the preliminary hearing should be in a position to advise the court at that hearing about the availability for any proposed trial diet of the persons who are to act as prosecutor and accused's representative at that diet.

46. The court will expect the prosecutor and the accused's representative to give at the preliminary hearing a considered estimate of how long the trial is likely to last. The estimate should be expressed as a number of days.

47. In order to be able to assist the court, at the preliminary hearing, in appointing a suitable trial diet of appropriate length, the prosecutor and the accused's representative should, before the preliminary hearing, discuss and attempt to agree an appropriate range of dates and venues for the trial diet. They should inform the clerk of court, before the preliminary hearing, of the outcome of these discussions.

48. The court will decide whether a fixed or floating trial diet should be allocated(**a**).

49. The final decision as to the date and location of the trial diet will always remain the responsibility of the court.

Review of bail conditions

50. If the accused is on bail, the court has a duty(**b**) to review the conditions of bail at the preliminary hearing. The accused's representative should be in a position to make submissions in support of any motion made in that connection, and to answer any questions asked by the court in that regard.

Review of Practice Note

51. This Practice Note will be kept under review, and its terms may be modified from time to time in the light of experience.

Cullen of Whitekirk

Lord Justice General
Edinburgh

28th January 2005

(a) See sections 72A(1) and 83A of the 1995 Act.
(b) Under section 72A(9) of the 1995 Act.

Appendix 3: HM Advocate v Forrester 2007 SCCR 216

HM Advocate v Forrester [2007] HCJ 04, 2007 SCCR 216 **Lord Bracadale 11 May 2007**

Preliminary Hearing

Solemn procedure—Preliminary hearings—Adjournment—Circumstances in which unopposed motion by defence for further adjournment refused— Criminal Procedure (Scotland) Act 1995 (c 46), ss 72, 73, 74, 75, 75A — Criminal Procedure (Amendment) (Scotland) Act 2004 (asp 5), ss 1, 2

Solemn procedure—Adjournment—Preliminary hearings—Circumstances in which unopposed motion by defence for further adjournment refused— Criminal Procedure (Scotland) Act 1995 (c 46), ss 72, 73, 74, 75, 75A — Criminal Procedure (Amendment) (Scotland) Act 2004 (asp 5), ss 1,

Sections 72–75A of the Criminal Procedure (Scotland) Act 1995 , as substituted or inserted by ss 1–2 of the Criminal Procedure (Amendment) (Scotland) Act 2004 , provide for preliminary hearings for High Court indictments, the purpose of the hearings being so far as possible to agree evidence, avoid the citing of unnecessary witnesses, and ensure that parties are ready to proceed before a trial diet is fixed, all with the general aim of avoiding delays and inconvenience caused by the adjournment or desertion of trial diets. Section 75A(2) of the 1995 Act provides that the court may adjourn any diet if it considers it appropriate to do so.

The Lord Justice General's Practice Note (No 1 of 2005) requires the prosecutor and the accused's representatives to communicate with each other in sufficient time before the preliminary hearing with a view to preparing a joint written record of their states of preparation. It states also that failure by a practitioner to be fully prepared for the preliminary hearing will be regarded as unacceptable.

The accused was charged on indictment with a considerable number of offences, all allegedly committed during various periods between 1965 and 1980. A preliminary hearing on 10 October 2006 was adjourned to 21 November 2006 on defence motion for the preparation of a medical report on the accused's physical condition. On 20 November that hearing was discharged by joint minute and a diet fixed for 19 December 2006. On that date the report was not available and the hearing was continued to 13 February 2007 when it was continued further to 6 March 2007, the medical report still not being available. On that date the report was available but the defence did not seek leave to lodge it. What they did seek was a further adjournment to obtain a medical report on the accused's alleged loss of memory regarding the

events libelled. The motion for an adjournment was not opposed by the Crown.

Held, (1) that continuations of the preliminary hearing should be regarded as an exceptional course rather than the rule, that in support of any motion for a continuation an explanation will be required as to why the particular line of enquiry giving rise to the motion was not, and could not reasonably have been, completed prior to the preliminary hearing, that where a continuation is granted the reasons for it must be fully and accurately stated, that where there are any further motions for continuations these must be examined in the light of the history of the case as disclosed in the minutes, and that counsel should be in possession of a copy of any earlier minute and be in a position to address the court on matters recorded in the minute (para 17);

(2) that the motion in this case was being made at the fifth continuation, 15 months after the accused had appeared on petition and some six months after service of the indictment, that no expert had been instructed, that no realistic estimate of the length of time required and no explanation as to why these enquiries had not been embarked on earlier had been advanced, that there was no suggestion of any failure by the Crown to disclose material which gave rise to this line of enquiry, that the enquiry seemed to be wholly speculative against a background of long delay in order to obtain a medical report which was not in the event lodged, that the court was not persuaded as to the necessity of the line of enquiry and that the motion came too late in the day (para 18); and motion refused and trial diet fixed.

Observed that compliance by the Crown with the commitments set out in the Lord Justice General's Practice Note 1 of 2005 was essential in order to allow the defence to embark on preparation at an earlier stage than service of the indictment (para 15).

Gavin Forrester was charged on indictment with 13 charges, comprising eight charges of lewd practices, two of attempted sodomy, one of sodomy, one of rape and one of assault, covering the period between 1965 and 1980.

After the procedures described in Lord Bracadale's opinion a preliminary hearing was held before his Lordship on 6 March 2007 in the High Court at Edinburgh.

On 8 March 2007 the motion was refused. On 11 May 2007 Lord Bracadale delivered the following opinion.

Lord Bracadale

Introduction

1. This case came before me on 6 March 2007 for a preliminary hearing at the High Court at Edinburgh. Miss MacKenzie, who appeared on behalf of the accused, moved me to continue the preliminary hearing for a further four weeks. I refused the motion and appointed the case to a trial diet.

History of case

2. The accused is charged with various charges of a sexual nature alleged to have been committed in the 1960s and 1970s. He appeared on petition at Kirkcaldy Sheriff Court on 1 December 2005. In due course an indictment was served citing the accused to a preliminary hearing on 10 October 2006. Thereafter, the preliminary hearing was continued on a number of occasions.

3. Schedule 2 of the joint written record was received in the Justiciary Office on 9 October 2006. Paragraph 11 includes the following statement:

> 'A medical report has been sought which is not yet available. Advice is to be sought in relation to the accused's health bearing on his ability to commit some of the crimes alleged, the functioning of his memory and his present state of health. A report is expected shortly. It may be that further investigations will be necessary in the light of the contents of the report.'

The minute of the preliminary hearing on 10 October records that counsel for the accused advised that the defence were not yet prepared to go to trial. A medical report would require to be prepared in respect of the accused and issues around the physical capabilities of the accused would require to be given consideration in

preparing a defence in this case. The preliminary hearing was continued until 21 November 2006.

4. On 20 November 2006 a joint minute for alteration of the diet under section 75A of the 1995 Act was lodged with the court. The minute sought discharge of the diet because the defence preparations were not yet complete as the defence were currently awaiting a medical report and required to seek a further medical opinion. No further specification was given. The hearing was continued under section 75A until 19 December 2006.

5. On 19 December 2006 the minute records that counsel for the accused informed the court that Dr Donat had been asked to prepare a report and sent the papers. Counsel advised that the defence had not yet received confirmation that Dr Donat could accept instructions and prepare a report. If he was able to do so then an estimate would require to be submitted to SLAB with a request for sanction for the expert's report. I pause to observe that it is somewhat difficult to square this state of affairs with the paragraph in the joint written record referred to above, namely, that a medical opinion had been sought. It does not appear from the minute that there was any explanation of this matter. In any event, the preliminary hearing was continued until 13 February 2007 to allow the defence report to be prepared.

6. The minute of the hearing on 13 February 2007 records that counsel for the accused advised the court that the report was not yet available. The minute describes the report as relating to the fitness of the accused to stand trial, but before me Miss MacKenzie submitted that this was an error in the minute and that the report was into the question of whether the accused physically could have committed the offences. The hearing was continued until 6 March 2007.

7. When the case called before me on 6 March 2007 Miss MacKenzie advised me that the report from Dr Donat was now available. However, she did not intend to seek leave to lodge the report or add its author as a witness. She then went on to advise me that there was a further line of enquiry. She explained that an issue arose in relation to the accused's position which was that he had no memory of events libelled in the charges. In November 2006 the defence had received a report from a psychologist, Michael Carlin, with respect to the psychological ability and functioning of the accused. Mr Carlin had been asked to explore the accused's position that he was unable to remember any of the events. The accused did not accept certain comments made in Mr Carlin's report. He said that he was unable to remember any of the period surrounding these events. Miss MacKenzie told me that the accused had suffered a

stroke in 2004. On 26 January 2007 the solicitors wrote to the accused's general practitioner asking if he could provide further information in relation to the accused's stroke. On 5 February 2007 the general practitioner wrote supplying information in relation to the stroke. This letter was forwarded to Mr Carlin who suggested that a neuropsychologist should examine the accused in relation to possible subjective memory loss. A neuropsychologist had been identified but was unable to accept instructions. As at the date of the hearing the solicitors were waiting for a response from another neuropsychologist whose name had been suggested to them.

8. Against that background Miss MacKenzie moved me to continue the hearing for a further four weeks. The Crown did not oppose the motion.

Preliminary hearings: statutory provisions

9. The scheme for preliminary hearings in the High Court is to be found in section 72 and subsequent sections of the Criminal Procedure (Scotland) Act 1995, as amended by the Act Criminal Procedure (Amendment) (Scotland) 2004 (the 1995 Act). In addition, certain consequential amendments were made to a number of other sections of the 1995 Act. The new system came into operation in April 2005. These provisions were introduced in response to the 2002 Review of the Practices and Procedure of the High Court of Justiciary by Lord Bonomy: Improving Practice (the Bonomy Report). The Bonomy Report found that a large number of trials were being adjourned on one or more occasions. One of the reforms proposed in the report was the introduction of a preliminary diet in order to identify those cases in which a trial was necessary and to assign a trial diet. The report anticipated that there would be few cases in which it would be necessary to adjourn the preliminary diet.

10. Section 72(6) of the 1995 Act provides the responsibilities and duties of the court in a case where at the preliminary hearing the accused pleads not guilty. Unless it considers it inappropriate to do so, the court is to dispose of various preliminary issues and applications, including objections to the admissibility of evidence. Among other requirements the court is to ascertain which witnesses are required. The court is to ascertain the extent to which parties have complied with the duty to seek agreement of evidence and the court is to ascertain so far as is reasonably practicable the state of preparation of the prosecutor and the accused with respect to their cases. It is open to the court to adjourn the diet in terms of section 75A(2). Section 72A requires the court after complying with subsection (6) of section 72 to appoint a trial diet.

11. Section 72E(2) provides that the prosecutor and the legal representative of the accused shall communicate with each other not less than two days before the preliminary hearing with a view jointly to preparing a written record of their state of preparation and the written record is to be lodged with the Clerk of Justiciary. Paragraph 9A.4 of the Act of Adjournal (Criminal Procedure Rules Amendment) (Criminal Procedure (Amendment) (Scotland) Act 2004) 2005 [SSI 2005/44] makes detailed provision for the joint written record which is to follow Form 9A.4.

12. Notices by the Crown under section 67 of the 1995 Act require to be given to the accused not less than seven clear days before the preliminary hearing unless on cause shown. Notices under section 78 of the 1995 Act of special defence, incrimination of a co-accused, and lists of witnesses and productions require to be lodged and intimated not less than seven clear days before the preliminary hearing unless the court on cause shown otherwise directs. An application under section 275 shall not be considered by the court unless made not less than seven clear days before the preliminary hearing or on special cause shown after that time (section 275B).

Practice Note

13. On 28 January 2005 the Lord Justice General issued Practice Note No 1 of 2005 which gives comprehensive guidance as to what practitioners must do in preparation for the preliminary hearing, the conduct of the hearing and the issues which the court expects practitioners to be able to address. The court expects all practitioners to be fully conversant with all of the provisions and requirements of the Practice Note.

Early preparation

14. The provisions relating to preliminary hearings, and the recommendations of the Bonomy Report, clearly have in contemplation a requirement that preparation for trial be commenced at an early stage. In September 2004, in anticipation of the implementation of the new provisions, the Lord Advocate issued a Crown Practice Statement in relation to the provision of information by the Crown to the defence in High Court cases. In terms of the Practice Statement the Crown undertake to provide the defence with a copy of a provisional list of witnesses within 14 days of first appearance. Within 28 days of first appearance the Crown will provide to the defence such copies of witness statements (excluding precognitions) as are then in the

possession of the Crown. Certain exceptional situations in which provision might be withheld are identified. Where additional statements are received these will be provided as soon as practicable. The Crown undertake to provide the defence with copies of documentary evidence as soon as practicable and, on service of the indictment, a note giving details of where and when any previously undisclosed copy productions may be collected and labelled productions examined. This note will be given no later than seven days after the service of the indictment.

15. Compliance by the Crown with commitments set out in the Practice Statement is essential in order to allow the defence to embark on preparation at an earlier stage than service of the indictment.

Continued preliminary hearings

16. It is clear from the statutory provisions relating to preliminary hearings that Parliament had in contemplation that the preliminary hearing would be the end-point of preparation rather than the starting point. Experience has shown that in practice continuation of the preliminary hearing has become all too common. In a number of cases, including the present case, there have been repeated continuations of the preliminary hearing. Research into the operation of preliminary hearings was commissioned by the Scottish Executive and was undertaken by researchers in the University of Aberdeen School of Law led by Professor Peter Duff. Their findings have recently been published: An Evaluation of the High Court Reforms Arising from the Criminal Procedure (Amendment) (Scotland) Act 2004 (the Duff Report). At paragraph 7.16 the report found that the number of preliminary hearings that were continued appeared to be growing steadily and to be causing serious scheduling difficulties in the High Court. The report identified the variation in judicial approach to preliminary hearings and the variable quality of court minutes as being factors in the number of continuations.

17. In my opinion continuation of the preliminary hearing should be regarded as an exceptional course rather than the rule. It follows that in support of any motion for a continuation an explanation will be required as to why the particular line of enquiry giving rise to the motion was not, and could not reasonably have been, completed prior to the preliminary hearing. Where a continuation is granted, the reasons for the continuation must be fully and accurately minuted, and, where there are any further motions to continue the preliminary hearing, these must be examined in the light of the history of the case as disclosed in the minutes. In the course of discussion before

me it became clear that defence counsel had not seen any of the minutes of the previous hearings. Minutes are sent to the parties immediately after the preliminary hearing. It seems to me reasonable to expect that at any continued preliminary hearing counsel should be in possession of a copy of any earlier minute and be in a position to address the court on the matters recorded in the minute.

Decision

18. The motion further to continue the preliminary hearing in this case was made at the fifth continuation. It was made 15 months after the accused had appeared on petition and some six months after service of the indictment. The 12-month time bar had already been extended by a significant period. No expert had been instructed. No realistic estimate of the length of time required was advanced. No explanation was advanced as to why these enquiries had not been embarked upon at a much earlier stage. It was not suggested that there had been any failure by the Crown to disclose material which gave rise to this line of enquiry. The enquiry seemed to me to be wholly speculative against a background where there had already been a lengthy delay in order to obtain a medical report which, in the event, was not lodged. I was not persuaded as to the necessity of the line of enquiry and it seemed to me that it came far too late in the day. Accordingly, although, somewhat surprisingly, the Crown did not oppose the motion, I refused the motion for a further continuation and I appointed a trial diet.

Representation; For the prosecutor: Hammond AD. For the accused: M C MacKenzie, instructed by Shiells, Solicitors, Brechin.

COMMENTARY, Sir Gerald Gordon

1 If I may say so with respect, this is a heroic attempt to make preliminary hearings perform their function in avoiding delay. Lord Bonomy and Parliament may well have contemplated that the preliminary hearing would be the end- point of preparation rather than the starting-point, but anyone with experience of intermediate diets in the sheriff summary court could have prophesied what has apparently in fact happened: that they would indeed be a starting-point rather than a finishing-point, and would be subject to frequent adjournments.

2 This decision is particularly noteworthy in that it was a defence motion which was refused, and indeed a defence motion which was not opposed by the Crown. To refuse a Crown motion to adjourn is comparatively easy, but the position is different in relation to the defence, who are sometimes thought of as 'having the court over a barrel' so to speak, since they have various possible reactions to such a refusal, which may in the end prolong proceedings. One is for the accused to sack his counsel. Another is to renew the motion at trial, with appropriate nods and hints in the direction of art 6 of the Human Rights Convention. And the last resort (apart from an application to the Scottish Criminal Cases Review Commission) is for the accused to appeal against any conviction on the ground either of an unfair trial, or of defective representation in respect of the failure of his representatives to take the necessary steps to obtain the required reports etc timeously. All these possibilities may tempt both the Crown and the court to accede to defence requests for adjournments as perhaps the lesser of two evils. This opinion provides a salutary example of a court deciding that there are limits beyond which it is not prepared to go in satisfying defence requests for adjournments.

3 Lord Bracadale fixed the trial diet for 10 April 2007, on which date it was continued to 11 April when certain preliminary matters were cleared up. The trial itself began on 12 April. The charge of assault was withdrawn by the Crown at the close of their case and certain deletions and amendments were made to some of the other charges before they went to the jury. The accused was convicted of the remaining charges, as amended, on 17 April 2007.

Appendix 4: High Court Practice Note 1 of 2018

Long Trial Protocol

This practice note is replicated overleaf.

HIGH COURT OF JUSTICIARY

Practice Note

No.1 of 2018

The Management of Lengthy or Complex Criminal Cases

1. This Practice Note takes effect from 10 May 2018.

2. There is widespread agreement that the length of the trials of complex crimes or trials involving multiple accused must be controlled within reasonable limits, both to make proper use of public resources and to enable the jury to retain and assess the evidence which they have heard. Save in exceptional circumstances, all trials, if properly managed, should be capable of completion within 3 months.

3. The Protocol set out in the schedule to this Practice Note has been agreed by the Crown, the Faculty of Advocates and the Law Society of Scotland.

4. It supplements the Criminal Procedure Rules 1996 and Practice Notes issued by the High Court of Justiciary. It summarises the good practice which experience has shown can assist in bringing about some reduction in the length of trials of complex crimes or involving multiple accused. The best handling technique for a long case is continuous management by an experienced judge nominated for the purpose. The judge should exert a beneficial influence by making it clear that, generally speaking, trials should be kept within manageable limits. In most cases 3 months should be the target upper limit. Intensive case management is likely to be needed to ensure this.

5. The Protocol will apply to cases which are likely to last eight weeks or longer. It may also be followed in suitable cases which are estimated to last for more than four weeks, and which have been identified by the Crown as likely to benefit from the measures included herein.

" CJM Sutherland"

Lord Justice General

Edinburgh

9 May 2018

SCHEDULE

PROTOCOL FOR THE MANAGEMENT OF LENGTHY OR COMPLEX CRIMINAL CASES

1. THE CROWN

Experience has shown that the involvement of the trial Advocate Depute at an early stage in the preparation of a complex trial is likely to result in effective identification of the essential components of the prosecution which in turn helps to ensure that the indictment is framed in a suitable way, with focus on the legal basis for the case, and that the appropriate witnesses and productions are identified at as early a stage as possible. Such an approach creates the best environment for ongoing management of the case. In fraud cases in particular it is important that the indictment has a structure which enables the key issues to be identified. It should be borne in mind that the use of schedules is likely to assist the simplification of the case, or the ease with which all involved may comprehend the issues set out in the indictment.

2. DESIGNATION OF THE TRIAL JUDGE

In any complex case which is expected to last more than eight weeks, the trial judge will be assigned at the earliest possible moment. The assigned judge must manage that case "from cradle to grave". Adequate reading time must be provided for this purpose, and to enable the judge to prepare for trial in due course.

3. DEFENCE

In the same way that it is important to identify the trial Advocate Depute and trial judge at the earliest opportunity, so too should defence counsel who will conduct the trial be identified as early as possible. Defence counsel will be treated as having responsibility to the court for the presentation and general conduct of the case. During the trial counsel should bear in mind the terms of PN No 3 of 2016.

4. STATEMENTS OF UNCONTROVERSIAL EVIDENCE AND THE DUTY TO AGREE EVIDENCE

It is particularly important in long trials, and the court will be particularly vigilant to ensure, that parties comply with their duties under section 257 of the 1995 Act.

An effective way for parties to comply with the duty to seek agreement of facts they seek to prove in their own case which they consider to be uncontroversial is to intimate, no later than 14 days before the preliminary hearing, a statement of uncontroversial evidence under section 258.

All parties are encouraged to consider the use of statements of uncontroversial evidence. If the Crown has not served a statement of uncontroversial evidence, an explanation should be requested. Challenges to statements of uncontroversial evidence will be scrutinized closely, bearing in mind the terms of section 258(4A) of the Criminal Procedure (Scotland) Act 1995.

5. CASE MANAGEMENT

i) Objectives

Effective case management of complex criminal cases requires the judge to have a much more detailed grasp of the case than may be necessary for many other preliminary hearings. The number, length and organisation of hearings will depend critically on the complexity of the individual case. However, thorough, well-prepared and extended preliminary hearings will save court time and costs overall. Unnecessary hearings should be avoided by dealing with as many aspects of the case as possible at the same time.

ii) Fixing the trial date

The trial date should not be fixed until the issues have been explored at a preliminary hearing. Only then can the length of the trial be estimated. It is understood that it will be apparent at a relatively early stage that a trial of some duration will be required. In such circumstances the trial Advocate Depute should be assigned at the earliest possible stage, for the purpose of managing the case. The Crown should notify the court that a case suitable for the operation of the protocol has been identified, in order that the case management, and other steps, identified herein may be initiated. Once a trial is fixed on the basis of the estimate provided, that estimate will be **increased** if, and only if, the party seeking to extend the time justifies why the original estimate is no longer appropriate.

iii) The Preliminary Hearing

Early identification of the relevant disputed issues is key to successful case management. The prosecution should provide an outline written statement of the prosecution case at least one week in advance of the preliminary hearing, outlining in simple terms:

- the key facts on which it relies
- the key evidence by which the prosecution seeks to prove the facts.

The statement must be sufficient to permit the judge to understand the case and for the defence to appreciate the basic elements of the case against each accused. The outline statement should not be considered binding, but it will serve an essential purpose in telling the judge, and everyone else, what the case is really about and identifying the key issues. The advocate depute should be given the opportunity to highlight any points from the prosecution outline statement of case.

A core reading list and core bundle for the preliminary hearing should be delivered at least one week in advance. This may be expanded during the process or case management, the end product being a core bundle for the use of the jury in due course, consisting of those documents to which frequent reference is likely to be made.

It is important that a proper defence statement be provided as required by the Section 70A of the Criminal Procedure (Scotland) Act 1995 Act. Each defence counsel should be asked to outline the defence for each accused. Early consideration should be given to the issues identified in this protocol to enable the preliminary hearing to operate as an effective case management hearing.

There should then be a real dialogue between the judge and all counsel for the purpose of identifying:

- the focus of the prosecution case
- the common ground
- the real issues in the case.

The judge will try to generate a spirit of co-operation between the court and the advocates on all sides. The expeditious conduct of the trial and a focussing on the real issues must be in the interests of all parties. It cannot be in the interests of any accused for the good points to become lost in a welter of uncontroversial or irrelevant evidence.

In many fraud cases, for example, the primary facts are not seriously disputed. The real issue is what each accused knew and whether that accused was dishonest. Once the judge has identified what is in dispute and what is not in dispute, the judge can then discuss with

the advocates how the trial should be structured, what can be dealt with by admissions or agreed facts, what uncontroversial matters should be proved by concise oral evidence.

Both parties should be encouraged to consider the use of statements of uncontroversial evidence.

iv) Consideration of the length of the trial

The length of trial should be that which is reasonable and appropriate for determination of the real issues in dispute. If the trial is not estimated to be within a manageable and appropriate length, it will be necessary for the judge to consider what steps should be taken to reduce the length of the trial, whilst still ensuring that the prosecution has the opportunity of placing the full details of the alleged criminality before the court. To assist the judge in this task, the Crown should be asked to explain why the prosecution has rejected a shorter way of proceeding; they may also be asked to divide the case into sections of evidence and explain the scope of each section and the need for each section.

The prosecution and the defence should be prepared to put forward in writing, if requested, ways in which a case estimated to last more than three months can be shortened, including: possible severance of the indictment by separating charges or accused; identifying areas of the case where admissions can be made; or exclusion of sections of the case or of evidence.

The judge must not usurp the function of the prosecution in this regard, must respect the responsibilities which lie upon defence counsel, and must bear in mind that at the outset, the judge will know less about the case than the advocates. The aim is to achieve fairness to all parties. The judge must make a careful assessment of the degree of judicial intervention which is warranted in each case. The intention is not for the judges to take control, but for the judge to direct and manage the efforts of those involved in a flexible way which assists identification of key issues, enables the trial to focus on the primary issues in dispute, and keeps the eventual trial within manageable limits.

v) Expert Evidence

Early identification of the subject matter of expert evidence to be adduced by the prosecution and the defence should be made as early as possible. Following the exchange of expert evidence, any areas of disagreement should be identified; together with any proposals for increasing the scope of any agreement.

vi) Surveillance Evidence

Where a prosecution is based upon many months' observation or surveillance evidence, and it appears that it is capable of effective presentation based on a shorter period, the advocate depute should be required to justify the evidence of such observations before it is permitted

to be adduced, either substantially or in its entirety. The focus should be on observations of relevance to the trial.

vii) Interviews

Where evidence is to be led of extensive police interviews, consideration should be given to the way in which such interviews may be edited, or the evidence relating thereto presented to the jury in a shortened form.

viii) Multiple Accused

Trials involving multiple accused raise their own special issues. These may concern the extent to which the same issues may need to be covered by different counsel, or the extent to which issues relating to notices of intention to lead incriminatory evidence may arise. To the extent possible, the judge should address these matters at the preliminary hearing.

6. DISCLOSURE

In fraud cases the volume of documentation obtained by the prosecution is liable to be immense. The problems of disclosure are intractable and have the potential to disrupt the entire trial process. Early and effective disclosure is central to the operation of this protocol.

The prosecution should only disclose those documents which are relevant (i.e. likely to form part of the Crown case, assist the defence or undermine the prosecution). The judge should therefore try to ensure that disclosure is focussed accordingly. This should be borne in mind in relation to any requests for further disclosure. For example, in many fraud cases the defence will know the nature of the documents which they seek, and from what source, and may be able to assist the court by providing a list which is specific, manageable and realistic. In non-fraud cases, it should be made clear to which issues the material sought relates, and its relevance. Defence counsel should draw to the attention of the court at the earliest opportunity any disclosure issue which impairs their ability to comply with any part of this protocol.

At the outset the judge should set a timetable for dealing with disclosure issues.

7. THE TRIAL

A heavy fraud or other complex trial has the potential to lose direction and focus. This is undesirable for three reasons:

- The jury may lose track of the evidence, thereby prejudicing both prosecution and defence.

- The burden on the accused, the judge, and indeed all involved may become intolerable.
- Scarce public resources are wasted.

It is therefore necessary for the judge to exercise firm control over the conduct of the trial at all stages.

i) The order of the evidence

By the outset of the trial at the latest (and in most cases very much earlier) the judge must be provided with a schedule, showing the sequence of prosecution (and, in an appropriate case, defence) witnesses and the dates upon which they are expected to be called. This can only be prepared by discussion between prosecution and defence. The schedule should be kept under review by the judge and by the parties. Experience suggests that the earlier this schedule can be produced, and particularly if it can be done prior to the first preliminary hearing the more effective management can be.

If an excessive amount of time is allowed for any witness, the judge can ask why. The judge may probe with the advocates whether the time envisaged for the evidence-in-chief or cross-examination (as the case may be) of a particular witness is really necessary.

The order of the evidence may legitimately have to be departed from. It will, however, be a useful tool for monitoring the progress of the case. There should be periodic case management sessions, during which the judge engages the advocates upon a stock-taking exercise: asking, amongst other questions, "where are we going?" and "what is the relevance of the next three witnesses?" as well as any other issues relating to presentation of the case. This will be a valuable means of keeping the case on track.

The judge may wish to consider issuing the occasional use of "case management notes" to the advocates, in order to set out the judge's tentative views on where the trial may be going off-track, which areas of future evidence are relevant and which may have become irrelevant (e.g. because of concessions, admissions in cross-examination and so forth). Such notes from the judge, plus written responses from the advocates can, cautiously used, provide a valuable focus for debate during periodic case management reviews held during the course of the trial. The sole purpose of these notes will be to assist in the management of the case.

ii) Controlling examination.

Setting rigid time limits in advance for examination or cross-examination is rarely appropriate but a timetable is essential so that the judge can exercise control and so that there is a clear target to aim at for the completion of the evidence of each witness. Recognising that a certain amount of scene-setting may be necessary, experience

nevertheless suggests that examination- in-chief is often highly repetitive and lacking in focus. The judge can and should raise this if it becomes an issue. Moreover the judge can and should indicate when cross-examination is unduly prolix, irrelevant, unnecessary or time wasting. The judge may limit the time for further cross-examination of a particular witness. Parties should bear in mind the terms of PN 2 of 2017.

Particular attention will be paid to whether it is necessary to replay sections of a video-taped interview which has already been played in full.

iii) Electronic presentation of evidence

Electronic presentation of evidence has the potential to save huge amounts of time in fraud and other complex criminal trials and should be used as widely as possible. Greater use of other modern forms of graphical presentations should be made whenever possible.

There should nevertheless be a core bundle of those documents to which frequent reference will be made during the trial. The jury may wish to mark that bundle or to refer back to particular pages as the evidence progresses. Electronic presentation of evidence can be used for presenting all documents not contained in the core bundle.

PDF copies of all productions should be provided to the judge if that is requested.

iv) Time to prepare defence case

Whilst it is recognised that, in some cases, the defence may require time to consider the Crown case before commencing the defence case this should be kept to as short a period as possible. Any period of longer than 24 hours will be exceptional.

v) Jury Management

The jury must be regularly updated as to the trial timetable and the progress of the trial, subject to warnings as to the predictability of the trial process.

If legal issues arise in the course of the trial legal argument should be heard at times that cause the least inconvenience to jurors.

Appendix 5: High Court Practice Note 1 of 2024

Taking of evidence of a vulnerable witness by a commissioner

This practice note is replicated overleaf.

HIGH COURT OF JUSTICIARY
PRACTICE NOTE
No. 1 of 2024

TAKING OF EVIDENCE OF A VULNERABLE WITNESS BY A COMMISSIONER

Introduction

1. This Practice Note will come into effect on 2 September 2024. It replaces Practice Note 1 of 2017.

2. Statutory provision for the availability of special measures for vulnerable witnesses has been an increasing feature of the criminal courts for many years, most recently by the *Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019*. The 2019 Act introduced ground rules hearings to be held before evidence is taken by a commissioner to ensure preparedness. It also allows pre-recording of evidence before indictment if appropriate.

3. In spite of that, the day to day practical application of these measures can on occasion leave much to be desired. This is particularly the case with the taking of the evidence of a vulnerable witness by a commissioner.

4. Early conduct of a commission has benefits not only in the earlier capture of the evidence but also in giving more time for addressing issues such as editing and admissibility.

5. Those preparing and considering applications, conducting commission hearings and presiding over them must bear in mind that sections 274 and 275 of the *Criminal Procedure (Scotland) Act 1995* apply just as they do at trial (section 271I(5) and (6)). They must bear in mind the powers of a commissioner to decide an objection at a commission hearing (Act of Adjournal Rule 22.12(3)). They are reminded that, on the day of the commission, it may be necessary to ensure: that all microphones are working, and on when required; that the witness is favourably situated in respect of a microphone; and that they take care not to speak over the witness.

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

7. The purpose of this Practice Note is to give guidance on—

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

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

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

When practitioners should consider whether a commission is required

8. Parties need to consider proactively and at an early stage whether any witness is, or may be, a vulnerable witness. In High Court proceedings, if the Crown intends to seek the special measure of a commission, that must be intimated to the defence at the earliest opportunity so that appropriate legal aid cover can be arranged without delay. Similarly, the defence must intimate any such intention to seek a commission as soon as possible.

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

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

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

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

11. The VW notice or application is to:

- reflect any relevant statutory provisions;
- explain the basis upon which the witness qualifies as a vulnerable witness, and any specific issues relating to the witness;
- state why a commission is considered appropriate for the witness;
- state whether the commission requires to be held in any particular place, or environment, due to the location of the witness or any particular vulnerabilities which the witness may have;
- state whether the witness requires additional special measures and in particular whether there should be a supporter;
- identify the appropriate form, wording and scope of questions to be asked and, where appropriate, written questions should be prepared for consideration by the court (see Practice Note 1 of 2019 "VULNERABLE AND CHILD WITNESSES: written questions");
- state whether the witness will give evidence to the commission by live television link;
- state whether the witness is restricted as to any times of the day, or particular days or dates that he or she can attend a commission as a result of his or her vulnerability;
- state whether the witness is likely to need frequent breaks or any other special requirements, such as disabled access;
- address how any question of identification is going to be dealt with;
- identify any productions or labels that may require to be put to the witness. The use of any productions or labels should be kept to a minimum;
- if any prior statement in any form may be put to a witness, be accompanied by a copy of the statement and identify the relevant passages therein (which should be kept to a minimum);
- state the manner in which such a statement should be put, and the provision, if any, of the *Criminal Procedure (Scotland) Act 1995* being relied upon;
- confirm that the parties have discussed the best means of putting such a statement to a witness, having regard to the interests of the witness and the fairness of the trial;
- state whether an interpreter is needed;
- state the communication needs of the witness: identifying the level of the witness's comprehension, and whether any communication

aids or other reasonable adjustments are required. In certain cases it may assist the court to be provided with any expert report addressing these issues and any other relevant issues mentioned in paragraph 11; and

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

Decision on the application at preliminary hearing/ground rules hearing

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

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

- whether the witness will affirm or take the oath;
- the location of the commission which is the most suitable in the interests of the witness;
- the timing of the commission which is the most suitable in the interests of the witness;
- pre-commission familiarisation with the location;
- where the accused is to observe the commission and how he is to communicate any instructions to his advisors;
- if the commission is to take place within a court building in which the witness and the accused will both be present, what arrangements will be put in place to ensure that they do not come into contact with each other;
- the reasonable adjustments which may be required to enable effective participation by the witness;
- the appropriate form, wording and scope of questions to be asked. The court may consider asking parties to prepare questions in writing (see Practice Note 1 of 2019 "VULNERABLE AND CHILD WITNESSES: written questions");
- the length of examination-in-chief and cross examination, and whether breaks may be required;

- how requests for unscheduled breaks may be notified and dealt with;
- potential objections, and whether they can be avoided;
- the lines of inquiry to be pursued;
- the scope of any questioning permitted under s 275 of the 1995 Act, and how it is to be addressed;
- the scope of any questions relating to prior statements;
- where any documents or label productions are to be put to the witness, how this is to be managed and whether any special equipment or assistance is required;
- whether any special equipment (for example, to show CCTV images to the witness) may be required;
- the scope for any further agreement between the parties which might shorten the length of the commission or confine the issues to be addressed;
- where there are multiple accused, how repetitious questioning may be avoided;
- the extent to which it is necessary to "put the defence case" to the witness. Parties are invited to have regard to the observations of the Court of Appeal in *R* v *Lubemba* [2015] 1 WLR 1579 and *R* v *Barker* [2011] Criminal LR 233.
- how that is to be done;
- whether the parties have agreed how this issue may be addressed in due course for the purposes of the jury;
- any specific communication needs of the witness;
- whether any communication aids are required, e.g. "body maps";
- if a statement in whatever form is to be used as the evidence in chief of the witness, what arrangements are to be made for the witness to see this well in advance of the commission (i.e. how, where, and when) , not on the day of the commission;
- whether any such statement requires to be redacted or edited in any way;
- in such a case, whether, and to what extent, there should be any examination in chief of the witness;

- the court may also make directions as to the circumstances in which visually recorded prior statements may be made available to the defence;[a]
- the wearing of wigs and gowns;
- how the judge/parties should introduce themselves to the witness in advance, when this will take place, having regard to the needs and preferences of the witness
- whether the parties should speak to the witness after the commission;
- the court will direct that parties may access a copy of the recording once available on standard conditions:

  (i) that copies will not be made of any recording, disc(s) or storage device (s);

  (ii) that no disclosure of the recording or contents of the disc(s) or storage device (s) will be made unless necessary in the legitimate interests of the accused;

  (iii) that the disc(s) or storage device (s) will be returned at the end of the proceedings;

  (iv) that except when being viewed, the disc(s) or storage device(s) will be kept in a locked, secure container and not unattended or otherwise unprotected; and

  (v) that the accused can view the recording, disc(s) or storage device (s) only under the supervision of their legal representatives.
- the court may impose other conditions as seems appropriate;
- the court will direct that, within 14 days of parties being advised that a copy of the commission recording is available for borrowing, parties are to confirm to the court in writing that they have viewed and listened to the recording of the commission and confirm that it is of sufficient quality without headphones for use at the trial;
- the court will direct that, in the event that there is a problem with the commission recording, parties should seek to solve it and, if the intervention of the court is required before the trial diet, use section 75A procedure by accelerating the trial to convene a preliminary hearing at which any issue can be resolved. The trial diet can be reserved and re-fixed at the conclusion of the preliminary hearing.

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

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

14. The court may make directions about these matters, or any other matters which might affect the commission proceedings (including specifying any other steps which will facilitate the giving of evidence by the witness), or which may be required for the effective conduct of the commission. If combined special measures are sought, the court will address how this is to work in practice.

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

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

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

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

19. Commission hearings must commence on time.

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

Lord Justice General
Edinburgh
1 August 2024

Appendix 6: High Court Practice Note 1 of 2019

Vulnerable and Child Witnesses: Written Questions

This practice note is replicated overleaf.

HIGH COURT OF JUSTICIARY

Practice Note

No.1 of 2019

VULNERABLE AND CHILD WITNESSES: written questions

1. This Practice Note takes effect from 8 April 2019.

2. It supplements *High Court Practice Note Number 1 of 2017: Taking of evidence of a vulnerable witness by a commissioner.* Paragraph 11 of that Practice Note provides that the court may consider asking parties to prepare questions in writing. The Protocol set out in the schedule to this Practice Note sets out the general approach to be taken in this matter.

3. The Protocol has been agreed by the Crown, the Faculty of Advocates and the Law Society of Scotland.

CJM Sutherland

Lord Justice General

Edinburgh

5 March 2019

SCHEDULE

PROTOCOL FOR WRITTEN QUESTIONS

VULNERABLE AND CHILD WITNESSES

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

Certain general principles can be identified.

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

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

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

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

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

Appendix 7: Commission Checklist

HMA v [ ]

PF REF: [ ]

VULNERABLE WITNESSES – EVIDENCE ON COMMISSION

Issues to be considered and ***questions to be answered*** in terms of HC Practice Notes No. 1 of 2017 and No. 1 of 2019 prior to preliminary hearing in cases where special measures are sought in the form of evidence on commission (including cases where it is proposed that a statement or recording will form evidence in chief).

IN ALL CASES

A	Has there been full disclosure?		
B	Has the court been provided with any relevant expert reports and sources of information germane to its consideration of the application?		

IN CASES WHERE IT IS PROPOSED THAT EVIDENCE IN CHIEF WILL TAKE THE FORM OF A STATEMENT AND/OR RECORDING OF AN INTERVIEW AND/OR TRANSCRIPT

Standard protocols govern the circumstances in which visually recorded prior statements may be made available to the defence

C	Where it is proposed to use an audio/visual recording of JII as evidence in chief, has the Crown checked that the recording is of sufficient quality and is playable on court equipment?		

D	Has the Crown satisfied itself that the evidence in the recording and/or document is all relevant, admissible and in section 288C cases that its admission would not contravene section 274?		
E	Are the defence taking objection to any of the content of the recording/statement as a preliminary issue or otherwise?		
F	Have Crown and defence identified appropriate redactions to address the issues in paras D and E?		

IN ALL CASES

1	Is an interpreter required?		
2	Will the witness affirm or take the oath		
3	What location for the commission will be the most suitable in the interests of the witness?		
4	What time for the commission is the most suitable in the interests of the witness?		

5	Does any special arrangement require to be made for communication between the accused and solicitor in viewing room and counsel/solicitor in the commission room? [*The standard protocol on communication is set out between Q 25 and Q 26 below*]		

	If there are multiple accused, are any particular arrangements required for the accused to view by way of video link from the nearest court CCTV room?		
6	Should the judge and/or parties introduce themselves		
	to the witness in advance and, if so how and when?		
7	What reasonable adjustments will be required to enable the effective participation of the witness?		
8	Will breaks be required? If the witness may require unscheduled breaks for a personal or medical reason which may be embarrassing to articulate, how is this to be communicated?		

9	What are the lines of enquiry to be pursued in chief and in cross-examination? Is there merit in the submission of written questions in advance of the Commission? [*See also Q 19 below]*		
10	Does the Crown have a section 275 application which may impact on the scope of questioning?		
11	Does the defence have a section 275 application which may impact on the scope of questioning?		

12	*i.* Is it anticipated that reference will be made to prior statements? *ii.* If so, what is the purpose? *iii.* What passages will be referred to? *iv.* Does any prior statement which may need to be put require redaction?		
13	Are any documents or label productions to be put to the witness?		
14	How is this to be managed and will any special equipment or assistance be required?		
15	Can the scope of any questioning be reduced which might shorten the length of the commission *i.* By further agreement of evidence. *ii.* By agreement between parties to avoid unnecessary questioning and duplication on the issues to be addressed?		
16	In cases of multiple accused, how will repetitious questioning be avoided?		
17	What are the specific communication needs of the witness?		
18	Are any communication aids required e.g. body maps?		

19	What is the appropriate form of questions which are to be asked? In cases of children under 12, and others for whom in terms of PN 1 of 2019 parties consider written questions are appropriate or likely to be required by the Court: Has a list of questions been prepared and intimated to the court: *i.* By the Crown, if the Crown envisages examining in chief? *ii.* By the defence?		
20	How long will the commission take? Please provide an accurate estimate expressed in minutes. *i.* Examination in chief *ii.* Cross examination		
21	What is the extent to which it will be necessary to "put the defence case" to the witness? (See R v Lubemba 2015 1 WLR 1579 and R v Barker 2011 Crim. LR 233)		
22	How is that to be done?		
23	Have parties agreed how this issue may be addressed in due course for the purposes of the jury?		
24	Where a prior statement is to be used as part of the witness' evidence in chief, is the statement to be shown to the witness in advance of the commission and, if so, how, where and when?		

25	If so, should there be any examination in chief of the witness (and, if so, to what extent)?		
	DEFAULT ARRANGEMENTS FOR COMMISSION HEARINGS • **Pre-commission familiarisation will take place according to standard protocols operated by VIA.** • **Wigs and gowns will not be worn.** • **The accused will watch proceedings by way of a video link from the nearest court /CCTV room.** • **There are standard protocols in place that communication will take place by 'phone/text between the solicitor (sitting with the accused) and the counsel/solicitor advocate (sitting in the commission room). In many cases SLAB have granted sanction for two solicitors to be available to facilitate communication between the viewing room and the commission room.** • **Standard protocols are in place for VIA to ensure that the witness and the accused will not come into contact with each other.**		
26	If there is a particular issue which may require departure from these standard protocols, please set out the proposed variation and reasons for proposing it		
	Standard protocols will apply to the arrangements for parties to view the recording after the Commission hearing. **At the preliminary hearing at which an application for commission is granted, the court will stipulate the arrangements.**		

Useful References/Links

http://www.theadvocatesgateway.org/

- 3. Planning to question someone with an autism spectrum disorder including

Asperger syndrome - **New!**

- 4. Planning to question someone with a learning disability
- 5. Planning to question someone with 'hidden' disabilities: specific language impairment, dyslexia, dyspraxia, dyscalculia and AD(H)
- 6. Planning to question a child or young person
- 7. Additional factors concerning children under 7 (or functioning at a very young age)
- 12. General principles when questioning witnesses and defendants with mental disorder
- 14. Using communication aids in the criminal justice system
- 15. Witnesses and defendants with autism: memory and sensory issues

Special Measures Guidance - CPS, Bar Council and NSPCC

Appendix 8: Commission recording check forms for Crown and Defence

COMMISSION RECORDING CHECK FORM (Crown)

NAME OF ACCUSED	
PF REFERENCE NUMBER	
DATE OF COMMISSION HEARING	
LOCATION OF COMMISSION HEARING	

I CONFIRM THAT I AM SATISFIED THAT THE COMMISSION DISC(S) PRODUCED IS/ARE OF SUFFICIENT QUALITY TO BE PLAYED TO THE JURY AT TRIAL	YES/NO
IF "NO", WHAT STEPS ARE BEING TAKEN? e.g. Instruction of a transcript, application to the court to fix a further CPH etc.	

ADVOCATE DEPUTE	
DATE	

Please note that once completed the above form should be submitted to the court and will be printed and placed with the case papers for trial. The form should be submitted for cases next calling in Glasgow to highcourtglasgow@scotcourts.gov.uk and for cases next calling in any other location to firstinstancehighcourt@scotcourts.gov.uk

COMMISSION RECORDING CHECK FORM (Defence)

NAME OF ACCUSED	
PF REFERENCE NUMBER	
DATE OF COMMISSION HEARING	
LOCATION OF COMMISSION HEARING	

I CONFIRM THAT I AM SATISFIED THAT THE COMMISSION DISC(S) PRODUCED IS/ARE OF SUFFICIENT QUALITY TO BE PLAYED TO THE JURY AT TRIAL	YES/NO
IF "NO", WHAT STEPS ARE BEING TAKEN? e.g. Instruction of a transcript, application to the court to fix a further CPH etc.	

DEFENCE COUNSEL/ SOLICITOR ADVOCATE	
DATE	

Please note that once completed the above form should be submitted to the court and will be printed and placed with the case papers for trial. The form should be submitted for cases next calling in Glasgow to highcourtglasgow@scotcourts.gov.uk and for cases next calling in any other location to firstinstancehighcourt@scotcourts.gov.uk

Appendix 9: Witnesses giving evidence remotely in criminal trials

Generally witnesses attend physically at court and are subject to supervision and control by the court which is designed to ensure that the rules of evidence are complied with and that a witness is giving evidence untainted by outside influence.

The same principles apply when a witness gives evidence remotely by TV link as a witness may do on the direction of the court under Schedule 4 of the Coronavirus (Scotland) Act 2020.

The following rules are of particular importance and must be complied with by all witnesses when giving evidence remotely.

The term "production" means a formal court document which may be shown to a witness in the trial.

(1) Before giving evidence, a witness must not observe another witness giving evidence in the same trial unless specifically authorised by the court.

(2) Before giving evidence, a witness must not discuss the evidence that witness will give with any other witness.

(3) Before giving evidence, a witness must not look at any productions made available for the purposes of taking evidence remotely except with the permission of the court.

(4) While a witness is giving evidence, no one other than the witness may be in the same room or able to hear what is being said in the room without the permission of the court.

(5) Unless directed by the court, or on the authority of the court, a witness must not discuss the evidence the witness is giving or will give before the witness has finished giving evidence.

(6) A witness must not confer with anyone else or be subject to outside influence whilst answering questions.

(7) Generally, the only document a witness may look at whilst answering questions is a production. A witness must not look at personal notes, records, statements or reports unless permitted by the judge.

(8) Whilst answering questions a witness should only look at a document when directed to by court personnel; which may be a prosecution or defence lawyer, court officer, clerk of court or judge.

(9) No recording is to be made of a witness giving evidence remotely other than by the court.

(10) After giving evidence, a witness must not discuss the evidence that witness has given with any other witness in the trial until the whole trial has finished.

Appendix 10: Guidance on whether a section 275 application is required for the accused's account of what happened during the incident with which the charge was concerned

1 Paragraph [145] of the UK Supreme Court judgment in *Daly and Keir v HM Advocate* [2025] UKSC 38, 2025 SLT 1253 states as follows:

> "[145] The accused's account of what had happened during the incident with which the charge was concerned was also considered to fall within the scope of section 274(1). The Lord Justice Clerk rejected the Crown's submission that the evidence did not require an application under section 275 because it was merely the accused's account of the subject matter of the charge. She did so because his account involved sexual behaviour which was not detailed in the indictment and therefore did not form "part of the subject matter of the charge" (para 74). This reasoning reflects a literal reading of the legislation; but it is difficult to attribute to the legislature an intention that the accused should be prohibited from giving his account of the critical events unless the court exercises the power under section 275(1) in his favour. Even if the legislation could otherwise be interpreted as enabling the court to prevent the accused from placing his account before the jury, such a reading would be incompatible with his Convention right to a fair trial."

2 This has been interpreted in some quarters as meaning that no section 275 application is required to have the accused's account of the sexual activity occurring during the incident with which the charge was concerned admitted in evidence. The Crown do not agree and sought a ruling on the matter. I was asked to rule on this in the preliminary hearing court, but it became redundant as the defence agreed to submit a section 275 application to admit the accused's account of what had happened during the incident. The application has been lodged and granted.

3 I took the view that it would be helpful to practitioners if I, as the first instance criminal administrative judge, issued a preliminary view on the matter. This is intended to be helpful to practitioners. It is not a judgment on the issue as no arguments were heard and no authorities considered. If the matter is to be litigated on, then a full hearing will be fixed for arguments with authorities, and a judgment will be issued.

4 In the meantime, having considered the matter here are my preliminary views.

5 Firstly, Lord Reed, does not say in terms (at paragraph [145]) that a section 275 application is not required in such circumstances. He comments that the interpretation of the legislation on the point was "a literal reading of the legislation".

6 He does however comment that if a section 275 application was refused which sought to admit the accused's account of what had happened during the incident with which the charge was concerned, that would be a breach of the article 6 convention right to a fair trial. I don't take any issue with that. However, he does not say that the case in which the point was decided, namely *CH v HM Advocate* [2020] HCJAC 43, 2021 JC 45, was wrongly decided on this point.

7 The statutory scheme in sections 274 and 275 of the 1995 Act allows the court to consider in advance of the trial any evidence of sexual behaviour not detailed in the indictment and therefore does not form part of the subject matter of the charge for the purposes of section 274(1)(b) (paragraph [74] of *CH v HM Advocate* per the then Lord Justice Clerk (Dorrian)). This would cover any defence account which involves evidence of sexual behaviour not detailed in the charge, which would cover the accused's account of what had happened during the incident giving rise to the charge. Invariable practice has been to grant a section 275 application the purpose of which is to allow the accused to say what occurred during the incident libelled, where it includes an account of sexual conduct that is not part of the subject matter of the charge. This approach protects the accused's right to a fair trial whilst respecting and applying a statutory scheme that was approved in principle by the ECtHR in *Judge v United Kingdom* (2011) 52 EHRR SE17.

8 There are benefits from having these matters determined in advance of the trial. These include that:

1) The trial is not taken up with such matters as they are determined in advance.
2) The complainer's views are sought in advance of the trial. The court has long since departed from trial by ambush.
3) The court has oversight and has the opportunity to pose questions for parties on the evidence sought to be admitted.
4) The court will in accordance with its statutory obligations take account of the complainer's dignity and privacy in its decision making.
5) The court will be carrying out its statutory duties set out in section 275 as follows:

"(6) The court shall state its reasons for its decision under subsection (1) above, and may make that decision subject to conditions which may include compliance with directions issued by it.

(7) Where a court admits evidence or allows questioning under subsection (1) above, its decision to do so shall include a statement—

(a) of what items of evidence it is admitting or lines of questioning it is allowing;

(b) of the reasons for its conclusion that the evidence to be admitted or to be elicited by the questioning is admissible;

(c) of the issues at the trial to which it considers that that evidence is relevant.

(8) A condition under subsection (6) above may consist of a limitation on the extent to which evidence—

(a) to be admitted; or

(b) to be elicited by questioning to be allowed,

may be argued to support a particular inference specified in the condition."

9 Following *Daly and Keir*, the judges of the Judicial Institute who edit the Preliminary Hearings Bench Book considered the UKSC judgement with a view to issuing guidance to judges, including PH judges who deal with these matters, on section 275 applications. This included paragraph [145] of the UKSC judgment in *Daly and Keir*. The following is an extract from the PH bench book on the point (at 9.10.4):

> "The [Supreme Court] does not go as far as finding that the [Appeal Court] in CH is wrong on its interpretation of 'subject matter of the charge' finding that it is consistent with a literal meaning. In practice, as the court observes, these applications are granted, and it is hard to conceive of circumstances where they could be refused without breaching article 6. **On the basis that there is no current difficulty, it is suggested that there may be no need to alter current practice at least until there is a case more conclusively deciding the point**" [emphasis added].

10 This represents the view of the PH judges.

11 As the bench book states such applications are routinely granted as it is hard to conceive of circumstances where they could be refused without breaching article 6.

12 In practice, following the decisions of the High Court in *DS v HM Advocate* [2005] HCJAC 90, 2006 JC 47 and the Privy Council in *DS v HM Advocate* [2007] UKPC D1, 2007 SC (PC) 1, it is exceptionally rare for the court to give effect to section 275A by placing relevant previous convictions before the jury. It is suggested that it would never be appropriate to do so if the extent of the grant of a section 275 application went no further than allowing the accused to give his account of the sexual conduct that occurred on the occasion libelled.

Lord Mulholland

Criminal Administrative Judge

December 2025