

About the RCPCH

The Royal College of Paediatrics and Child Health (RCPCH) is responsible for training and examining paediatricians. The College has over 17,000 members in the UK and internationally and sets standards for professional and postgraduate education. We work to transform child health through knowledge, research and expertise, to improve the health and wellbeing of infants, children and young people across the world.

RCPCH response to the Pre-Recording Evidence of Child (and Other Vulnerable) Witnesses – Response to Consultation, with specific focus on child witnesses

Comments

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

Yes

Any comments?

This is a humane and progressive action. It will allow more vulnerable children to be protected from further distress, *“subject to the right of the witness to choose to give evidence in person”*. *The choice of the witnesses whether or not to give pre-recorded evidence or to appear in court would need to be fully informed.* The question is – who/ which professional would be best placed to inform the child witness? Provisions will have to be made for child witnesses with communication difficulties.

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

Yes

Any comments?

All the special measures listed should be standard. This would reduce bureaucracy and the protracted negotiations should a child witness choose a measure not listed as standard. The use of the prior statement as evidence in chief and the involvement of a commissioner will result in a considerably less stressful experience for vulnerable child witnesses, and will not compromise the rigour or fairness of the legal process.

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

- **Should the initial focus of any presumption be on all child witnesses, or on child complainers or on those under a certain age?**
- **Should the initial focus be on all solemn cases, cases in the High Court or cases involving only certain types of offences, eg. Sexual offences; serious violent offences; etc.**

Any comments?

Rather than have an age cut-off, the initial focus should be on all child witnesses. Children and young people have different rates of developmental maturity, especially in language and communication skills.

Initial pilot studies should be carried out on those cases where the level of distress associated with being in the same building as the accused on the same day would be potentially the most traumatic for the child. This would be for child complainants of any age in a case where there are accusations of sexual or severe physical abuse.

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

No

Any comments?

The current system already allows children to choose to give evidence in court if they wish to do so. *"Where a child under 12 wishes to be present in court to give evidence at a trial for a serious offence listed in that section, the court must make an order requiring the child to be present unless the court considers that would not be appropriate (section 271B(3) and (4))"*. The questions are – who in "the court" makes the order, and how is that decision made?

It is important that children over 12 years are asked for their preference, but it must be explained to them that the presumption is that they will give pre-recorded evidence.

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

Those working with children and young people know that age is no guide to the child's capacity for understanding in order to make an informed decision. A qualified professional must decide whether the child witness of whatever age, has the legal capacity to make the decision of whether to give evidence in court. All children should have the right to give evidence in court if they have a strong preference to do so. In practice, this would be likely to be a very small number of cases, but nonetheless it should be legally permissible.

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

Divided opinions from respondents

Any comments?

Most children who offend have been offended against. A child accused should therefore not be treated differently from other child witnesses.

Some believe there is merit in the child being exposed to the realities of their situation and its potential consequences. However, the court case should still be managed with sensitivity, as accused children tend to be very vulnerable people.

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

No

Any comments?

This is a different context, and it does not make as much sense in this situation for the child accused of a crime to give evidence in advance.

The factors that should be taken into account would be the capacity of the child to understand and whether there are difficulties in language and communication skills. Mitigating background features would be the past social and family history of the child accused.

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

Yes

Any comments?

It is important to take evidence from the child at an early stage so that the therapeutic process can begin, and the child will not have to revisit the whole situation many months down the line.

“Any pre-recorded evidence taken by way of evidence by a commissioner is not currently part of the formal proceedings in a criminal trial, so the commissioner does not have the same formal powers as the trial judge”. Perhaps the commissioner should have the same formal powers as the trial judge?

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

Any comments?

The main barrier to the taking of evidence prior to the serving of the indictment is that there may not be complete clarity at the time the evidence is taken about what precise charges will be brought. However, the evidence pre-recorded from the child at this earlier stage is likely to be of a higher quality than of that taken many months later, so the overall quality and usefulness of the evidence will be as high or higher than with the current system.

Current practice is that the child is subjected to a joint investigative interview/video-recorded interview by the police and social worker, with no facilities or legal processes to enable the child to be interviewed with input from defence and prosecution. The current system would require a further interview with legal representation from defence and prosecution. The child would need to be supported throughout by an independent safe guarder or court support system. Alternatively, the JII or VRI could be used as evidence in court to avoid subjecting the child to examination in chief or cross.

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

The current process is neither child-focussed nor child-friendly, and does do harm. There needs to be a trauma-focussed approach to reduce the significant adverse effects these processes have on the child. The present joint investigative interview/ video recorded interview should continue, but additional interviews and evidence gathering e.g. by medical examination may need to be considered together.

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

Yes

Any comments?

It is logical that there are some ground rules. The presence of an intermediary in Scottish courts to ensure best evidence is a sensible recommendation. It is important to have clarity about the questions, manner of asking etc to prevent the process being too adversarial, inefficient or traumatic, and to maximise its usefulness having considered the particular needs of the witness.

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

This should be in close proximity to the recording of evidence from the child.

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

Yes

Any comments?

This will allow consistency of approach throughout the process and ensure that the trial judge is happy with the evidence collected and ease the trauma and lessen the confusion for child witnesses.

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

Yes

Any comments?

It would allow the Commissioner to consider a late application for an additional special measure such as using a prior statement as the child's evidence in chief or using additional measures to support child's language / reduce trauma of interview.

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

Yes

Any comments?

As the trial judge, this seems appropriate. However the Commissioner will need to understand the developmental stages and language processing abilities of children at different ages; and the effect on language skills and literacy caused by the abuse and neglect.

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

No

For further information about any aspect of this consultation response, please contact Professor Steve Turner, Officer for Scotland at: s.w.turner@abdn.ac.uk