



GUIDANCE ON THE QUESTIONING OF
CHILDREN IN COURT



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Scottish Executive
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CONTENTS

	Page
Forewords	1
Introduction	6
Purpose of the guidance	6
Duty of the court	7
Duty of the practitioner	7
Power of the court	7
Pre-hearing preparation – identification of the issue	8
Pre-hearing preparation – accommodating the witness	8
Examination – general	9
Examination in chief and re-examination	10
Cross-examination	11
Use of the guidance	11
APPENDIX A – Members of the sub-group	13
Wider Programme of Work on Vulnerable and Child Witnesses	14

FOREWORDS

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Foreword by the Deputy Minister for Justice

The Scottish Executive is committed to modernising the justice system so that victims and witnesses find a system which meets their needs. Child witnesses and victims are especially vulnerable. The whole legal process from the start of an investigation to giving evidence in court can make an already traumatic experience even more upsetting and stressful. We want to increase support and improve standards for child witnesses to help them participate in the legal process and give their best evidence.

This Guidance on Questioning Children in Court is the second in a series of guidance documents on Child Witness Support. It was developed in response to the Lord Advocate's Working Group on Child Witness Support which made 16 recommendations to improve support for children and enhance practice in relation to child witnesses. This guidance focuses on summarising good standards of practice with regard to questioning young witnesses in court and covers all proceedings in which a child gives evidence.

We published a consultation document on Child Witness Support in October 2002. The document included proposals for the provision of support services for young witnesses and draft guidance on a whole range of stages and procedures which a child witness might encounter. This included draft guidance on Questioning Children in Court developed by a sub-group of partners involved with children and with the justice system. Of 75 responses received, 38 made specific comments on this draft guidance. Three main issues raised by consultees have been incorporated including: clarification as to who is responsible for intervening to disallow inappropriate questioning; the need for certain wording in the guidance to be further defined; and, extending the proceedings which would be covered by the guidance.

This series of documents is complemented and strengthened by the Vulnerable Witnesses (Scotland) Bill which was introduced in June 2003. This will allow further assistance and protection to be given to child witnesses enabling them to give their best evidence. However, child witness reform is part of wider reform of the justice system. We have a White Paper with proposals for implementing reform of the High Court of Justiciary and a review of summary justice ongoing, all contributing to key improvements in efficiency to the benefit of child witnesses. This guidance therefore relates to a wide range of initiatives and legislation which will improve and increase the support for child witnesses.

In "A Partnership for a Better Scotland" we said that we would secure a criminal justice system that fully supports victims and witnesses. I therefore welcome this guidance and the contributions of our key partners towards this.

HUGH HENRY, MSP
Deputy Minister for Justice



Foreword by the Solicitor General for Scotland

Witnesses are fundamental to the operation of the criminal justice system. We ask a lot of our witnesses, particularly our child witnesses and it is, therefore, vital to reduce any unnecessary distress and anxiety which is caused by involvement in criminal proceedings. It is crucial that those who work with child witnesses are equipped with the special skills and understanding to enable children to give their best evidence.

Many adults find the experience of giving evidence stressful, but children are considered to be particularly vulnerable and may find this process very difficult. This vulnerability demands special consideration and skills from those who question them in court.

This guidance sets out best practice to be employed when questioning child witnesses and is intended to support the training and skills required from those who carry out this sensitive and difficult task.

Elish Angiolini

ELISH ANGIOLINI, QC
Solicitor General for Scotland



Foreword by the Dean of the Faculty of Advocates

The giving of evidence in any proceedings, however formal or informal, is likely to be an anxious prospect and a difficult task for anyone. This is all the more so when the witness is a child. All judges, tribunal members and legal practitioners should be sensitive to the anxieties of and difficulties facing any witness. Again, this is all the more so when the witness is a child.

It was for these reasons that the Faculty of Advocates assisted in the preparation of this guidance. Much of it is equally applicable to all witnesses, but plainly special considerations can and do arise in relation to vulnerable people. The most important safeguard will always be the discretion and good sense of those participating in and those presiding over our courts and tribunals, especially since it is not possible to anticipate every problem nor to lay down rules for every circumstance. Nonetheless this guidance should be helpful to all such persons, and of course not everyone involved with child and other vulnerable witnesses will be subject to the oversight and regulation of a legal professional body. The promotion and publication of this compilation of good practice in this important area can only be beneficial to the proper administration of justice in Scotland.

A handwritten signature in dark ink that reads "Colin Campbell". Below the signature is a horizontal line, likely representing a signature strip or a decorative flourish.

COLIN CAMPBELL, QC
Dean of the Faculty of Advocates



Foreword by the President of the Law Society of Scotland

The Law Society of Scotland has a unique role in the administration of justice in Scotland. Not only is the Society concerned with the administration of justice from the perspective of the legal profession, it is equally concerned from the viewpoint of the public, the stakeholders in the justice system whether as victims, witnesses or accused persons. The Society is therefore committed to working with others in improving and modernising the justice system as a whole.

Children have a special place in that system and it has long been recognised that they should benefit from additional support when giving evidence in court. The use of special measures, such as supporters or a live television link, goes some way to reducing the anxiety and distress experienced by some children when giving evidence. However, everyone involved in the court process must examine their role and take steps to ensure that they are following best practice when questioning child witnesses. The Guidance on Questioning Children in Court seeks to summarise best practice and provides welcome guidance on advocacy techniques on examining children effectively in an adversarial system whilst ensuring that the child is treated with sensitivity, dignity and respect.

This measure is part of a much wider programme of work designed to improve the treatment of victims and witnesses in the justice system. The Society welcomes these developments. The identification of potentially vulnerable witnesses at an early stage in the case and co-ordinated communication of that information to all involved is crucial to improving the treatment of these witnesses. Identification of vulnerable and intimidated witnesses is a practical rather than a legal issue and must be tackled through increasing awareness and sensitivity and by enhancing the knowledge and skills of everyone involved in the justice process. This guidance, together with training and other current initiatives, will improve the support which is available for child witnesses, and help them participate more effectively in the justice system.

The Society is grateful for having had the opportunity to contribute to the development of this guidance and looks forward to seeing it working in practice.

A handwritten signature in dark ink, appearing to read 'Joseph Platt'. The signature is fluid and cursive, written in a professional style.

JOSEPH PLATT

President of the Law Society of Scotland

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Introduction

- 1 Recommendation 5 of the Lord Advocate's Working Group on Child Witness Support was that in order to improve the standard of questioning of young witnesses:
 - the Lord Advocate should consider inviting all those involved in criminal and children's hearing court proceedings to collaborate on the development of guidance on the questioning of children in court;
 - the Director of Judicial Studies in Scotland should be invited to refer to such guidance in judicial training, in order to develop a more consistent approach to judicial intervention when questioning is deemed inappropriate.
- 2 Accordingly the Scottish Executive Justice Department set up a small working group comprising of a sheriff nominated by the Sheriffs' Association, representatives of the Crown Office, the Faculty of Advocates, the Law Society of Scotland, the Scottish Children's Reporter Administration and the Family Law Association.

Purpose of the guidance

- 3 What follows is intended to provide a brief summary of some basic points to assist all practitioners to conduct the examination of children in an effective, responsible and professional manner. It is not a detailed technical manual. It is neither possible nor desirable to prescribe detailed rules to be followed in every case irrespective of the circumstances in which a child is questioned. Sensitivity and common sense are needed and practitioners should consider all the issues very carefully before they go into the trial.¹
- 4 It is, however, possible to identify certain advocacy techniques that can be usefully employed in this field. Some of what follows may appear to experienced practitioners to be rudimentary. It is, however, especially important where the questioning of children is concerned for all practitioners to learn how to use and to employ the basic advocacy skills. The effective questioning of children demands that responsible practitioners consider carefully the preparations that require to be made in advance of the hearing as well as the tone, content and manner of questioning to be employed. This guidance is intended to assist in these tasks. Finally, practitioners are reminded that only when it is unavoidable in the interests of justice should a child² be called as a witness to give evidence.

¹ In this context "trial" includes hearing or proof.

² The younger or more vulnerable the child the more important it is to weigh in the balance the necessity of calling him or her as a witness.

Duty of the court

- 5 It is the duty of the court to ensure a fair trial. Consistent with this duty the court is also obliged to have regard to the reasonable interests of other parties to the court process, in particular witnesses and among witnesses particularly those who are obliged to relive by describing in the witness box an ordeal to which they say they have been subject. Where it is necessary in the interests of justice to call as a witness a child, steps will be taken to ensure that the interests of the child are protected consistent with the duty to ensure a fair hearing. In criminal cases the Memorandum by the Lord Justice – General on Child Witnesses³ provides guidance to judges to assist them to ensure so far as is reasonably practicable that the experience of giving evidence by all children under the age of 16 causes as little anxiety and distress to the child as possible in the circumstances.

Duty of the practitioner

- 6 Any party intending to call a child as a witness in any proceedings should give notice of that intention to the other parties and to the court as soon as is reasonably practicable. It is the duty of every practitioner to ensure that the experience of giving evidence by all children causes as little anxiety and distress to the child as possible in the circumstances. The Guide to the Professional Conduct of Advocates and the Code of Conduct (Scotland) Rules 1992⁴ specifically provide that in the examination of witnesses and particularly the cross examination of hostile witnesses the law places the practitioner in a privileged position which he should not abuse. The court requires the assistance of parties in making suitable arrangements for the examination and cross-examination of children and ensuring that such examination is confined to what is strictly necessary in the interests of justice and the securing of a fair hearing. In an adversarial system it is necessary that each party should be vigilant as to the proper conduct of any examination of the child by the other and to take objection to any inappropriate examination.

Power of the court

- 7 Inappropriate questioning can be particularly harmful to children. Practitioners can expect the court to be particularly sensitive to the need to ensure that children are questioned appropriately. Practitioners should bear in mind that the court has inherent power, whether or not objection is taken by a party, to

³ Reproduced as the Appendix to this document.

⁴ Supplementary Code of Conduct for Solicitors exercising extended Rights of Audience.

disallow questioning (1) that is irrelevant to the issue before it⁵ (2) that has no object other than to insult the witness (3) that is intended to or has the effect of harassing the witness (4) that has as its purpose the making of a comment as opposed to eliciting a fact and (5) that involves repetition of a question that has already been clearly answered.

Pre-hearing preparation – identification of the issue

- 8 Pre-hearing investigation should be carried out skilfully, professionally and in accordance with published national guidelines.⁶ These are necessary and appropriate safeguards – for the children involved, the investigators and for the investigation itself i.e. the ascertainment of the truth. The investigation should be completely transparent and open to scrutiny.
- 9 Parties should make every effort to identify in advance the issues to be determined.
- 10 Parties have a duty to try to reach agreement on all matters that are or are likely to be uncontroversial.
- 11 All parties and the court should be aware as far as is reasonably practicable of the respective positions of the parties in relation to the evidence that the child being examined will give. Where there are several parties it is important that arrangements are made to avoid the duplication of questioning so far as is reasonably practicable.

Pre-hearing preparation – accommodating the witness

- 12 The child should give evidence as soon as is reasonably practicable after the events being spoken about. Taking of evidence on commission (and if necessary recording it on video) in advance of the hearing should be considered.
- 13 Steps (such as the provision of screens, video link, familiarisation visit, removal of court dress, etc.) should be taken to facilitate the giving of evidence by the child. Account should be taken of the child's views in this regard. The parties must assist the court to take the steps in relation to the child. Parties should provide as much information as possible as early as possible in relation to the circumstances of the child and his or her requirements.
- 14 The child should be introduced to the examiners in advance of their examination.⁷

⁵ Thus it is essential that the court and the parties are fully aware of the issues. The parties have a duty to assist the court in ensuring that the examination does not stray into irrelevant matters.

⁶ These guidelines are to be published separately.

⁷ For the avoidance of doubt the rule of professional practice that prevents an Advocate or Solicitor Advocate from interviewing or discussing a case with a witness does not present any impediment whatsoever to an introductory meeting with a child in advance of the hearing to introduce themselves. On the contrary it is good professional practice to have such an introductory meeting with the child.

- 15 Before giving evidence, the child should be made aware of the procedure and arrangements under which he or she will give evidence.
- 16 The pace of the examination should be dictated primarily by the needs of the child. Sufficient time should be allowed for breaks in the evidence as required.

Examination – general

17 Examination, Cross-examination and Re-examination require:

- **Sensitivity.** There is no substitute for sensitive awareness towards the child on the day and of the need not to harm the child at any stage of the process.
- **Preparation.** The examiner must read all of the papers in advance of the hearing, understand the issues in the case and be fully prepared to conduct the examination.
- **Organisation.** The examiner should organise the material to be examined. Ideally, the examiner should exhaust each topic being examined before moving on to the next one. It is helpful if the topic being examined is signposted at the beginning⁸ and the end⁹ of the examination on that point.
- **Mutual Understanding.** Before examining the child on the controversial matters it may be helpful to attempt to build a rapport with the witness.¹⁰ Once the examiner has finished with rapport building he should clearly signal that he is moving to important matters.¹¹
- **Fact-finding.** The purpose of examination is to elicit facts. Questions should be short and straightforward.¹² The examiner should seek to elicit only one fact with each question asked. It may be irrelevant to seek explanations of behaviour. Care should be taken before asking a child why he or she did or did not do something. An answer to such a question from the child may be of little evidential value and irrelevant for the purposes of the trial. It may be harmful to the child to require him or her to provide an answer. It is also unhelpful to repeat persistently a question in the same form as children can alter their response according to what they may think the questioner wants to hear. It is unnecessary for a child witness to be told what another witness has said or is expected to say. Questions of that nature are apt to confuse the child. Likewise summarising or recapitulating an answer already given should be avoided in questioning and should not under any circumstances involve the use of words other than those already used by the child.

⁸ E.g. I want to ask you about what happened on the day you went to the zoo.

⁹ E.g. that is all that I have to ask you about what happened on the day you went to the zoo.

¹⁰ E.g. ask the child to identify a favourite topic or event and explore the details with open questions.

¹¹ E.g. Now I want to ask you about the reason you are here today.

¹² Avoid double questions, hypothetical questions, double negatives, long questions and legalese.

- **Simplicity.** The examiner should use as simple language as possible. Plain words should be chosen that can be clearly understood by the child. It is impossible to over emphasise the importance of the choice of words used in questions.
- **Precision.** Precision is required in the use of language in the question. Careful thought requires to be given to using as precise language as possible so that the child clearly understands what it is that is being asked.
- **Pace.** The examiner should speak slowly and clearly and allow for pauses by the child. The child should not be interrupted. Sufficient time should be given to the child to allow him or her to answer the question.
- **Tone.** The tone of questioning should be appropriate to the circumstances. Bullying and harassing a child is wholly inappropriate.
- **Eye Contact.** It is important that, so far as is reasonably practicable, the examiner maintains eye contact with the child during the examination. This is especially the case where CCTV equipment is being used. Practitioners should familiarise themselves with it before beginning the examination.

Examination in chief and re-examination

18 It is particularly important not to ask leading questions in relation to controversial matters. The child must be allowed to tell his or her story in her own words. The focus should be on the child and not the examiner. The examiner must be able to distinguish between a leading and non-leading question and should be able to elicit the evidence in a non-leading form.¹³ If there remain background matters that are uncontroversial then the parties should identify these in advance of the examination and may agree that leading questions may be asked in relation to them. Practitioners may find it beneficial not to ask leading questions, even in relation to non-controversial matters or during rapport-building, as leading a witness, particularly a child, can be habit forming.

¹³ A leading question is a question that suggests the answer desired. It is sometimes said that putting a question in a form that is amenable to both an affirmative and a negative answer is not a leading question (e.g. did you or did you not see the dog?). This is incorrect as the examiner has clearly alerted the witness to the answer desired. The way to avoid asking a leading question is to prefix it with words such as Where, when, what, who, etc. In the example given "What did you see?"

Cross-examination

- 19 While the purpose of cross-examination is to test the credibility and reliability of the evidence and it may necessarily involve a challenge to the child's account, practitioners are reminded that it is rarely appropriate to adopt a confrontational approach in the cross-examination of a child, particularly in the case of young children. Practitioners have a professional duty not to ask inappropriate questions.¹⁴ Practitioners can expect that the court will not permit inappropriate questions to be asked.
- 20 In cross-examination leading questions are technically permissible and sometimes unavoidable (for example when putting an accused's position to a witness). However, practitioners should bear in mind that answers to such questions are often of limited evidential value. The credibility and reliability of a witness can be tested effectively without resort to leading questions. A spontaneous response to a non-leading question is far more telling than a doubtful assent to words put in a witness's mouth. Whatever its purpose, the Judge or jury may well place little weight on evidence elicited from leading questions in cross-examination.

Use of the guidance

- 21 The foregoing guidance has been produced for use where children are questioned in court in any proceedings by Prosecutors, Children's Reporters, Counsel, Solicitor Advocates and Solicitors as well as any other person who may be engaged in this process, including Safeguarders or Curators *ad litem*.

¹⁴ I.e. questions that are irrelevant, insulting, or repetitive, or are designed to harass the witness, or are framed so as to make a comment as opposed to eliciting a fact.

| APPENDICES

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APPENDIX A

Members of the sub-group

Mr P Beaton, Scottish Executive Justice Department (Chair)

Sheriff R J D Scott, Sheriffs' Association

Mr S Di Rollo, QC, Faculty of Advocates

Mrs G Watt, Crown Office and Procurator Fiscal Service

Mrs K Harper, Crown Office and Procurator Fiscal Service

Ms S Barrie, Crown Office and Procurator Fiscal Service

Ms J Robeson, Scottish Children's Reporter Association

Mr G A Brown, Law Society of Scotland

Ms R Kelsey, Family Law Association

Dr J H Curran, Central Research Unit, Scottish Executive Justice Department

Ms B A Brown, Scottish Executive Justice Department

Mr S McCourt, Scottish Executive Justice Department

The contribution of all those involved in preparing this guidance is gratefully acknowledged.

WIDER PROGRAMME OF WORK ON VULNERABLE AND CHILD WITNESSES

The guidance set out in this document is part of a wider programme of work on victims, witnesses and the modernisation of the justice system. This chart sets out the wider programme and how it contributes to our aims and objectives for vulnerable and child witnesses.

Our Aim

To increase support and improve standards of treatment of vulnerable witnesses to help them participate in the legal process and give their best evidence.

The **Executive** is committed to:

- securing a criminal justice system that fully supports victims and witnesses
- reforming the courts and the legal system to deal with cases more efficiently.

It is widely accepted that children under 16 and other vulnerable witnesses find the current legal process intimidating and distressing.

The **Executive**:

- has introduced a Bill to enable better protection and assistance to be given to vulnerable witnesses, particularly children – it is also intended that the Bill will help to support the development of a culture within the justice system which enables children and other vulnerable witnesses to participate fully
- has issued a White Paper on proposals for implementing reform of the High Court in Scotland including legislation, which will be of benefit to vulnerable witnesses
- has implemented the Scottish Strategy for Victims, including establishing a Witness Service in Sheriff and High Courts and a Victim Information and Advice Service within the Crown Office and Procurator Fiscal Service
- co-ordinates the Child Witness Support Implementation Group to oversee the implementation of the recommendations of the Lord Advocate's Working Group on Child Witness Support.

Objectives

With regard to Vulnerable and Child Witnesses, these four key areas of work have commonly agreed objectives to:

- Improve information and support systems.
- Improve case management and introduce greater certainty of time scales in sensitive cases.
- Improve and increase the availability of special measures.
- Improve the gathering and taking of evidence.


Child Witnesses

For child witnesses, this includes:

Information and Support Systems	Case management	Special measures	Gathering evidence
Publication and distribution of information for child witnesses and parents or carers CW	Consistent inter-agency operational support of young witnesses CW	Automatic entitlement to special measures VV	Improve conduct of interviews and precognition with young witnesses CW
Victim Support services, 31 local services, overseen by Victim Support Scotland that provide support to victims of crime SSV	More thorough case preparation HCR	Supporter as a statutory special measure VV	Greater use of prior statements as main evidence VV
Witness Service. Delivered by Victim Support Scotland, it provides information and practical and emotional support to all witnesses in the Sheriff and High Court cases SSV	Active case management by the judge including mandatory preliminary hearings HCR	Availability of special measures for witnesses in civil proceedings VV	Reduce stress of young witnesses in relation to identification of accused CW
Victim Information and Advice SSV	Consideration of special measures and case management by the Judiciary CW	Streamlined notification procedure for special measures well in advance of trial VV	Dock identification unnecessary where witnesses have previously identified accused VV
Publication and dissemination of leaflets and launch of website. www.scottishvictimsofcrime.co.uk SSV	Good practice guidance for judges and sheriffs and revision of the Lord Justice General's Memorandum on the treatment of Child Witnesses by the Courts, 1990 CW	Children under 12 in criminal cases about sexual or violent matters to give evidence without having to come to court VV	Abolition of competence test VV
Clarify roles of those making decisions relating to therapy before court proceedings CW	Facilitate the prioritisation of cases with young witnesses CW		Improve standards of questioning children in court CW
Improve conduct of court familiarisation visits CW	Modernised time limits to avoid unnecessary adjournments HCR		Restrictions on use of evidence relating to a witness's character and sexual behaviour in children's hearing court proceedings VV
Refurbishment of court premises SSV	Greater certainty of trials including fixed diets HCR		Discretionary power in non-sexual offence cases to prevent accused conducting his own defence VV
Information on Vital Voices and the Vulnerable Witnesses (Scotland) Bill is on website www.scotland.gov.uk/vitalvoices VV	Information about young witnesses to inform decision making in the legal process CW		Questioning victims of sexual offences in court SSV
Establish inter-agency mechanisms for collection and publication of statistics on young witnesses and court proceedings CW			Use of expert evidence to provide information about behaviour of a witness VV

CW = Child Witness Support Implementation Group
SSV = Scottish Strategy for Victims

VV = Vital Voices (Vulnerable Witnesses (Scotland) Bill)
HCR = Lord Bony's Reform of the High Court

 Relates to this publication



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