

VITAL VOICES
Helping Vulnerable Witnesses Give Evidence
Report on the Analysis of Responses to the Consultation



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Report on the Analysis of Responses to the Consultation

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**Scottish Executive Social Research
2002**

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Executive Summary

Corroboration

- 38 consultees considered whether the law of corroboration should be altered, with 33 supporting the Executive's line that it should not be amended and instead that supports available to vulnerable witnesses should be improved. 3 consultees sought a review of the law particularly in relation to cases involving rape and other sexual offences.

Defining Vulnerability

- The consultation document invited comments on a number of suggested changes to the definition of "vulnerable person". There was majority support from consultees for widening the current definition of "vulnerable person" so that more witnesses would be eligible for special measures.
- 52 consultees considered whether the external circumstances faced by a witness should be taken into account when deciding whether they should be eligible for special measures. 44 consultees were in favour of this proposal. The main reason given for extending the definition of "vulnerable person" was on the basis that it was seen as too restrictive.
- 51 consultees addressed the question of whether specific categories of witness should be eligible for special measures, with 25 consultees in favour and 15 against. Five consultees gave conditional support and six consultees did not specify a clear view.
- 27 consultees considered that all alleged victims of sexual offences should be eligible for special measures. 9 consultees did not agree with this proposition.
- Only 15 consultees were supportive of the proposition that all categories of witness should be allowed to use special measures.
- 35 consultees considered that an accused in a criminal trial should be eligible for special measures. 12 consultees gave conditional support to this proposition, with 6 consultees being against this proposal.

Special Measures

- The majority of consultees were in favour of the use of the existing special measures and some consultees expressed views on how these measures could be better used.
- 28 consultees commented on whether pre-trial video recording of a cross-examination would be a positive development, with 19 agreeing that it would be a positive development. Only 5 consultees disagreed, with 4 not specifying their view.
- 32 consultees agreed that written guidance to clarify the role of the supporter would be helpful. No consultees were against this proposal.
- 33 consultees supported the ban on personal cross-examination by accused in sexual offence cases being extended to other types of case. 12 consultees did not agree with this suggestion.
- There was a mixed response to the use of both intermediaries and *amicus curiae* in criminal proceedings.

- 52 consultees considered the issue of intermediaries with only 23 in full support of the proposal. The rest of the consultees either supported limited use of intermediaries, were not in favour or preferred awaiting the outcome of the pilot schemes being conducted in England and Wales.
- The appointment of an *amicus curiae* was supported by 23 consultees with 21 not being in favour of the proposal.

Range of Proceedings

- 45 consultees supported special measures being made available in civil proceedings. 2 consultees were against the proposition.
- 41 consultees also supported the restrictions on use of character and sexual history evidence in criminal trials being introduced to referrals from the children's hearing system to the sheriff court.

Competence Test

- There was little support for retaining the competence test in its current form.
- With regard to child witnesses the majority of consultees were in favour of either abolishing (34 consultees) or modifying (12 consultees) the test. Only 9 consultees were in favour of retaining the test in its current form.
- With regard to all witnesses 27 consultees wanted the test abolished, 12 wanted it modified with only 9 expressing the view that the test should be retained.

Expert Evidence

- 34 consultees were in favour of greater use being made of expert evidence in cases involving vulnerable witnesses. Only 11 consultees were against this proposal

Scottish Law Commission's recommendations on identification evidence

- Only 2 consultees opposed the implementation of the Scottish Law Commission's proposals on identification evidence with 25 consultees being in favour of the proposal.

SECTION ONE: INTRODUCTION

Introduction and purpose of the consultation

1. The Scottish Executive has recently completed a consultation process to inform a review of the current law and practice relating to vulnerable witnesses. The consultation forms part of a much wider programme of work to help improve the position of victims and witnesses in the criminal justice system.
2. The purpose of the consultation, as outlined in the Scottish Executive's consultation document, was to look at current arrangements relating to vulnerable witnesses,¹ to consider whether these arrangements need to be extended and whether there are alternative ways in which witnesses who may have particular needs can be assisted in providing 'best evidence'.
3. The purpose of this report is to present the findings of the analysis of responses to the consultation exercise.
4. In total, almost 700 copies of the consultation document were distributed to individuals, members of the judiciary and organisations throughout Scotland.² In addition, the document was placed on the Scottish Executive's website. The closing date for receipt of responses to the consultation was 31 July 2002. A total of 76 responses were received. Table 1.1 (below) contains information on the number of responses received, by category of interest group. A full list of Consultees is contained in Annex B.

Table 1.1: Responses to the Consultation by Interest Group Category

Category	Number of responses received
Member of the Public	1
Voluntary Organisation	19
Local Authority / Social Work	23
Public / Statutory Body	10
Professional Association	14
Academic	3
Sheriffs / Judges	1
Other Legal	5
TOTAL	76

¹ The Consultation Document defines vulnerable witness as referring to "any witness who may be in special need of help for any reason." (para 4, page 3)

² See Annex A for a Consultation mailing list

5. It should be noted from the outset that, as the overall number of submissions received was low (76 in total), and not all Consultees addressed each question, the percentages cited throughout the report will, in the main, refer to very low numbers. Therefore, caution should be exercised when quoting percentages cited within the report.

Structure of the Report

6. The purpose of this report is to present the findings of the analysis of responses to the consultation exercise. The results of the analysis are contained in eight sections. Section Two contains Consultees' views on the requirement for corroboration of evidence in criminal cases (Question 1), while Section Three contains an overview of Consultees' opinions on how vulnerability should be defined (Questions 2–10). The issue of special measures – both current and new – is examined in Sections Four and Five (Questions 11–20) and Section Six looks at the range of proceedings in which these measures should be available (Questions 21-24). Section Seven is concerned with Consultees' views on whether the competence test should be modified, abolished or retained (Question 25) while the final section, Section Eight, addresses 'related issues' (Questions 26–27).
7. The Annex contain a list of individuals and organisations to which the consultation document was distributed (Annex A), in addition to a list of those from whom responses were received (Annex B).

SECTION TWO: THE LEGAL CONTEXT

Question 1: Do you support the Executive’s views that the law on corroboration in criminal cases should not be changed?

Total Submissions Received	No comment made (n=38)	Consultees that commented (n=38)	Of those that commented			
			Yes (n=33)	No (n=3)	Yes – Conditional (n=2)	Not Specified (n=0)
76	50%	50%	87%	8%	5%	0%

8. Half of the submissions received (n=38) did not specifically address the issue of corroboration of evidence in criminal cases. Of those that did (n=33), 87% supported the Executive’s views that the law on corroboration of evidence in criminal cases should not be changed. A further 5% (n=2) offered conditional support for the Executive’s views while 8% (n=3) were opposed to it.
9. According to one Consultee the requirement for corroboration is an essential element in establishing guilt beyond a reasonable doubt.³ This Consultee suggested that there should be no diminution of the fundamental presumption of innocence in criminal proceedings to which every accused person is entitled until their guilt is established beyond reasonable doubt⁴.
10. Other Consultees suggested that corroboration acts a safeguard against any possible miscarriages of justice,⁵ the dangers of which are “too great”⁶. It also acts as a valuable “check on evidence presented”⁷ in addition to protecting the right of an accused to a fair trial.⁸ It is a basic tenet of the Scottish criminal justice system⁹ and the negative impact abolition would have on human rights would far outweigh the possible benefits to the victim.¹⁰
11. Other opinions expressed by Consultees on the matter of corroboration of evidence include the following:

³ The Faculty of Advocates (Number 74)

⁴ The Faculty of Advocates (Number 74)

⁵ Ferguson, P W (Number 3); Criminal Bar Association (Number 46); Scottish Human Rights Centre (Number 50)

⁶ The Faculty of Advocates (Number 74)

⁷ Scottish Human Rights Centre (Number 50)

⁸ Scottish Human Rights Centre (Number 50)

⁹ Scottish Rape Crisis Network (Number 51)

¹⁰ The Scottish Association for the Study of Delinquency (Number 31)

- There is no need to alter the rules on corroboration if vulnerable witnesses (in particular children¹¹ and female complainers in sexual offence cases¹²) are provided with the support and assistance required to ensure they give effective evidence¹³
- It is important to consider other steps for vulnerable witnesses while ensuring the rights of the accused are not compromised¹⁴
- There needs to be more focus on making the prosecution cases stronger¹⁵
- Current procedures limit the types of evidence used to corroborate witness statements.¹⁶ In addition, certain offences (such as domestic abuse cases) do not lend themselves to easily establishing corroborative evidence¹⁷ therefore more emphasis needs to be placed on gathering different types of evidence for use as corroboration¹⁸
- Further consideration of how evidence is collected is also required¹⁹
- The evidence of a child should not consist solely of their verbal statement:²⁰ too much emphasis is currently placed on the statements of child witnesses or “own evidence.”²¹ Instead, there needs to be a thorough investigation of forensic, alibi and circumstantial evidence²²

12. Two Consultees expressed conditional support for the Executive’s views on corroboration. According to these Consultees the law on corroboration of evidence in criminal cases should remain as it is on the proviso that:

(a) The Executive applies the principles that for under 16s, involvement in court processes is generally against their best interests and should be avoided where possible²³

(b) Improved supports to children/vulnerable witnesses should include pre-trial preparation and sensitive handling of all vulnerable witnesses from time of arrival at court²⁴

¹¹ Ayrshire & Arran Primary Care NHS Trust (Number 34), Barnado’s Scotland (Number 42); Child & Adolescent Section of the Royal College of Psychiatrists (Scottish Division) (Number 43); Crown Office Policy Group (Number 47)

¹² Scottish Rape Crisis Network (Number 51)

¹³ ACPOS (Number 5); Mental Welfare Commission for Scotland (Number 18); Ayrshire & Arran Primary Care NHS Trust (Number 34); Barnado’s Scotland (Number 42); Child & Adolescent Section of the Royal College of Psychiatrists (Scottish Division) (Number 43); Crown Office Policy Group (Number 47); Scottish Human Rights Centre (Number 50); Scottish Rape Crisis Network (Number 51); SCRA (Number 75)

¹⁴ Crown Office Policy Group (Number 47)

¹⁵ Scottish Rape Crisis Network (Number 51)

¹⁶ Women Supporting Women (Number 36)

¹⁷ ADSW (Number 55)

¹⁸ Women Supporting Women (Number 36); Cross Party Group in the Scottish Parliament on Men’s Violence Against Women and Children (Number 37); Barnado’s Scotland (Number 42); ADSW (Number 55); Scottish Women’s Aid (Number 56)

¹⁹ Barnado’s Scotland (Number 42)

²⁰ Childline Scotland (Number 6); Children 1st (Number 60)

²¹ NCH Scotland (Number 64)

²² Childline Scotland (Number 6); Children 1st (Number 60)

²³ Scottish Child Law Centre (Number 45)

²⁴ Clackmannanshire Council – Social Services (Number 54)

13. Thirteen per cent (n=3) of Consultees were in favour of alterations to the current law on corroboration of evidence in criminal cases. These Consultees offered the following in support of their views:

- The requirement for corroboration is a barrier to justice in certain cases, in particular cases involving the sexual abuse of children²⁵
- A review of the law on corroboration and the Moorov doctrine is required: the current requirement of corroboration results in no justice for many children²⁶
- Amending the rules on corroboration may present difficulties due to human rights legislation; however, a wide review of procedures is required in addition to consideration of the use of specialist prosecutors and judges²⁷
- If the law on corroboration is not changed, the whole area of sexual abuse needs closer scrutiny²⁸
- Changes in procedures²⁹ and vastly improved support services are required³⁰

²⁵ The Highland Council – Social Work (Number 70)

²⁶ East Renfrewshire Council – Social Work Department (Number 57)

²⁷ Victim Support (Number 53)

²⁸ Open Secret (Number 22)

²⁹ British Psychological Society (Number 24)

³⁰ Open Secret (Number 22)

SECTION THREE: DEFINING VULNERABILITY

Question 2: Should the external circumstances faced by a witness be taken into account in deciding whether he or she should be eligible for special measures?

Total Submissions Received	No comment made (n=24)	Consultees that commented (n=52)	Of those that commented			
			Yes (n=44)	No (n=7)	Yes – Conditional (n=0)	Not Specified (n=1)
76	32%	68%	85%	13%	0%	2%

14. Of the Consultees that addressed Question 2 (n=52), 85% (n=44) were in favour of the external circumstances faced by a witness being taken into account in deciding whether s/he should be eligible for special measures; 13% (n=7) of Consultees were opposed to the proposal while 2% (n=1) did not specify a view.
15. The view was expressed that the current test is “too restrictive”³¹, “restrictively narrow”³² and “very prescriptive”.³³ Instead, the court should be able to exercise a discretion to provide special measures to a wider range of witnesses (such as witnesses who were victims of sexual assault; threatened witnesses etc)³⁴ in addition to being able to take account of external circumstances such as the nature of the crime.³⁵ It was suggested that, unless the circumstances of individual witnesses are considered it is unclear how ‘best evidence’ might be obtained from them.³⁶
16. According to one Consultee, as vulnerability manifests itself “in different forms, at different times, in different people” it is therefore not easy to define: the focus must be the impact on testimony.³⁷ The view was advanced by another Consultee that, apart from child witnesses, all other witnesses should be regarded as vulnerable if their circumstances are such that the quality of their evidence will be affected if the measures are not made available to them.³⁸
17. Suggestions advanced by other Consultees as to what external circumstances faced by witnesses should be taken into account in determining eligibility for special measures include:

³¹ Ferguson, P W (Number 3)

³² Scottish Rape Crisis Network (Number 51)

³³ ACPOS (Number 5)

³⁴ West Lothian Council – Community & Support Services (Number 28)

³⁵ Scottish Rape Crisis Network (Number 51)

³⁶ Fiona Raitt, University of Dundee – Department of Law (Number 41)

³⁷ SCRA (Number 75)

³⁸ Ferguson, P W (Number 3)

- The relationship between the child and the accused must always be considered a “crucial factor”³⁹ in determining a child’s ability to give reliable evidence⁴⁰
- The nature of the crime⁴¹
- The emotional/physical state of the witness⁴²
- Evidence of intimidation⁴³
- If the witness has been a victim:
 - Witnesses who have been victims of domestic violence or sexual assault/offences;⁴⁴ abuse⁴⁵ or physical violence⁴⁶ should be afforded special measures. This should also include adult victims of sexual abuse perpetuated when the victim was a child⁴⁷
 - Witnesses subject to repeat victimisation⁴⁸
- The individual characteristics of the witness should be taken into account, for example:
 - Age
 - the elderly,⁴⁹ particularly if they have been subject to an attack of any kind⁵⁰
 - Children should *prima facie* be regarded as vulnerable⁵¹
 - Frailty⁵²
 - Disability⁵³ or communication difficulties⁵⁴, such as deaf people⁵⁵
 - Membership of minority groups: ethnic minorities;⁵⁶ members of gay, bisexual, transsexual communities⁵⁷
 - People with a dementing illness⁵⁸
- Witness experiencing intimidation⁵⁹

³⁹ Child & Adolescent Section of the Royal College of Psychiatrists (Scottish Division) (Number 43)

⁴⁰ Child & Adolescent Section of the Royal College of Psychiatrists (Scottish Division) (Number 43)

⁴¹ Scottish Rape Crisis Network (Number 51)

⁴² Scottish Rape Crisis Network (Number 51)

⁴³ Scottish Rape Crisis Network (Number 51)

⁴⁴ Fife Domestic Abuse Forum (Number 9); Soroptimist International of Aberdeen (Number 11); The City of Edinburgh Council – Social Work (Number 20); West Lothian Council – Community & Support Services (Number 28); Commission for Racial Equality (Number 35); Child & Adolescent Section of the Royal College of Psychiatrists (Scottish Division) (Number 43)

⁴⁵ Clinical & Counselling Psychology Services – Motherwell/Clydesdale Department (Number 12)

⁴⁶ The City of Edinburgh Council – Social Work (Number 20)

⁴⁷ ADSW Children & Families Standing Committee (Number 19) ; Open Secret (Number 22); Child & Adolescent Section of the Royal College of Psychiatrists (Scottish Division) (Number 43)

⁴⁸ ACPOS (Number 5); Fife Domestic Abuse Forum (Number 9); West Lothian Council – Community & Support Services (Number 28)

⁴⁹ ACPOS (Number 5), Clinical & Counselling Psychology Services – Motherwell/Clydesdale Department (Number 12); ADSW Children & Families Standing Committee (Number 19)

⁵⁰ ADSW Children & Families Standing Committee (Number 19)

⁵¹ Ferguson, P W (Number 3)

⁵² Clinical & Counselling Psychology Services – Motherwell/Clydesdale Department (Number 12); ADSW Children & Families Standing Committee (Number 19) ; West Lothian Council – Community & Support Services (Number 28)

⁵³ ACPOS (Number 5)

⁵⁴ West Lothian Council – Community & Support Services (Number 28)

⁵⁵ Edinburgh & East of Scotland Deaf Society (Number 29)

⁵⁶ ACPOS (Number 5); West Lothian Council – Community & Support Services (Number 28)

⁵⁷ ACPOS (Number 5)

⁵⁸ Clinical & Counselling Psychology Services – Motherwell/Clydesdale Department (Number 12)

⁵⁹ ACPOS (Number 5); Commission for Racial Equality (Number 35); East Renfrewshire Council –

- Witness who feel threatened⁶⁰
 - Witnesses subjected to crimes of hatred; for example, racial or homophobic attacks⁶¹
18. In addition, it was suggested that there could be included a discretionary category such as on ‘cause shown’⁶² which would cover unusual or exceptional circumstances.
19. Opposition to the proposal was expressed by 13% of Consultees (n=7). For one Consultee, opposition was based on the premise that the proposal might lead to additional delay and cost, and the blurring of the focus on those people with a mental disorder and others who need protection.⁶³ Another suggested that the eligibility criteria remain unchanged until the Court Witness Service has had time to ‘bed in’⁶⁴ while another favoured retention of the status quo on the basis that it would be hard to differentiate between a witness’ fear of giving evidence and those fearful of appearing due to their “inability to tell truth”.⁶⁵
20. In the view of one Consultee certain types of witness should be presumptively vulnerable, rather than having to establish vulnerability by category or specific circumstances in each case. Those for which the presumption should exist are:
- the under 16s
 - individuals with a mental disorder (to be subject to medical report if not in detention)
 - those over a certain age (possibly 75), and
 - individuals certified (by the police) as intimidated⁶⁶

All other witnesses should have the right to seek vulnerable status on provision of evidence of vulnerability: the status should not be granted as of right. Witnesses should, however, have the right to opt out of any special processes to which vulnerability entitles them.⁶⁷

21. While opposed to a “blanket widening” of the current definition of vulnerable witness, one Consultee suggested that the issue of vulnerability should be determined on two issues:
- (a) “does the cognitive, communication or physical abilities of the witness create conditions that might cause them to be unduly led or caused to give confused testimony as a result of the normal course of the conduct of the proceedings?; or

⁶⁰ Social Work Department (Number 57); Angus Council - Social Work (Number 61)
⁶¹ Open Secret (Number 22); West Lothian Council – Community & Support Services (Number 28)
⁶¹ Commission for Racial Equality (Number 35); East Renfrewshire Council – Social Work Department (Number 57)
⁶² Crown Office Policy Group (Number 47)
⁶³ Mental Welfare Commission for Scotland (Number 18)
⁶⁴ Dumfries & Galloway Council – Social Services Department (Number 23)
⁶⁵ The Faculty of Advocates (Number 74)
⁶⁶ Ross, Margaret Deputy Head of School of Law, University of Aberdeen (Number 25)
⁶⁷ Ross, Margaret Deputy Head of School of Law, University of Aberdeen (Number 25)

(b) “is the witness rendered unable to give testimony in the usual way because of the nature of the offence they have allegedly been subject to or witnessed?”⁶⁸

⁶⁸ Edinburgh & the Lothians Child Protection Office (Number 30)

Question 3: Should only specific categories of witness be eligible for special measures, or should any witness be allowed to use them if the court permits?

(a) Should specific categories of witness be allowed to use special measures?

Total Submissions Received	No comment made (n=25)	Consultees that commented (n=51)	Of those that commented			
			Yes (n=25)	No (n=15)	Yes – Conditional (n=5)	Not Specified (n=6)
76	33%	67%	49%	29%	10%	12%

22. Thirty three per cent of Consultees did not specifically address Question 3. Of those that did (n=51), 49% (n=25) were in favour of specific categories of witnesses being accorded special measures; five Consultees expressed conditional support while 29% (n=15) were opposed to the proposal and 12% (n=6) did not specify a view.

23. While the majority (49%) of Consultees were in favour of special measures applying to specific categories only, many of these favoured an expansion of the current range of categories on the basis that they are too restrictive⁶⁹ or “inadequate.”⁷⁰ Consultees advocated expansion of the range of categories so as to incorporate:

- Children: all children should be considered for special measures in the first instance⁷¹ in all cases and not just those who were victims of personal sexual assault.⁷²

Suggestions as to how ‘child’ should be defined were advanced. According to two Consultees the status of ‘child’ should refer to those under 16 years of age⁷³ while another mooted a redefinition so as to refer to the age of the complainer at the time the alleged offence occurred thereby recognising the vulnerability of adults who were subjected to abuse as children. In addition, it would take account of any child who has reached 16 before the commencement of the trial.⁷⁴

⁶⁹ ACPOS (Number 5)

⁷⁰ Soroptimist International of Aberdeen (Number 11). This Consultee also pointed to a perceived failing with the current three categories in that they fail to allow for witnesses with undiagnosed or untreated mental illness.

⁷¹ Ferguson, P W (Number 3); Ross, Margaret Deputy Head of School of Law, University of Aberdeen (Number 25); Commission for Racial Equality (Number 35); ADSW (Number 55); NCH Scotland (Number 64)

⁷² NCH Scotland (Number 64)

⁷³ Childline Scotland (Number 6); Ross, Margaret Deputy Head of School of Law, University of Aberdeen (Number 25)

⁷⁴ City of Edinburgh Council, Social Work Unit (Number 1)

- Those with a mental disorder as well as mental incapacity:⁷⁵ people with a diagnosed and enduring mental illness⁷⁶
 - Victims of sexual abuse,⁷⁷ in particular adults who have been a victim of sexual abuse perpetrated when they were children⁷⁸
 - Victims of domestic abuse and violence⁷⁹
 - Persons over 75⁸⁰
 - Those who are intimidated⁸¹
 - The visually impaired⁸²
 - Witnesses who have communication problems: all communication problems should be confirmed by medical staff⁸³
 - Witnesses with hearing difficulties⁸⁴
 - Deaf and deafblind people with mental health difficulties⁸⁵
 - Persons with a learning difficulties⁸⁶
 - Victims of crimes of hatred (for example, racial or homophobic attacks)⁸⁷
24. While opposed to a blanket widening of the definition, one Consultee advocated making explicit the criteria by which eligibility for special measures was determined as this might assist to include those who currently fall outwith the scope of the measures.⁸⁸ It was further suggested that the categories should be wide enough to include a range of vulnerabilities.⁸⁹ In addition, Consultees specified that, while measures should be available only to specific categories, witnesses who do not fall within the defined categories but are identified as needing access to special measures at any point during proceedings should then be considered.⁹⁰ Or, as mooted by one Consultee, a discretionary

⁷⁵ Ross, Margaret Deputy Head of School of Law, University of Aberdeen (Number 25); NSF Scotland (Number 26); Commission for Racial Equality (Number 35); North Lanarkshire Council - Social Work Department (Number 68)

⁷⁶ Renfrewshire Council – Social Work Department (Number 69)

⁷⁷ Soroptimist International of Aberdeen (Number 11); Commission for Racial Equality (Number 35); Perth & Kinross Area Child Protection Committee (Number 52); Scottish Women’s Aid (Number 56)

⁷⁸ Perth & Kinross Area Child Protection Committee (Number 52); North Lanarkshire Council - Social Work Department (Number 68)

⁷⁹ Soroptimist International of Aberdeen (Number 11); Commission for Racial Equality (Number 35); Scottish Women’s Aid (Number 56)

⁸⁰ Ross, Margaret Deputy Head of School of Law, University of Aberdeen (Number 25)

⁸¹ Ross, Margaret Deputy Head of School of Law, University of Aberdeen (Number 25); Commission for Racial Equality (Number 35)

⁸² Glasgow and West of Scotland Society for the Blind (Number 13); Scottish Association of Sign Language Interpreters (Number 17)

⁸³ Clackmannanshire Council – Social Services (Number 54)

⁸⁴ Scottish Association of Sign Language Interpreters (Number 17); Edinburgh & East of Scotland Deaf Society (Number 29)

⁸⁵ The Scottish Council on Deafness (Number 33)

⁸⁶ Commission for Racial Equality (Number 35)

⁸⁷ Commission for Racial Equality (Number 35)

⁸⁸ Edinburgh & the Lothians Child Protection Office (Number 30)

⁸⁹ The Highland Council – Social Work (Number 70)

⁹⁰ Scottish Rape Crisis Network (Number 51); Perth & Kinross Child Area Protection Committee (Number 52); Scottish Women’s Aid (Number 56)

category should be included such as ‘exceptional circumstances’ where special measures could be used if the court was satisfied exceptional circumstances existed.⁹¹

25. Consultees in favour of retaining specific categories cautioned that (a) the use of non-specific categories would lead to substantial number of applications from persons “not specifically vulnerable”;⁹² and (b) opening the measures to all witnesses would place an “intolerable burden” on the courts.⁹³
26. The idea was mooted that a working group should be established to look at formulating a standardised approach to assessing those eligible for special measures.⁹⁴
27. One Consultee expressed conditional support for specific categories on the proviso that investments continue to be made in improving practices, procedures and facilities for all witnesses.⁹⁵

⁹¹ The Law Society of Scotland (Number 76)
⁹² Mental Welfare Commission for Scotland (Number 18)
⁹³ Criminal Bar Association (Number 46)
⁹⁴ Arrol Park Resource Centre (Number 72)
⁹⁵ Fife Council – Social Work Service (Number 59)

Question 3(b) Should all categories of witness be allowed to use special measures?

Total Submissions Received	No comment made (n=25)	Consultees that commented (n=51)	Of those that commented			
			Yes (n=15)	No (n=25)	Yes – Conditional (n=5)	Not Specified (n=6)
76	33%	67%	29%	49%	10%	12%

28. As the data above indicate, 33% (n=25) of Consultees did not specifically address this question. Of the 67% that did (n=51), 49% (n=25) were opposed to all categories of witnesses being eligible for special measures. 29% (n=15) of Consultees supported access to special measures by all categories of witnesses, 10% (n=5) of consultees expressed conditional support while 12% (n=6) did not specify a view.

29. A Consultee in favour of special measures for all categories of witness expressed the view that the current categories are “too crude and rigid”.⁹⁶ Other Consultees in favour of special measures being made available to all categories of witness expressed the view that:

- If it is determined that the use of special measures would enable the witness to give their best evidence then the measures should be made available⁹⁷
- It should be a matter for the court to determine, on assessment:⁹⁸ guidance should be drafted to assist the court in determining the matter⁹⁹
- No victim or witness should be “denied full access to justice due to lack of special measures”¹⁰⁰
- It would ensure all witnesses could participate equally¹⁰¹ and were treated equally¹⁰²
- All groups of witnesses listed [in the consultation document] should be considered¹⁰³
- Any victim who is very frightened or insecure should be allowed to use special measures;¹⁰⁴ those who fear or experience intimidation and wish measures to be provided¹⁰⁵
- In determining eligibility, it is important to consider the nature of the relationship between the parties¹⁰⁶

⁹⁶ SCRA (Number 75)

⁹⁷ Women Supporting Women (Number 36)

⁹⁸ Open Secret (Number 22); Scottish Human Rights Centre (Number 50)

⁹⁹ Scottish Human Rights Centre (Number 50)

¹⁰⁰ Victim Support (Number 53)

¹⁰¹ Victim Support (Number 53)

¹⁰² Disability Rights Commission (Number 58)

¹⁰³ Lanarkshire primary Care NHS Trust, Clinical & Counselling Psychology Services – Motherwell/Clydesdale Department (Number 12)

¹⁰⁴ Aberdeenshire Council – Housing & Social Work (Number 66)

¹⁰⁵ East Renfrewshire Council – Social Work Department (Number 57)

¹⁰⁶ Child & Adolescent Section of the Royal College of Psychiatrists (Scottish Division) (Number 43)

30. According to one Consultee it is difficult to confine special measures to pre-determined groups and therefore a compromise could be reached. This would entail pre-determined groups automatically qualifying for special measures but would also allow for individuals who fall outwith these categories to avail of these measures if they can demonstrate ‘special cause’.¹⁰⁷
31. One Consultee suggested that, rather than viewing such measures as special treatment and giving rise to a special measures culture, the justice system must take responsibility for the comfort and security of all those giving evidence and ensure that all witnesses have whatever arrangements they need to give their best evidence.¹⁰⁸ In the view of another Consultee, the special measures culture could be avoided by the “application of new rules by the courts to set the thresholds for court witness vulnerability.”¹⁰⁹
32. In addition, in order that vulnerable witnesses can be identified and assisted at the earliest opportunity, victim awareness training is essential for all personnel involved in the criminal justice system.¹¹⁰

¹⁰⁷ Fiona Raitt, University of Dundee – Department of Law (Number 41)

¹⁰⁸ Children 1st (Number 60)

¹⁰⁹ SCRA (Number 75)

¹¹⁰ East Renfrewshire Council – Social Work Department (Number 57)

Question 4: What criteria should be used to decide whether someone with a mental illness should be able to use special measures?

Total Submissions Received	No comment made (n=26)	Consultees that commented (n=50)
76	34%	66%

33. Thirty four per cent (n=26) of submissions did not address this question. Of the Consultees that did (n=50), 66% (n=33) supported the recommendation of the Millan Committee¹¹¹ that the use of special measures should be dependant on the illness of the witness and not on whether a court order was issued.¹¹²
34. Three Consultees supported use of the English/Welsh system¹¹³ with one stating that the system appears to be “well founded and could be readily imported into the Scottish Legal System.”¹¹⁴
35. Other suggestions advanced by Consultees on the issue include the following:
- The nature of the illness should be deciding factor in each case¹¹⁵
 - Anyone with a mental illness whether "sectioned" or not should be entitled to apply to the court.¹¹⁶ This is necessary in the interests of justice and the good of the witness¹¹⁷
 - Measures should be made available to all persons suffering from a mental disorder as defined by statute¹¹⁸
 - The definition of mental disorder should be broadened to include:
 - A person who has accepted voluntary treatment¹¹⁹

¹¹¹ The Millan Committee Report on the Review of the Mental Health (Scotland) Act 1984.

¹¹² Soroptimist International of Aberdeen (Number 11); Mental Welfare Commission for Scotland (Number 18); The City of Edinburgh Council – Social Work (Number 20); West Lothian Council Community & Support Services (Number 28); South Lanarkshire – Social Work Resources - (Number 32); North Ayrshire Criminal Justice Services (Number 39); Scottish Human Rights Centre (Number 50); East Renfrewshire Council – Social Work Department (Number 57); Angus Council - Social Work (Number 61); Aberdeenshire Council - Housing & Social Work (Number 66); Glasgow City Council - Social Work Services (Number 67); The Highland Council - Social Work (Number 70)

¹¹³ The Scottish Association for the Study of Delinquency (Number 31); Crown Office Policy Group (Number 47); The Law Society of Scotland (Number 76)

¹¹⁴ The Scottish Association for the Study of Delinquency (Number 31)

¹¹⁵ ACPOS (Number 5). While this view accords with the view of the Millan Committee, the Consultee did not specifically address removal of the requirement of a court order. On this basis the submission has not been included among the submissions indicating support for the Committee’s recommendations.

¹¹⁶ Ferguson, P W (Number 3); Miss Garry Robertson (Number 7); Shetland Islands Council – Social Care Service (Number 16); Scottish Rape Crisis Network (Number 51); Clackmannanshire Council – Social Services (Number 54); Scottish Women’s Aid (Number 56); Arrol Park Resource Centre, Community Forensic Mental Health Services (Number 62); Scottish Law Agents Society (Number 65); North Lanarkshire Council - Social Work Department (Number 68)

¹¹⁷ Miss Garry Robertson (Number 7)

¹¹⁸ Mental Welfare Commission for Scotland (Number 18)

¹¹⁹ Argyll & Bute Council (Number 38)

- Voluntary patients¹²⁰
- Those using dedicated services in either the voluntary, statutory or health sectors¹²¹ but not detained in hospital¹²²
- People who are mentally ill¹²³
- Those suffering from a phobia or anxiety or post natal depression¹²⁴
- Individuals with Alzheimers and enduring mental health problems such as schizophrenia¹²⁵
- However, it should be broad enough to incorporate people with mental health problems which do not fit a particular diagnosis¹²⁶ as many individuals with mental health problems do not fit into the criteria that would allow them to qualify for special measures.¹²⁷ Any definition of mental illness should seek to ensure that it does not exclude people suffering from mental health problems who may not fit into a diagnostic category¹²⁸
- It should not have to be a requirement that the mental illness suffered should be directly related to the court case for example, depression as a result of crime¹²⁹
- Witness should be asked if they foresee a problem in giving evidence in open court¹³⁰

36. Consultees offered suggestions as to how the need for special measures for someone with a mental illness should be assessed:

- An evaluation of the capacity, current mental state, objectivity and reality orientation of the witness should be undertaken with any assessment being conducted by professionals¹³¹
- Medical, or other evidence, to show that without access to use of special measures the health of the witness is at risk¹³²
- A soul and conscience report from a general practitioner, psychiatrist and/or psychologist should be produced stating that the witness has mental health difficulties and specifying what these are¹³³
- Any assessment of the witness would need to be conducted by a relevant professional such as a:
 - general practitioner¹³⁴

¹²⁰ Dumfries & Galloway Council – Social Services Department (Number 23); Argyll & Bute Council (Number 38); East Renfrewshire Council - Social Work Department (Number 57)

¹²¹ Dumfries & Galloway Council – Social Services Department (Number 23); Argyll & Bute Council (Number 38)

¹²² Dundee City Council – Social Work Department (Number 40)

¹²³ Argyll & Bute Council (Number 38)

¹²⁴ Clackmannanshire Council – Social Services (Number 54)

¹²⁵ Community Forensic Mental Health Services (Number 62)

¹²⁶ Scottish Women’s Aid (Number 56)

¹²⁷ SCRA (Number 75)

¹²⁸ Scottish Rape Crisis Network (Number 51)

¹²⁹ East Renfrewshire Council – Social Work Department (Number 57)

¹³⁰ The Law Society of Scotland (Number 76)

¹³¹ Ayrshire & Arran NHS Trust (Number 34)

¹³² The Law Society of Scotland (Number 76)

¹³³ Clackmannanshire Council – Social Services (Number 54)

¹³⁴ Edinburgh & East of Scotland Deaf Society (Number 29); Commission for Racial Equality

- mental health officer¹³⁵
 - psychiatrist¹³⁶
 - psychologist¹³⁷
 - counsellor¹³⁸
 - social worker¹³⁹
 - any other relevant agencies¹⁴⁰
- Judges should hear evidence from experts (such as social workers or mental health professionals) to ascertain whether someone with mental illness should be allowed to give evidence by special measures¹⁴¹
 - The decision should be a collective decision, taken by a number of persons, for example, a psychiatrist, psychologist, solicitor and someone who knows the witness very well such as a nurse or social worker¹⁴²
 - There should be a standardised assessment carried out based on the available clinical information: not in favour of relying on psychiatric diagnosis as this can result in inconsistencies¹⁴³
37. Guidance for the courts¹⁴⁴ and police¹⁴⁵ was requested. It was suggested that suitably qualified professionals such as psychiatrists, psychologists or mental health officers could provide the guidance. Guidance would also have to be given to such professionals with regard to the level of vulnerability the court would expect before granting special measures.¹⁴⁶
38. Concern was expressed by one Consultee that special measures might be invoked to force people with mental health issues to appear in the witness box instead of adjourning the trial to allow for treatment and recovery of the witness. The Consultee suggested that a distinction requires to be drawn between (a) those individuals with a chronic mental

(Number 35); North Ayrshire Criminal Justice Services (Number 39)

One Consultee suggested that the views of the witness' GP should be sought in the first instance before advice is sought from specialist psychiatric opinion: Fife Council – Social Work Service (Number 59)

¹³⁵ Commission for Racial Equality (Number 35)

¹³⁶ Ferguson, P W (Number 3); ADSW Children & Families Standing Committee (Number 19); British Psychological Society (Number 24); NSF Scotland (Number 26); Commission for Racial Equality (Number 35); North Ayrshire Criminal Justice Services (Number 39); North Lanarkshire Council – Social Work Department (Number 68)

¹³⁷ British Psychological Society (Number 24); North Ayrshire Criminal Justice Services (Number 39)

¹³⁸ ADSW Children & Families Standing Committee (Number 19) ; North Lanarkshire Council – Social Work Department (Number 68)

¹³⁹ ADSW Children & Families Standing Committee (Number 19)

¹⁴⁰ Shetland Islands Council – Social Care Service (Number 16)

¹⁴¹ Victim Support (Number 53)

¹⁴² Arrol Park Resource Centre Community Forensic Mental Health Services (Number 62)

¹⁴³ Dr Colin McLaren, Clinical Psychologist, Arrol Park Resource Centre (Number 72)

¹⁴⁴ Scottish Human Rights Centre (Number 50); Glasgow City Council - Social Work Services (Number 67)

¹⁴⁵ British Medical Association (Number 48)

¹⁴⁶ Glasgow City Council – Social Work Services (Number 67)

illness that does not render them too ill to appear and (b) those in an acute phase of illness likely to resolve and allow appearance, even if at a later stage. The test should be a medical one to determine if the witness could appear in a court setting if permitted access to special measures.¹⁴⁷

39. Additionally, as highlighted by another Consultee, the court should take full account of the person's mental state as the court date approaches, as experience of people with mental health difficulties indicate, individuals who are to give evidence in court can become progressively more anxious as the court date approaches. Symptoms of serious mental illness can then assert themselves and can lead to “an otherwise credible witness appearing to be incredible.”¹⁴⁸

¹⁴⁷ Criminal Bar Association (Number 46)

¹⁴⁸ Renfrewshire Council – Social Work Department (Number 69)

Question 5: Is the current definition of a vulnerable witness adequate to cover adults with learning disabilities?

Total Submissions	No comment made (n=47)	Consultees that commented (n=29)	Of those that commented			
			Yes (n=14)	No (n=10)	Yes – Conditional (n=4)	Not Specified (n=1)
76	62%	38%	48%	35%	14%	3%

40. Of the 29 Consultees that specifically addressed this question, 48% (n=14) expressed the view that the current definition of a vulnerable witness is adequate to cover adults with learning disabilities. Thirty five per cent (n=10) of Consultees did not share this view, 14% (n=4) expressed conditional support, and 3% (n=1) did not specify a view.

41. Consultees of the opinion that the current definition of a vulnerable witness adequately covered those with learning disabilities suggested that it may not always be evident to police officers or witness support staff when an adult is suffering from significant impairment of intelligence or social functioning. Good quality training of all agencies involved is required.¹⁴⁹ The problem may be who acts as representative for such a witness and whether the police alert the Crown Office/Procurator Fiscal.¹⁵⁰

42. Consultees not satisfied that the current definition of vulnerable witness was adequate to cover adults with learning disabilities opined that:

- Under the present system, the need for some sort of special treatment often only becomes apparent once the case is in court¹⁵¹
- The current definition is too narrow as witnesses with learning difficulties may not have a significant impairment of intelligence and social functioning¹⁵² but may still be distressed and need support to give evidence¹⁵³
- The current definition does not clearly define the difficulties of those who have a mild or borderline learning disability. It is not uncommon for such people to attend court as a witness/victim/accused and appear to understand the proceedings, answer questions in a superficial manner as if they understand the true implications of what is being said, but, in reality, they do not.¹⁵⁴

43. These Consultees advanced a number of suggestions which include:

¹⁴⁹ Fife Council – Social Work Service (Number 59)

¹⁵⁰ Fiona Raitt University of Dundee – Department of Law (Number 41)

¹⁵¹ The Scottish Association for the Study of Delinquency (Number 31)

¹⁵² Scottish Women’s Aid (Number 56); The Law Society of Scotland (Number 76)

¹⁵³ Scottish Women’s Aid (Number 56)

¹⁵⁴ Arrol Park Resource Centre Community Forensic Mental Health Services (Number 62)

- Suggestibility is a particular problem for people with borderline learning disabilities and should be included in the definition of vulnerable witnesses¹⁵⁵
 - The definition should include the words "would include one whose communication difficulties are such that the individual is unable to fully express himself or herself, or fully comprehend another person through normal speech". Additional wording may need to be considered in instances where a person can only use sign language¹⁵⁶
 - Remove the term "significant"¹⁵⁷ from the current definition and introduce instead a similar test to that for those with a mental illness¹⁵⁸
 - The definition used in the "Same as You" should apply¹⁵⁹
 - The court and the wider Criminal Justice System should ensure that the current criteria are determined by an assessment of a person's intelligence on a fully standardised intelligence test, and a reliable and valid assessment of sound functioning. Assessments should be carried out by a Chartered Clinical Psychologist with expertise in Adult Learning Disabilities¹⁶⁰
 - Adults with sensory impairment should be included¹⁶¹
44. One Consultee who was undecided on the matter expressed concerns as to how the decision on whether impairment is significant would be made and whether a medical opinion would be required as this could result in additional distress for the witness.¹⁶²

¹⁵⁵ Arrol Park Resource Centre Community Forensic Mental Health Services (Number 62)

¹⁵⁶ ACPOS (Number 5)

¹⁵⁷ Disability Rights Commission (Number 58); The Law Society of Scotland (Number 76)

¹⁵⁸ Disability Rights Commission (Number 58)

¹⁵⁹ Dumfries & Galloway Council – Social Services Department (Number 23)

¹⁶⁰ British Psychological Society (Number 24)

¹⁶¹ The Highland Council – Social Work (Number 70)

¹⁶² East Renfrewshire Council – Social Work Department (Number 57)

Question 6: Should all alleged victims of sexual offences be eligible for special measures?

Total Submissions Received	No comment made (n=38)	Consultees that commented (n=38)	Of those that commented			
			Yes (n=27)	No (n=9)	Yes – Conditional (n=1)	Not Specified (n=1)
76	50%	50%	71%	24%	3%	2%

45. Half the Consultees (n=38) did not address this question. Of the half that did, 71% (n=27) agreed that the alleged victims of sexual offences should be eligible for special measures; 24% (n=9) were opposed to extending the measures to these victims while one consultee expressed conditional support and the remaining 2% (n=1) was undecided on the matter.

46. Consultees who favoured the extension of special measures to all alleged victims of sexual offences did so on the basis that:

- There is a particular trauma associated with the crime¹⁶³
- Witnesses have difficulties in giving evidence of such a distressing and personal nature¹⁶⁴
- In addition, adults who have experienced sexual abuse during their childhood can be re-traumatised, in particular, when the victim is confronted with their alleged perpetrator in court¹⁶⁵
- While the Sexual Offences (Procedure and Evidence) (Scotland) Act gives substantial new protections to complainers in sexual offences, they do not currently benefit from access to special measures when giving evidence: they still have to face the accused in court during questioning¹⁶⁶
- The system in Scotland should accord with the law in England and Wales¹⁶⁷
- Whether or not such measures are applied should depend on the victim's health, both mental and physical, and the circumstances of the case¹⁶⁸
- The measures should be available particularly if the alleged victim knows the alleged perpetrator¹⁶⁹ and, particularly, in intra-familial abuse cases¹⁷⁰
- While there could be drawbacks in creating a "victim culture" whereby the nature of the offence designates the victim as inevitably vulnerable, the particular obstacles faced by

¹⁶³ Scottish Rape Crisis Network (Number 51); Perth & Kinross Area Child Protection Committee (Number 52)

¹⁶⁴ Scottish Rape Crisis Network (Number 51)

¹⁶⁵ East Renfrewshire Council, Social Work Department (Number 57)

This Consultee made particular reference was made to the inquiry report into the sexual abuse of children in Fife, over a 30 year period. This study describes the trauma suffered by adult witnesses throughout the investigation and court processes.

¹⁶⁶ Scottish Women's Aid (Number 56)

¹⁶⁷ Plotnikoff & Woolfson (Number 4); Crown Office Policy Group (Number 47)

¹⁶⁸ ACPOS (Number 5)

¹⁶⁹ The City of Edinburgh Council – Social Work (Number 20)

¹⁷⁰ SCRA (Number 75)

complainers in sexual offence cases suggest that there should be access to special measures if the complainer so requests¹⁷¹

- In view of the potential for harm arising from assertive challenge under cross-examination¹⁷²
- The measures should be available to these victims on a discretionary basis¹⁷³

47. Consultees not in favour of affording all alleged victims of sexual offences eligibility for special measures expressed the view that:

- The interest of justice would not be served. In Solemn proceedings it would “send the wrong message to the jury by usurping the function of the jury to assess the credibility, and/or demeanour, of the witness independently; giving rise to prejudice against accused persons; and threatening the presumption of innocence of accused persons.”¹⁷⁴
- Instead, what is required is greater vigilance on the part of judges to stop inappropriate and aggressive lines of questioning¹⁷⁵
- It may be appropriate for some witnesses to have the use of special measures e.g. the use of screens as these would be helpful in reducing anxiety for rape victims.¹⁷⁶ Should not apply except insofar as anonymity is presently always accorded to victims of rape and other sex crimes¹⁷⁷
- The need for special measures should be based on an appropriate assessment¹⁷⁸
- In England and Wales the Youth Justice and Criminal Evidence Act 1999 treats all complainers in sexual offence cases as vulnerable; however the relevant sections of the Act have yet to be implemented. It may therefore be appropriate to wait until they are in force and review the position in the light of subsequent experience in that jurisdiction¹⁷⁹

¹⁷¹ Fiona Raitt University of Dundee – Department of Law (Number 41)

¹⁷² Fife Council – Social Work Service (Number 59)

¹⁷³ Crown Office Policy Group (Number 47)

¹⁷⁴ The Faculty of Advocates (Number 74). A view shared by Criminal Bar Association (Number 46)

¹⁷⁵ Edinburgh & East of Scotland Deaf Society (Number 29)

¹⁷⁶ British Psychological Society (Number 24)

¹⁷⁷ Ferguson, P W (Number 3)

¹⁷⁸ Ayrshire & Arran NHS Trust (Number 34)

¹⁷⁹ Scottish Law Agents Society (Number 65)

Question 7: What factors should be taken into account in deciding whether a witness is sufficiently affected by actual or feared intimidation as to need special measures?

Total Submissions Received	No comment made (n=45)	Consultees that commented (n=31)
76	59%	41%

48. As the data indicate, 59% (n=45) of Consultees did not specifically address this question. Of the 41% (n=31) that did, not all were in favour of defining the factors which should be taken into account in deciding whether a witness is sufficiently affected by actual or feared intimidation so as to need special measures. Those Consultees advanced the following views:

- Every witness should be eligible for special measures¹⁸⁰
 - The focus should be the effect, or potential effect, on the witness' ability to give evidence¹⁸¹
 - Although certain groups may be more prone to intimidation than others, it would be unhelpful if all such groups were to be categorised as vulnerable. There should be capacity in the system to accommodate those who have a fear of intimidation both from the accused and from the process of justice¹⁸²
 - The subjective fears of an individual witness should be taken into account. If a witness can demonstrate that they have a genuine fear that significantly inhibits their giving best evidence then they should be considered eligible¹⁸³
- It is not helpful¹⁸⁴ to list factors which will be relevant; instead, it should be for the court to determine¹⁸⁵ on a case by case approach¹⁸⁶
- Where intimidation is alleged, it should be investigated fully by the police on behalf of COPFS and a statement from the investigating officer, or from the Witness Protection Unit, in support of the allegation should be sufficient cause for the court to consider an application.¹⁸⁷

49. One Consultee suggested that membership of a minority group, be it religious, racial, or sexual, should not *ipso facto* be considered relevant unless there is a link between membership of that group and the witness' difficulty in giving evidence.¹⁸⁸

¹⁸⁰ The Scottish Association for the Study of Delinquency (Number 31); Fiona Raitt University of Dundee – Department of Law (Number 41); Perth & Kinross Area Child Protection Committee (Number 52)

¹⁸¹ SCRA (Number 75)

¹⁸² ADSW (Number 55)

¹⁸³ Fiona Raitt University of Dundee – Department of Law (Number 41)

¹⁸⁴ Ferguson, P W (Number 3)

¹⁸⁵ Ferguson, P W (Number 3); Scottish Law Agents Society (Number 65)

¹⁸⁶ Ferguson, P W (Number 3); British Psychological Society (Number 24)

¹⁸⁷ Crown Office Policy Group (Number 47)

¹⁸⁸ Ferguson, P W (Number 3)

50. Consultees in favour of defining a list of factors to be taken into account in deciding whether a witness is sufficiently affected by actual or feared intimidation as to need special measures offered the following suggestions:

- *Repeat harassment*: either against the witness directly or a history of harassment in the area¹⁸⁹
- *The existence of corroborating evidence*¹⁹⁰ to be based on
 - the witness having reported the intimidation to the police and the findings of the police investigation¹⁹¹
 - evidence of breach of a specific bail condition or order of the court¹⁹²
- *Repeat victimisation of the witness* by the accused, in particular in cases of domestic violence¹⁹³
- *The nature of the crime/offence*¹⁹⁴:
 - In particular, childhood sexual abuse cases¹⁹⁵; or
 - Crimes that were racially motivated or motivated by prejudice around a person's sexuality¹⁹⁶
- *The relationship between the witness and the accused*:¹⁹⁷ such as family; neighbours; pupil and teacher; employer and employee relationship etc¹⁹⁸
- *Offence specific witnesses* such as witnesses in cases involving:
 - Domestic Abuse: women, children and young people¹⁹⁹
 - If the witness is a victim of:
 - racially motivated crimes²⁰⁰

¹⁸⁹ ACPOS (Number 5); Cross Party Group in the Scottish Parliament on Men's Violence Against Women and Children (Number 37); Scottish Rape Crisis Network (Number 51); East Renfrewshire Council - Social Work Department (Number 57)

¹⁹⁰ Clinical & Counselling Psychology Services – Motherwell/Clydesdale Department (Number 12); The Law Society of Scotland (number 76)

¹⁹¹ Clackmannanshire Council – Social Services (Number 54); The Faculty of Advocates (Number 74)

¹⁹² The Faculty of Advocates (Number 74)

¹⁹³ The City of Edinburgh Council – Social Work (Number 20); Clackmannanshire Council – Social Services (Number 54); East Renfrewshire Council - Social Work Department (Number 57); Fife Council - Social Work Service (Number 59)

¹⁹⁴ Open Secret (Number 22); Cross Party Group in the Scottish Parliament on Men's Violence Against Women and Children (Number 37); Scottish Rape Crisis Network (Number 51)

¹⁹⁵ Open Secret (Number 22)

¹⁹⁶ Cross Party Group in the Scottish Parliament on Men's Violence Against Women and Children (Number 37); Scottish Rape Crisis Network (Number 51)

¹⁹⁷ Cross Party Group in the Scottish Parliament on Men's Violence Against Women and Children (Number 37); Scottish Rape Crisis Network (Number 51); Victim Support (Number 53)

¹⁹⁸ Victim Support (Number 53)

¹⁹⁹ Scottish Women's Aid (Number 56)

²⁰⁰ Cross Party Group in the Scottish Parliament on Men's Violence Against Women and Children (Number 37); East Renfrewshire Council - Social Work Department (Number 57); Fife Council – Social Work Service (Number 59)

- hate crimes²⁰¹
 - crimes of violence²⁰²
 - sex crimes²⁰³
 - neighbourhood crimes as the address of the witness will be known to the accused²⁰⁴
 - *Characteristics of the witness*
 - The emotional or physical state of the witness²⁰⁵
 - Disabilities; for example, deafness: some deaf people can feel isolated and therefore they might find the whole court experience confusing and threatening.²⁰⁶ Other disabilities or health problems which make the witness feel more vulnerable should also be considered²⁰⁷
 - Age: the elderly²⁰⁸ and the young²⁰⁹
 - Those whose first language is not English²¹⁰
 - Recent arrivals from other societies²¹¹
 - Witnesses whose sexual orientation is not heterosexual²¹²
51. Other Consultees advocated a form of objective assessment such as an assessment of the mental state of the witness at the time of the interview, collaborative history and evidence from police or other reputable sources etc.²¹³ Alternatively, it was suggested that an assessment should be conducted of the extent to which their giving of evidence would be impaired unless special measures were provided.²¹⁴ One submission suggested the matter should be looked at as part of a working group.²¹⁵
52. One Consultee cautioned that the jury’s perception of the accused may be influenced by the provision of special measures to a witness. Therefore, the measures should be made available only in exceptional circumstances.²¹⁶

201 East Renfrewshire Council – Social Work Department (Number 57)

202 East Renfrewshire Council – Social Work Department (Number 57)

203 East Renfrewshire Council – Social Work Department (Number 57)

204 East Renfrewshire Council – Social Work Department (Number 57); Fife Council - Social Work Service (Number 59)

205 Cross Party Group in the Scottish Parliament on Men’s Violence Against Women and Children (Number 37); Scottish Rape Crisis Network (Number 51)

206 Edinburgh & East of Scotland Deaf Society (Number 29)

207 East Renfrewshire Council – Social Work Department (Number 57)

208 Clackmannanshire Council – Social Services (Number 54); Scottish Women’s Aid (Number 56)

209 Open Secret (Number 22)

210 Clackmannanshire Council – Social Services (Number 54)

211 Clackmannanshire Council – Social Services (Number 54)

212 Clackmannanshire Council – Social Services (Number 54)

213 Ayrshire & Arran NHS Trust (Number 34)

214 Commission for Racial Equality (Number 35)

215 Arrol Park Resource Centre (Number 72)

216 The Faculty of Advocates (Number 74)

Question 8: Should communication problems be included in the definition of a vulnerable witness, and if so how?

Total Submissions Received	No comment made (n=40)	Consultees that commented (n=36)	Of those that commented			
			Yes (n=26)	No (n=8)	Yes – Conditional (n=0)	Not Specified (n=2)
76	53%	47%	72%	22%	0%	6%

53. Over half the Consultees (n=40) did not specifically address Question 8. Of the 47% (n=36) that addressed the question, 72% (n=26) were in favour of extending the definition of a vulnerable witness to include those with communication problems; 22% (n=8) were opposed to this suggestion while 6% (n=2) were undecided on the matter.

54. One Consultee supported a widening of the definition to include witnesses with communication problems but only where these problems significantly inhibit the giving of best evidence.²¹⁷ Other Consultees supported a widening when it caused difficulty for the witness and the court.²¹⁸ Therefore, there should be general availability of special measures to any witness who can be shown to be able to benefit from them.²¹⁹

55. Among the witness who should be included for consideration are:

- Any witness where English is not their first language²²⁰
- People with sensory impairment or language barriers/problems²²¹
- People who are:
 - deaf²²²
 - deafened²²³
 - hard of hearing²²⁴
 - unable to speak or disability in speech²²⁵
 - individuals whose first sign language is not British Sign Language²²⁶
 - deafblind²²⁷

²¹⁷ Fiona Raitt University of Dundee – Department of Law (Number 41)

²¹⁸ ACPOS (Number 5); Glasgow and West of Scotland Society for the Blind (Number 13)

²¹⁹ Ferguson, P W Number 3)

²²⁰ Ayrshire & Arran NHS Trust (Number 34); East Renfrewshire Council - Social Work Department (Number 57)

²²¹ ADSW (Number 55); The Highland Council - Social Work (Number 70)

²²² British Psychological Society (Number 24); The Scottish Council on Deafness (Number 33); Ayrshire & Arran NHS Trust (Number 34)

²²³ The Scottish Council on Deafness (Number 33)

²²⁴ Edinburgh & East of Scotland Deaf Society (Number 29); The Scottish Council on Deafness (Number 33)

²²⁵ British Psychological Society (Number 24); Ayrshire & Arran NHS Trust (Number 34)

²²⁶ The Scottish Council on Deafness (Number 33)

- Individuals with a learning disability²²⁸
- Individuals with Autistic Spectrum Disorders²²⁹
- Profoundly handicapped children/adults²³⁰
- Those with an emotional or psychiatric problem which affects their ability to communicate²³¹ or those affected by physiological difficulties²³²
- Children under 16 who may have difficulty understanding²³³

56. According to one Consultee, eligibility for special measures should be “stigma-free.”²³⁴ Additionally, it was suggested that the court should be given the discretion to use special measures on ‘cause shown.’²³⁵ It was also noted that consideration would need to be given to the impact of the European Convention on Human Rights, in particular in relation to the right accorded to each individual to have an interpreter appointed if they cannot understand or speak the language used in court.²³⁶

57. Opposition to an extension of the definition of vulnerable witness to include individuals with communication difficulties was voiced by 22% (n=8) of Consultees on the basis that:

- The existing measures are adequate²³⁷
 - Adequately addressed through use of translators, loop system and sign language²³⁸
 - Communication difficulties do not create a need for special measures, as adequate translation facilities are available; however, a courtroom process which enables an efficient verbatim translation of evidence would be welcome, but it should not detract from the ability to cross-examine a witness effectively²³⁹
- The Court Witness Scheme should assist communication problems. The Scheme should be allowed to operate across all courts before any changes to the current system are considered²⁴⁰
- Better training and understanding of the needs of individuals with communication problems would be more beneficial²⁴¹

58. One Consultee opposed to the expansion of the definition to include witnesses with communication difficulties suggested that “it may be appropriate to consider some

²²⁷ The Scottish Council on Deafness (Number 33)

²²⁸ Mental Welfare Commission for Scotland (Number 18); British Psychological Society (Number 24)

²²⁹ Child & Adolescent Section of the Royal College of Psychiatrists (Scottish Division) (Number 43)

²³⁰ Clackmannanshire Council – Social Services (Number 54)

²³¹ East Renfrewshire Council – Social Work Department (Number 57)

²³² SCRA (Number 75)

²³³ East Renfrewshire Council – Social Work Department (Number 57)

²³⁴ SCRA (Number 75)

²³⁵ The Law Society of Scotland (Number 76)

²³⁶ Victim Support (Number 53)

²³⁷ Scottish Law Agents Society (Number 65)

²³⁸ The Faculty of Advocates (Number 74)

²³⁹ Criminal Bar Association (Number 46)

²⁴⁰ Dumfries & Galloway Council – Social Services Department (Number 23)

²⁴¹ Disability Rights Commission (Number 58)

sort of functional disability in communicating as a basis for defining a person as vulnerable, but special measures adopted must not restrict effective cross-examination”.²⁴² Another Consultee expressed support for the approach outlined in the Lord Advocate's guidance on the use of interpreters in court settings.²⁴³

²⁴² Criminal Bar Association (Number 46)

²⁴³ Commission for Racial Equality (Number 35)

Question 9(a): Which vulnerable witnesses, if any, should be automatically entitled to use special measures?

Total Submissions Received	No comment made (n=39)	Consultees that commented (n=37)
76	51%	49%

59. Forty nine per cent (n=37) of the Consultees specifically addressed this question. In their opinion, the witnesses who should automatically be entitled to use of special measures should include:

- All witnesses should be automatically considered for use of special measures but none should be entitled to their use²⁴⁴
- Children: under 16²⁴⁵, children generally²⁴⁶, children under 18²⁴⁷ and (most²⁴⁸) young people²⁴⁹, unless the court determines that no such measures are called for²⁵⁰
 - In line with other legislation such as the Age of Legal Capacity (Scotland) Act 1991, it was suggested by one Consultee that children under the age of 12 have automatic entitlement as well as young persons (12-18 years) if they are affected by an additional vulnerability factor such as a learning disability or fear of intimidation²⁵¹
- Victims of domestic violence/abuse²⁵²
- Anyone with mental illness²⁵³ - past or present²⁵⁴ - including mental incapacity²⁵⁵
- Those with a learning difficulties²⁵⁶

²⁴⁴ SCRA (Number 75)

²⁴⁵ Ferguson, P W (Number 3); ACPOS (Number 5); Childline (Number 6); Mental Welfare Commission for Scotland (Number 18); Scottish Child Law Centre (Number 45); Crown Office Policy Group (Number 47); East Renfrewshire Council - Social Work Department (Number 57); For the Consultees that addressed the aspect of qualifying age, 6 advocated 'child' apply to under 16 year olds while one suggested it apply to under 18 year olds.

²⁴⁶ Open Secret (Number 22); Edinburgh & East of Scotland Deaf Society (Number 29); Commission for Racial Equality (Number 35); Clackmannanshire Council – Social Services (Number 54); ADSW (Number 55); Fife Council – Social Work Service (Number 59)

²⁴⁷ Scottish Human Rights Centre (Number 50)

²⁴⁸ Edinburgh & East of Scotland Deaf Society (Number 29)

²⁴⁹ Young person was defined by one Consultee as applying to those aged between 12 and 18 years. Barnado's Scotland (Number 42)

Another Consultee expressed the view that Young witnesses should never be questioned in open court unless they wish this to happen (Plotnikoff & Woolfson (Number 4)).

²⁵⁰ Ferguson, P W (Number 3)

²⁵¹ Barnado's Scotland (Number 42)

²⁵² Commission for Racial Equality (Number 35); Crown Office Policy Group (Number 47); Scottish Rape Crisis Network (Number 51); Clackmannanshire Council – Social Services (Number 54); Scottish Women's Aid (Number 56); East Renfrewshire Council - Social Work Department (Number 57)

²⁵³ ACPOS (Number 5); Commission for Racial Equality (Number 35); Scottish Human Rights Centre (Number 50); Scottish Rape Crisis Network (Number 51); Clackmannanshire Council – Social Services (Number 54); ADSW (Number 55); Scottish Women's Aid (Number 56)

²⁵⁴ Scottish Human Rights Centre (Number 50)

²⁵⁵ Mental Welfare Commission for Scotland (Number 18)

- Any individual who suffers from significant impairment of intelligence and social functioning²⁵⁷
- Those with a diagnosis of Autistic Spectrum Disorder²⁵⁸
- Members of diverse minority groups²⁵⁹
- Victims of sexual offences²⁶⁰
- Adults who are alleged victims of childhood abuse and/or all alleged victims of sexual offences²⁶¹
- Repeat victims²⁶²
- Elderly victims²⁶³
- Witnesses suffering from intimidation or harassment²⁶⁴
- The disabled²⁶⁵
- Those with a communication problem²⁶⁶
 - Those with a sensory impairment or language problem which affects their ability to communicate²⁶⁷
- Victims of crimes of hatred (for example, racial or homophobic attacks)²⁶⁸
- Victims of stalking²⁶⁹
- As defined by statute²⁷⁰
- Any victim or witness who is disadvantaged by the justice system where full and equal participation is not possible without the use of special measures²⁷¹

²⁵⁶ ACPOS (Number 5); Miss Garry Robertson (Number 7); Edinburgh & East of Scotland Deaf Society (Number 29); Commission for Racial Equality (Number 35); Barnado’s Scotland (Number 42); Child & Adolescent Section of the Royal College of Psychiatrists (Scottish Division) (Number 43); Clackmannanshire Council – Social Services (Number 54); ADSW (Number 55); East Renfrewshire Council - Social Work Department (Number 57); The Highland Council - Social Work (Number 70)

²⁵⁷ Scottish Human Rights Centre (Number 50)

²⁵⁸ Child & Adolescent Section of the Royal College of Psychiatrists (Scottish Division) (Number 43)

²⁵⁹ ACPOS (Number 5)

²⁶⁰ ACPOS (Number 5); Open Secret (Number 22); Commission for Racial Equality (Number 35); Child & Adolescent Section of the Royal College of Psychiatrists (Scottish Division) (Number 43); Crown Office Policy Group (Number 47); Scottish Rape Crisis Network (Number 51); Perth & Kinross Child Protection Committee (Number 52); Scottish Women’s Aid (Number 56); East Renfrewshire Council - Social Work Department (Number 57); Fife Council - Social Work Service (Number 59)

²⁶¹ Perth & Kinross Area Child Protection Committee (Number 52)

²⁶² ACPOS (Number 5)

²⁶³ ACPOS (Number 5); Clackmannanshire Council – Social Services (Number 54)

²⁶⁴ ACPOS (Number 5); Mental Welfare Commission for Scotland (Number 18); Commission for Racial Equality (Number 35); Scottish Rape Crisis Network (Number 51)

²⁶⁵ ACPOS (Number 5)

²⁶⁶ Edinburgh & East of Scotland Deaf Society (Number 29)

²⁶⁷ ADSW (Number 55); The Highland Council - Social Work (Number 70)

²⁶⁸ Commission for Racial Equality (Number 35); Scottish Rape Crisis Network (Number 51)

²⁶⁹ Scottish Women’s Aid (Number 56)

²⁷⁰ Scottish Rape Crisis Network (Number 51); Perth & Kinross Area Child Protection Committee (Number 52); The Highland Council - Social Work (Number 70)

²⁷¹ Victim Support (Number 53)

60. The view was advanced that any witness who feels the need for additional protection to enable them to give quality evidence should be afforded such protection.²⁷² The views of the victim or witness on using special measures should be taken into account.²⁷³
61. Two Consultees suggested that no witness should have an automatic right to special measures; instead, the matter should be for the court to determine, on a case by case approach.²⁷⁴ Another Consultee cautioned that “creating automatic rights and presumptions in favour of certain groups being treated in particular ways may result in inflexibility.”²⁷⁵
62. The suggestion was made that the Judiciary and court Staff should receive disability awareness training.²⁷⁶

²⁷² Fife Domestic Abuse Forum (Number 9)

²⁷³ Victim Support (Number 53)

²⁷⁴ The Faculty of Advocates (Number 74); The Law Society of Scotland (Number 76)

²⁷⁵ Scottish Law Agents Society (Number 65)

²⁷⁶ Edinburgh & East of Scotland Deaf Society (Number 29)

Question 9(b): Where entitlement depends on permission of the court, when and how should judicial discretion be exercised?

Total Submissions Received	No comment made (n=48)	Consultees that commented (n=28)
76	63%	37%

63. Sixty three per cent of Consultees did not specifically address this section of Question 9. Of the 37% of Consultees that did address this section (n=28), one was of the opinion that it would not be appropriate to be prescriptive as to how judicial discretion should be exercised. Instead, that matter “is best left to the judiciary.”²⁷⁷ Another expressed the view that “it would be unhelpful to fetter the court's discretion by providing specifically for when and how judicial discretion should be exercised.”²⁷⁸

64. Not all Consultees were in favour of the discretion to determine whether special measures apply residing in the Judiciary. Opposition to the principle was based on the premise that:

- Judicial discretion increases the risk of judgement rather than justice being the determining factor for entitlement²⁷⁹
- Judicial discretion could lead to further variations in practice with consequent unintentional discrimination being experienced by witnesses in courts²⁸⁰
- There was no evidence of judges or sheriffs exercising their own discretion to use special measures unless asked for²⁸¹
- Discretionary entitlement is a further legal hoop or process that vulnerable witnesses would have to go through²⁸²
- Judicial discretion should only to be used to include a witness in a category, not exclude them²⁸³
- Where a witness has requested or been identified as needing special measures, it would be very difficult for a judge to refuse the witness otherwise²⁸⁴

65. Other Consultees advanced suggestions as to how judicial discretion should be exercised:

- If a judge is asked to determine entitlement then s/he should have regard to the evidence produced in support of the application. This may include an expert report and perhaps a statement or affidavit from the witness²⁸⁵

²⁷⁷ Ferguson, P W (Number 3)

²⁷⁸ Scottish Law Agents Society (Number 65)

²⁷⁹ Women Supporting Women (Number 36)

²⁸⁰ Dumfries & Galloway Council – Social Services Department (Number 23)

²⁸¹ Plotnikoff & Woolfson (Number 4)

²⁸² Scottish Rape Crisis Network (Number 51)

²⁸³ Scottish Women’s Aid (Number 56)

²⁸⁴ The Scottish Association for the Study of Delinquency (Number 31)

- The discretion should be exercised in such a way as to ensure the system is not misused²⁸⁶
- By taking a flexible approach²⁸⁷
- In the cautious and conscientious manner, as at present²⁸⁸
- Other factors such as the public interest and the views of the witness need to be considered²⁸⁹
- Discretion should be exercised where the court decides that the quality of individual testimony would be devalued²⁹⁰
- Where cause is shown in relation to a witness with:
 - mental illness,
 - learning disability,
 - communication problems, or
 - where there is repeat victimisation or intimidation²⁹¹

66. Consultees also advanced suggestions as to when the discretion should be exercised:

- “At an early stage in proceedings”,²⁹²
- At the pre-trial hearing using expert advice as necessary²⁹³
- In Sheriff and jury trials, applications should be made at first diet²⁹⁴ and in summary cases, applications should be made at the intermediate diet²⁹⁵
- In criminal matters, applications should be made at preliminary, first or intermediate diets and, for civil matters, applications should be made either (a) by enrolled motion; or (b) a motion before the Lord Ordinary or Sheriff²⁹⁶

67. One Consultee noted that, at present, judges too readily accede to Section 271 applications that do not set out the reasons why witnesses fulfil the statutory criteria.²⁹⁷

68. It was further suggested that guidance should be drafted outlining potential scenarios where special measures would be used.²⁹⁸

285 Fiona Raitt University of Dundee – Department of Law (Number 41)
 286 Clinical & Counselling Psychology Services – Motherwell/Clydesdale Department (Number 12)
 287 British Psychological Society (Number 24)
 288 Scottish Human Rights Centre (Number 50)
 289 Victim Support (Number 53)
 290 ADSW (Number 55)
 291 Fife Council – Social Work Service (Number 59)
 292 SCRA (Number 75)
 293 East Renfrewshire Council – Social Work Department (Number 57)
 294 Crown Office Policy Group (Number 47)
 295 Crown Office Policy Group (Number 47)
 296 The Faculty of Advocates (Number 74)
 297 Criminal Bar Association (Number 46)
 298 Scottish Human Rights Centre (Number 50)

Question 10: Should the accused in a criminal trial ever be eligible for special measures, and if so when?

Total Submissions Received	No comment made (n=23)	Consultees that commented (n=53)	Of those that commented			
			Yes (n=35)	No (n=6)	Yes – Conditional (n=12)	Not Specified (n=0)
76	30%	70%	66%	11%	23%	0%

69. Thirty per cent of Consultees (n=23) did not specifically address this question. Of those that did (n=53), 66% (n=35) were in favour of the accused in criminal trials being eligible for special measures; 23% (n=12) expressed conditional support while 11% (n=6) were opposed to an accused being eligible for special measures.

70. One of the Consultees in favour of the accused being eligible for special measures was so if access to these measures would assist the accused in giving evidence.²⁹⁹ Eligibility for the measures was deemed necessary in order to “ensure a fair trial and to improve the quality of the evidence”³⁰⁰ given by an accused. In addition, eligibility would ensure that “the over-riding principle of fairness to the accused”³⁰¹ is achieved. According to two Consultees, the criteria for eligibility should be the same for an accused as it is for any other witness.³⁰² One Consultee commented that the “approach which addresses the defendant's vulnerability on the basis of the same eligibility as other witnesses is to be commended.”³⁰³

71. Consultees pointed out that, in contemplating this matter, the following factors should be taken into account:

- The decision in *V and T v United Kingdom*³⁰⁴
 - This case dealt specifically with an instance where an accused who is vulnerable on grounds of age gave evidence. The court decided that such a witness should have the benefit of special measures and any other approach would be in danger of challenge on the ground of "inequality of arms"³⁰⁵
 - The logic of "equality of arms" would also extend to the entitlement of an adult accused to special measures.³⁰⁶ What is important is that the accused is entitled to seek special measures and not be automatically excluded on the basis that s/he is the accused³⁰⁷

²⁹⁹ Commission for Racial Equality (Number 35)
³⁰⁰ Shetland Islands Council – Social Care Service (Number 16)
³⁰¹ Crown Office Policy Group (Number 47)
³⁰² The Faculty of Advocates (Number 74); SCRA (Number 75)
³⁰³ Plotnikoff & Woolfson (Number 4)
³⁰⁴ 30 EHRR 121
³⁰⁵ Ferguson, P W (Number 3)
³⁰⁶ Ferguson, P W (Number 3)
³⁰⁷ Ferguson, P W (Number 3)

- Decisions of the European Court of Human Rights:
 - which confirmed that steps must be taken to ensure that an accused understands the proceedings, as with the Bulger case³⁰⁸
 - measures may need to be made available to all adults on the principle of “equality of arms” under the Convention³⁰⁹
72. As indicated above, a quarter of Consultees (n=12) expressed conditional support for the proposal of extending eligibility for special measures to the accused. These Consultees were in favour of measures being extended in cases involving:
- Children³¹⁰ (under the age of 16³¹¹) and young persons³¹²
 - Immature young offenders particularly aged 16-17, many of whom may struggle to understand court proceedings and their implications³¹³
 - An accused charged with sexual assault or abuse:³¹⁴ the accused in sex crimes/rape cases should be accorded anonymity until conviction³¹⁵
 - Those with learning difficulties³¹⁶
 - Accused with a diagnosis of Autistic Spectrum Disorder³¹⁷
 - An accused who is deaf; or has interpretation, communication or comprehension difficulties³¹⁸
 - An accused when they are accused of a crime against a person who was violent or abusive towards them; for example, where provocation or self-defence is an issue³¹⁹
 - As is already considered through the Appropriate Adult procedures³²⁰
73. It was further suggested that the preparation of special measures for an accused should be put in place at the start of the trial, thereby ensuring that s/he is not disadvantaged by being unable to give evidence if s/he chooses.³²¹ There may be

³⁰⁸ East Renfrewshire Council – Social Work Department (Number 57)

³⁰⁹ Criminal Bar Association (Number 46); ADSW (Number 55)

³¹⁰ Childline Scotland (Number 6); Clinical & Counselling Psychology Services – Motherwell/Clydesdale Department (Number 12); Barnado’s Scotland (Number 42); Child & Adolescent Section of the Royal College of Psychiatrists (Scottish Division) (Number 43); NCH Scotland (Number 64)

³¹¹ Childline Scotland (Number 6); Child & Adolescent Section of the Royal College of Psychiatrists (Scottish Division) (Number 43)

³¹² Barnado’s Scotland (Number 42); Child & Adolescent Section of the Royal College of Psychiatrists (Scottish Division) (Number 43)

³¹³ Dundee City Council – Social Work Department (Number 40)

³¹⁴ Child & Adolescent Section of the Royal College of Psychiatrists (Scottish Division) (Number 43)

³¹⁵ Ferguson, P W (Number 3)

³¹⁶ Child & Adolescent Section of the Royal College of Psychiatrists (Scottish Division) (Number 43); Disability Rights Commission (Number 58); Aberdeenshire Council - Housing & Social Work (Number 66)

³¹⁷ Child & Adolescent Section of the Royal College of Psychiatrists (Scottish Division) (Number 43)

³¹⁸ ACPOS (Number 5); Scottish Association of Sign Language Interpreters (Number 17); West Lothian Council – Community & Support Services (Number 28); The Scottish Council on Deafness (Number 33)

³¹⁹ The City of Edinburgh Council – Social Work (Number 20)

³²⁰ North Ayrshire Criminal Justice Services (Number 39)

³²¹ Scottish Human Rights Centre (Number 50)

grounds for making it incumbent on the defence to provide advance notice if the accused party seeks special measures.³²²

74. Consultees opposed to the suggestion (n=6) that special measures should be extended to an accused party in criminal trials advanced the following views:

- The fact that the accused has a defence agent to ‘protect’ him/her coupled with the appeal process already offer significant safeguards for the accused under domestic and European law³²³
- An accused party should be protected by current court procedures; for example insanity in bar of trial provides protection for those with a mental disorder³²⁴
- There is an argument for making the special measures available in some circumstances; for example, to an accused with significant mental health problems, or a victim of domestic abuse or repeat harassment. However, on balance there is a danger that the defence could abuse this. An accused person is not obliged to give evidence and will always have a lawyer in court representing their interests³²⁵
- There may be certain circumstances in which an accused person requires access to technical facilities, such as translation facilities, or other audio visual aids in the case of some accused with learning difficulties³²⁶
- The accused person is generally less likely to be vulnerable because the Crown “will not intimidate them or interfere with their evidence and also they will have a lawyer to protect them”³²⁷
- The role of an "appropriate adult" in criminal proceedings involving persons with a mental disorder should be maximised³²⁸

³²² ADSW (Number 55)

³²³ Fife Council – Social Work Service (Number 59)

³²⁴ Mental Welfare Commission for Scotland (Number 18)

³²⁵ Scottish Rape Crisis Network (Number 51)

³²⁶ Fiona Raitt University of Dundee – Department of Law (Number 41)

³²⁷ Scottish Women’s Aid (Number 56)

³²⁸ Glasgow City Council – Social Work Services (Number 67)

SECTION FOUR: EXISTING SPECIAL MEASURES

Question 11: What are the advantages and disadvantages of video recording evidence on commission, and how could the procedure be better used?

Total Submissions Received	No comment made (n=41)	Consultees that commented (n=35)
76	54%	46%

75. Forty six per cent (n=35) of the Consultees specifically addressed this question. These Consultees offered a number of comments in relation to the advantages and disadvantages of video recording evidence on commission; following is a synopsis of same:

(a) Advantages of video recording evidence on commission

- It is useful for child witnesses³²⁹
 - It is less frightening for children³³⁰
 - Use avoids the child having to be in the same room as the accused³³¹
 - It assists in providing a child friendly environment³³² away from the court building³³³
 - It is particularly useful for children who have been traumatised by the offence³³⁴
 - It also ensures child witness are unaffected by adjournments or delay and can result in less delays to the therapy and recovery of the child³³⁵
 - It avoids children being asked repeated questions and possibly altering their evidence, fearing they have given the 'wrong' answer³³⁶
 - Use might also assist deaf children in giving evidence: this may prove difficult in practice though, as the child and interpreter would need to be visible³³⁷

76. One Consultee noted that the Lord Advocate's Working Group on Child Witness Support did not identify any cases where this special measure was in use.³³⁸

- It is useful for other vulnerable witnesses:³³⁹
 - Again, it permits a less daunting setting to be created³⁴⁰

³²⁹ Mental Welfare Commission for Scotland (Number 18); Cross Party Group in the Scottish Parliament on Men's Violence Against Women and Children (Number 37); East Renfrewshire Council - Social Work Department (Number 57)

³³⁰ Childline (Number 6)

³³¹ Barnado's Scotland (Number 42)

³³² Barnado's Scotland (Number 42); Children 1st (Number 60); NCH Scotland (Number 64)

³³³ NCH Scotland (Number 64)

³³⁴ Child & Adolescent Section of the Royal College of Psychiatrists (Scottish Division) (Number 43)

³³⁵ City of Edinburgh Council, Social Work Unit (Number 1)

³³⁶ Children 1st (Number 60)

³³⁷ Scottish Association of Sign Language Interpreters (Number 17)

³³⁸ Plotnikoff & Woolfson (Number 4)

³³⁹ Mental Welfare Commission for Scotland (Number 18)

- Evidence is given away from the court setting and therefore the stress associated with providing evidence in a court of law is avoided³⁴¹
- Use of the method minimises the numbers present when the witness is giving evidence³⁴²
- It can also allow for evidence to be given outwith the court setting³⁴³
- It ensures the witness(es) do not face the accused in court³⁴⁴
- Use would be beneficial for the mentally ill to alleviate distress³⁴⁵
- It avoids repeat questioning³⁴⁶
- The number of questioners of the witness can be limited³⁴⁷
- The timing of evidence giving can be more certain³⁴⁸
- Avoids witness having long waits to give evidence:³⁴⁹ they would not be adversely affected by any delays³⁵⁰
- Evidence is less open to interference³⁵¹
- Evidence is less likely to become blurred³⁵² as memory recall is sharper if evidence is taken nearer the time the offence was committed³⁵³ and before a witness' memory of events fades³⁵⁴
- Useful for offences that had taken place over long periods of time³⁵⁵
- It would allow deaf people to give evidence in a more comfortable situation³⁵⁶
- The technology is widely available³⁵⁷
- Assists those with learning disabilities to give evidence and answer questions³⁵⁸

340 Scottish Rape Crisis Network (Number 51)

341 Clinical & Counselling Psychology Services – Motherwell/Clydesdale Department (Number 12); British Psychological Society (Number 24); Victim Support (Number 53); East Renfrewshire Council - Social Work Department (Number 57)

342 Scottish Rape Crisis Network (Number 51); Scottish Women’s Aid (Number 56); SCRA (Number 75)

343 Scottish Women’s Aid (Number 56); The Law Society of Scotland (Number 76)

344 ACPOS (Number 5); Clinical & Counselling Psychology Services – Motherwell/Clydesdale Department (Number 12); Clackmannanshire Council – Social Services (Number 54); East Renfrewshire Council - Social Work Department (Number 57); Scottish Law Agents Society (Number 65); The Law Society of Scotland (Number 76)

345 Miss Garry Robertson (Number 7)

346 Clinical & Counselling Psychology Services – Motherwell/Clydesdale Department (Number 12); Dumfries & Galloway Council – Social Services Department (Number 23); Cross Party Group in the Scottish Parliament on Men’s Violence Against Women and Children (Number 37); Barnado’s Scotland (Number 42)

347 SCRA (Number 75)

348 SCRA (Number 75)

349 Children 1st (Number 60)

350 Crown Office Policy Group (Number 47)

351 City of Edinburgh Council, Social Work Unit (Number 1)

352 Clinical & Counselling Psychology Services – Motherwell/Clydesdale Department (Number 12)

353 British Psychological Society (Number 24)

354 Victim Support (Number 53)

355 Mental Welfare Commission for Scotland (Number 18)

356 Edinburgh & East of Scotland Deaf Society (Number 29)

357 Ayrshire & Arran NHS Trust (Number 34)

358 Cross Party Group in the Scottish Parliament on Men’s Violence Against Women and Children (Number 37)

- Advantageous for those with medical conditions as it would prevent time delay, which may be critical for illnesses where mental deterioration is an issue³⁵⁹
- Journalists can still participate in the reporting process³⁶⁰

77. As highlighted by one Consultee, the advantages to use of video recording evidence depend on the court acting quickly to organise this measure.³⁶¹

(b) Disadvantages of video recording evidence on commission

78. For Consultees, the disadvantages associated with giving evidence on commission are:

- It does not allow the Defence to ask questions and therefore does not provide a full and tested statement³⁶²
- It creates problems for the Defence as the accused is not present when the evidence is being given³⁶³
- Matters arising from evidence led from other witnesses at trial cannot be put to the witness³⁶⁴
- If instructions follow from the Accused there would need to be adjournments to allow the Defence to meet with his/her client face to face. This might result in delays and extra costs³⁶⁵
- The Accused should have the right to listen or receive a transcript of proceedings³⁶⁶
- The Defence may find it difficult to gather evidence due to short timescale between service of indictment and trial date³⁶⁷
- It is difficult for a jury to assess the demeanour and impressiveness of a witness when the evidence is taken so remotely³⁶⁸
- There are issues relating to availability of the technology, logistics and its cost:³⁶⁹ facilities are not always widely available³⁷⁰
- Older witnesses could find technology daunting³⁷¹
- Lawyers may be able to subject a witness to repeated questioning³⁷²
- Lawyers, or other questioners, may not take account of vulnerability:³⁷³ the method of questioning may still be an ordeal for a child³⁷⁴

³⁵⁹ Crown Office Policy Group (Number 47)

³⁶⁰ Society of Editors (Number 27)

³⁶¹ Arrol Park Resource Centre (Number 72)

³⁶² ACPOS (Number 5)

³⁶³ Clackmannanshire Council – Social Services (Number 54); Scottish Law Agents Society (Number 65)

³⁶⁴ The Faculty of Advocates (Number 74)

³⁶⁵ Scottish Law Agents Society (Number 65)

³⁶⁶ Clackmannanshire Council – Social Services (Number 54)

³⁶⁷ Criminal Bar Association (Number 46)

³⁶⁸ The Faculty of Advocates (Number 74)

³⁶⁹ ACPOS (Number 5)

³⁷⁰ Criminal Bar Association (Number 46)

³⁷¹ Ayrshire & Arran NHS Trust (Number 34)

³⁷² Scottish Women’s Aid (Number 56)

³⁷³ Scottish Women’s Aid (Number 56); SCRA (Number 75)

- Both lawyers will be present in addition to the Commissioner who acts as ‘judge’: this could be intimidating for children³⁷⁵
 - This measure will only be effective “if it is part of wider changes to the criminal justice system”³⁷⁶
79. One Consultee stated that it is difficult to outline the disadvantages of the method as there is a lack of empirical evidence available on the use of video recorded evidence.³⁷⁷
80. Additionally, Consultees had a number of suggestions on how giving evidence on commission might be improved:
- Guidelines are required generally³⁷⁸ and also in order to establish appropriate questioning by lawyers³⁷⁹
 - There is a need for effective training for those in the legal profession:³⁸⁰ training would ensure the procedure was better used³⁸¹
 - The Executive should follow the recommendations in the Home Office revised ‘Guidance on Achieving Best Evidence in Criminal Proceedings: Guidance for Vulnerable and Intimidated Witnesses (Jan 2002)’³⁸²
 - The Executive should look at schemes in other countries, in particular the English scheme,³⁸³ and consider a pilot scheme in Scotland³⁸⁴
 - Commissioners should be used to conduct all questioning³⁸⁵
 - Questions should be provided by the parties, in advance³⁸⁶
 - Defence should be carried out in court³⁸⁷
 - There should be a live sound link as questioning occurs³⁸⁸
 - Parties should be able to observe proceedings through a one-way mirror and also be provided with an audio link³⁸⁹
 - An independent observer should be present³⁹⁰

³⁷⁴ Scottish Women’s Aid (Number 56)

³⁷⁵ East Renfrewshire Council – Social Work Department (Number 57)

³⁷⁶ East Renfrewshire Council – Social Work Department (Number 57)

³⁷⁷ The Law Society of Scotland (Number 76)

³⁷⁸ Scottish Rape Crisis Network (Number 51); Victim Support (Number 53)

³⁷⁹ Scottish Rape Crisis Network (Number 51)

³⁸⁰ Plotnikoff & Woolfson (Number 4); Shetland Islands Council – Social Care Service (Number 16); Scottish Rape Crisis Network (Number 51)

³⁸¹ Plotnikoff & Woolfson (Number 4)

³⁸² University of Dundee – Department of Law (Number 41); Perth & Kinross Area Child Protection Committee (Number 52)

³⁸³ The Highland Council – Social Work (Number 70)

³⁸⁴ British Psychological Society (Number 24); Perth & Kinross Child Protection Committee (Number 52)

³⁸⁵ Scottish Rape Crisis Network (Number 51); SCRA (Number 75)

³⁸⁶ SCRA (Number 75)

³⁸⁷ British Psychological Society (Number 24)

³⁸⁸ SCRA (Number 75)

³⁸⁹ SCRA (Number 75)

³⁹⁰ SCRA (Number 75)

- There should be an opportunity at the end of the evidence provision to challenge the Commissioner's questioning and to pick up on any issues overlooked³⁹¹
- The method should be used for Children's Hearings³⁹²
- The system could be better used by allowing the child more space and time to give views. Commissioners could use pictures/stories rather than routine questioning³⁹³

81. Finally, it was suggested that there is a need for strict controls over who has access to the videos.³⁹⁴

³⁹¹ SCRA (Number 75)

³⁹² SCRA (Number 75)

³⁹³ Barnado's Scotland (Number 42)

³⁹⁴ East Renfrewshire Council – Social Work Department (Number 57)

Question 12: How could screens be better used?

Total Submissions Received	No comment made (n=41)	Consultees that commented (n=35)
76	54%	46%

82. Forty six per cent of the Consultees specifically addressed this question. Of those that did (n=35), not all were in favour of the use of screens. Following is an overview of the reservations expressed by these Consultees:

- Witnesses can still feel threatened as the accused is in the room,³⁹⁵ in close proximity of the witness³⁹⁶ and therefore no sense of security is gained by the witness through use of this measure.³⁹⁷ A live link is a more effective measure to adopt³⁹⁸
- Screens can be intimidating.³⁹⁹ The use of a screen or live link could reinforce the beliefs of a person who, as a result of mental illness, believes that he/she is being spied on through walls⁴⁰⁰
- Witnesses may be unsure what is happening around them in the courtroom and this may increase the stress experienced by the witness. It could be unhelpful to extend the use of screens⁴⁰¹
- Use of screens can make the accused feel that they are 'hiding' and can lead to feelings of 'shame or intimidation'⁴⁰²

83. Three Consultees suggested that the results of any research into the effectiveness of the measure should be considered.⁴⁰³

84. The majority of Consultees (n=20) that addressed this question supported the use of the screens with one pointing out that the screens are not used enough.⁴⁰⁴ It was suggested that those who would benefit from use of screens would be:

- Children⁴⁰⁵
- Deaf people who are fearful of the court environment;⁴⁰⁶ however, an interpreter would be needed⁴⁰⁷

³⁹⁵ Soroptimist International of Aberdeen (Number 11); Children 1st (Number 60)
³⁹⁶ Barnado's Scotland (Number 42); Child & Adolescent Section of the Royal College of Psychiatrists (Scottish Division) (Number 43)
³⁹⁷ The Scottish Association for the Study of Delinquency (Number 31)
³⁹⁸ Soroptimist International of Aberdeen (Number 11)
³⁹⁹ Ayrshire & Arran NHS Trust (Number 34)
⁴⁰⁰ Mental Welfare Commission for Scotland (Number 18)
⁴⁰¹ British Psychological Society (Number 24)
⁴⁰² NCH Scotland (Number 64)
⁴⁰³ Dumfries & Galloway Council – Social Services Department (Number 23); Fife Council - Social Work Service (Number 59); The Law Society of Scotland (Number 76)
⁴⁰⁴ Dundee City Council – Social Work Department (Number 40)
⁴⁰⁵ Clackmannanshire Council – Social Services (Number 54); East Renfrewshire Council - Social Work Department (Number 57)
⁴⁰⁶ Edinburgh & East of Scotland Deaf Society (Number 29)

- All vulnerable witnesses;⁴⁰⁸ however the cost implications must be born in mind⁴⁰⁹
- Complainers of sexual offences⁴¹⁰
- All civil actions which involved vulnerable witnesses⁴¹¹
- All civil trials⁴¹²

85. It was noted that the use of screens is dependent on their availability in courtrooms.⁴¹³ It was suggested that every court should have access to screens and the screen type should be standardised.⁴¹⁴ In addition, as the positioning of the screen is important⁴¹⁵ court staff need to ensure that the screens are set up properly.⁴¹⁶ Guidance on the use of screens was requested.⁴¹⁷ It was suggested that it might be worth considering using one way screens so that the accused could see the witness,⁴¹⁸ as in England and Wales.⁴¹⁹

⁴⁰⁷ Scottish Association of Sign Language Interpreters (Number 17)
⁴⁰⁸ Crown Office Policy Group (Number 47); Scottish Rape Crisis Network (Number 51)
⁴⁰⁹ Crown Office Policy Group (Number 47)
⁴¹⁰ Scottish Rape Crisis Network (Number 51)
⁴¹¹ Clackmannanshire Council – Social Services (Number 54)
⁴¹² East Renfrewshire Council – Social Work Department (Number 57)
⁴¹³ City of Edinburgh Council, Social Work Unit (Number 1)
⁴¹⁴ Criminal Bar Association (Number 46); SCRA (Number 75)
⁴¹⁵ SCRA (Number 75)
⁴¹⁶ Perth & Kinross Area Child Protection Committee (Number 52)
⁴¹⁷ SCRA (Number 75)
⁴¹⁸ Clackmannanshire Council – Social Services (Number 54); The Highland Council - Social Work (Number 70)
⁴¹⁹ ACPOS (Number 5)

Question 13: How could CCTV be better used?

Total Submissions Received	No comment made (n=37)	Consultees that commented (n=39)
76	49%	51%

86. Fifty one per cent of the Consultees (n=39) specifically addressed the question of how CCTV could be better used. Of those Consultees, not all were in favour of use of CCTV and cited the following reasons for their opposition:

- The use of CCTV is not always in a child's best interests:
 - “When a judge decides to cut the screen 'dead' a child can feel this is a sign they have done something wrong”,⁴²⁰
 - CCTV can be used by defence lawyers to their advantage as they can speak closely to the screen which can intimidate a child⁴²¹
 - The experience can be threatening for a child⁴²²
 - A child witness still has to attend court and, as a result, may come into contact with the accused⁴²³
- There can be recurring technical problems which results in lengthening the court experience for vulnerable witnesses⁴²⁴
- There have been problems with use of CCTV for deaf people: a deaf person seeks assurance of who is in the room and also, when sign language is used, it can become tiring on the eye⁴²⁵
- CCTV could be threatening to the mentally ill⁴²⁶
- CCTV may not give an accurate portrayal of the evidence⁴²⁷
- It can lead to miscommunication between the witness and the person asking the questions⁴²⁸
- The accused cannot see the witness which is incorrect procedure⁴²⁹
- There is a fear that use of CCTV would result in it being easier to bring allegations without having to attend court; therefore, use should be restricted⁴³⁰
- CCTV is not always available in courts⁴³¹

⁴²⁰ Childline Scotland (Number 6)
⁴²¹ Childline Scotland (Number 6)
⁴²² Clinical & Counselling Psychology Services – Motherwell/Clydesdale Department (Number 12); Children 1st (Number 60)
⁴²³ Barnado’s Scotland (Number 42)
⁴²⁴ City of Edinburgh Council, Social Work Unit (Number 1)
⁴²⁵ Scottish Association of Sign Language Interpreters (Number 17)
⁴²⁶ Mental Welfare Commission for Scotland (Number 18)
⁴²⁷ Society of Editors (Number 27)
⁴²⁸ Cross Party Group in the Scottish Parliament on Men’s Violence Against Women and Children (Number 37)
⁴²⁹ Criminal Bar Association (Number 46)
⁴³⁰ Criminal Bar Association (Number 46)
⁴³¹ City of Edinburgh Council, Social Work Unit (Number 1)

87. It was suggested that the use of screens⁴³² or evidence on commission⁴³³ is preferable to the use of CCTV.⁴³⁴

88. The Consultees in favour of use of CCTV expressed the view that:

- CCTV helps witnesses, in particular children, feel better protected when giving evidence⁴³⁵
- Its use would result in the creation of a more child friendly⁴³⁶ and, overall, witness friendly environment⁴³⁷
- CCTV should be used for all cases of child abuse⁴³⁸
- Its use would also be beneficial to the mentally ill in order to avoid distress to these witnesses⁴³⁹
- CCTV should be used in rape and sexual abuse trials as it would enable rape victims to avoid the courtroom experience⁴⁴⁰
- Use could be extended to other vulnerable adults; for example, those with learning disabilities⁴⁴¹
- Overall, use of CCTV would ensure that it was less intimidating for the witness who may fear coming into contact with the accused⁴⁴²
- Additionally, it is a way to improve the quality of evidence as the witness would feel more relaxed⁴⁴³

89. Consultees offered suggestions as to how CCTV could be better used:

- Its use should be extended:
 - All courts should have links with rooms where vulnerable witnesses can use this facility⁴⁴⁴
 - All Sheriff Court and High Courts should be equipped with CCTV⁴⁴⁵
 - In addition, Children's Hearing rooms would benefit from CCTV use⁴⁴⁶
- It should be used outside the court setting⁴⁴⁷

⁴³² Crown Office Policy Group (Number 47)

⁴³³ Childline Scotland (Number 6); Children 1st (Number 60)

⁴³⁴ Childline Scotland (Number 6); Crown Office Policy Group (Number 47); Children 1st (Number 60)

⁴³⁵ ACPOS (Number 5)

⁴³⁶ Perth & Kinross Area Child Protection Committee (Number 52)

⁴³⁷ SCRA (Number 75)

⁴³⁸ Clackmannanshire Council – Social Services (Number 54)

⁴³⁹ Robertson, Miss G (Number 7)

⁴⁴⁰ Scottish Rape Crisis Network (Number 51)

⁴⁴¹ British Psychological Society (Number 24)

⁴⁴² Child & Adolescent Section of the Royal College of Psychiatrists (Scottish Division) (Number 43); SCRA (Number 75)

⁴⁴³ Arrol Park Resource Centre (Number 72)

⁴⁴⁴ Clackmannanshire Council – Social Services (Number 54)

⁴⁴⁵ Perth & Kinross Area Child Protection Committee (Number 52)

⁴⁴⁶ Dumfries & Galloway Council – Social Services Department (Number 23)

⁴⁴⁷ Perth & Kinross Area Child Protection Committee (Number 52); East Renfrewshire Council - Social

- Evidence should not be given from the witness' home⁴⁴⁸ for fear of intimidation and identification⁴⁴⁹
 - Witness, when giving evidence, should be accompanied by a supporter⁴⁵⁰
 - There should be co-operation between agencies; for example, social work departments⁴⁵¹
 - There should be clear rules regarding use⁴⁵²
 - Financial investment in technology is required⁴⁵³
90. It was also suggested that, before any changes are implemented, the outcome of current research to determine the effectiveness of use of CCTV should be considered.⁴⁵⁴

448 Work Department (Number 57); Faculty of Advocates (Number 74); SCRA (Number 75)
 449 One Consultee disagreed with this view and instead advocated use within the court setting.
 450 Scottish Law Agents Society (Number 65)
 451 East Renfrewshire Council – Social Work Department (Number 57)
 452 Society of Editors (Number 27); Scottish Women’s Aid (Number 56)
 453 Scottish Women’s Aid (Number 56)
 454 East Renfrewshire Council – Social Work Department (Number 57)
 Scottish Law Agents Society (Number 65); SCRA (Number 75)
 The Faculty of Advocates (Number 74)
 Fife Council – Social Work Service (Number 59)

Question 14a: How could better use be made of prior recorded statements?

Total Submissions Received	No comment made (n=40)	Consultees that commented (n=36)
76	53%	47%

91. As the data above indicate, 53% of Consultees (n=40) did not specifically address the question on how better use could be made of prior recorded statements.
92. Consultees in favour of the use of prior recorded statements suggested they should be used in (a) all cases involving children and at the court's discretion for other vulnerable witnesses;⁴⁵⁵ or (b) cases where the witness has a mental health problem.⁴⁵⁶
93. Support for use of the statements was, for some Consultees, based on the view that using the statements could reduce the stress experienced by a witness as a result of reliving the traumatic event⁴⁵⁷ and would therefore enable witnesses to give their 'best evidence'.⁴⁵⁸
94. A number of suggestions were advanced by Consultees on the use of prior recorded statements and include the following:
- There is a need for detailed written guidance for those conducting such interviews;⁴⁵⁹ in particular, in relation to the types of questions that can be asked with regard to admissible evidence.⁴⁶⁰ There should be safeguards in place to ensure that the evidence obtained is admissible⁴⁶¹
 - Also, there is a need for training for interviewers⁴⁶²
 - There is a need for a greater sense of urgency in taking down prior recorded statements:⁴⁶³ the statement should be taken as soon as possible after the event⁴⁶⁴
 - The statement should be taken by either:
 - A person or persons with mental health and legal training⁴⁶⁵
 - In the presence of a trained Commissioner and /or supporter⁴⁶⁶
 - Someone similar to an Appropriate Adult, although this person needs to be fully aware of the witness' vulnerability⁴⁶⁷

⁴⁵⁵ Clackmannanshire Council – Social Services (Number 54)
⁴⁵⁶ Renfrewshire Council – Social Work Department (Number 69)
⁴⁵⁷ Crown Office Policy Group (Number 47); East Renfrewshire Council - Social Work Department (Number 57)
⁴⁵⁸ Scottish Rape Crisis Network (Number 51)
⁴⁵⁹ Plotnikoff & Woolfson (Number 4)
⁴⁶⁰ Scottish Women's Aid (Number 56)
⁴⁶¹ Victim Support (Number 53)
⁴⁶² The Law Society of Scotland (Number 76)
⁴⁶³ The Scottish Association for the Study of Delinquency (Number 31)
⁴⁶⁴ Miss Garry Robertson (Number 7)
⁴⁶⁵ Miss Garry Robertson (Number 7)
⁴⁶⁶ Barnado's Scotland (Number 42)

- Interviews should be conducted in a child-friendly setting⁴⁶⁸
 - Social workers and police receive training in interviewing techniques, and should be able to competently conduct and record interviews⁴⁶⁹
95. According to one Consultee the role of the defence should also be considered, as a defence agent may object to “not being able to ask leading questions of the witness” and this may impact on the agent’s ability to adequately defend their client.⁴⁷⁰
96. Another Consultee, while in favour of use of the statements, noted that current use is of limited benefit as the witness still has to attend at court.⁴⁷¹
97. Consultees opposed to use of prior recorded statements expressed the following reservations:
- The method is 'fraught with difficulties' and therefore evidence should be given in person⁴⁷²
 - Those conducting the interview may not follow the rules appropriate to the court⁴⁷³
 - The system of use of prior recorded statements would undermine the defence's ability to cross-examine a witness⁴⁷⁴ as matters arising from evidence led from other witnesses cannot be put to a witness pre trial
 - It is difficult for a jury to assess demeanour etc of witness when evidence is taken so remotely, and it is not compatible with an accused's right to a fair trial under Article 6 of the European Convention on Human Rights⁴⁷⁵
98. It was suggested that there is a need to look at the research on this subject,⁴⁷⁶ which would include an analysis of any research conducted on use of the statements in England and Wales.⁴⁷⁷

⁴⁶⁷ British Psychological Society (Number 24)

⁴⁶⁸ Barnado’s Scotland (Number 42)

⁴⁶⁹ East Renfrewshire Council – Social Work Department (Number 57)

⁴⁷⁰ British Psychological Society (Number 24)

⁴⁷¹ Scottish Rape Crisis Network (Number 51)

⁴⁷² Scottish Law Agents Society (Number 65)

⁴⁷³ Criminal Bar Association (Number 46)

⁴⁷⁴ Criminal Bar Association (Number 46)

⁴⁷⁵ The Faculty of Advocates (Number 74)

⁴⁷⁶ Perth & Kinross Area Child Protection Committee (Number 52)

⁴⁷⁷ The Highland Council – Social Work (Number 70)

Question 14b: Would separate pre-trial video-recorded cross-examination be a positive development, and how would it work?

Total Submissions Received	No comment made (n=48)	Consultees that commented (n=28)	Of those that commented			
			Yes (n=19)	No (n=5)	Yes – Conditional (n=0)	Not Specified (n=4)
76	63%	37%	68%	18%	0%	14%

99. Over half (63%) the Consultees did not specifically address the second strand of this question. Of those that did (n=28), 68% (n=19) expressed the view that the separate use of pre-trial video-recorded cross-examination would be a positive development, 18% (n=5) did not accord with this view, while 14% (n=4) were undecided on the matter.

100. The 68% of Consultees that commented and advanced the view that the use of separate pre-trial video-recorded cross-examination evidence would be a positive development cited the following points in support of its use:

- Greater pre-trial judicial management would reduce the strain on witnesses and would benefit the judicial system as a whole⁴⁷⁸
- It would allow witnesses to give evidence at an earlier stage⁴⁷⁹
- It would reduce court time⁴⁸⁰ and therefore reduce time delays that occur in the court process⁴⁸¹
- It would reduce the need for witnesses to repeat statements⁴⁸²
- Use would reduce the stress experienced by witnesses as⁴⁸³
 - they would spend less time giving evidence⁴⁸⁴
 - alternatively they might not be required to attend at court at all⁴⁸⁵
- It would be less intimidating for an alleged victim as there would be less people present to hear the details⁴⁸⁶
- Use would be favourable for witnesses with mental health problems⁴⁸⁷
- The court would save money as it would negate the need for a witness and interpreter to appear in court⁴⁸⁸

⁴⁷⁸ Plotnikoff & Woolfson (Number 4)

⁴⁷⁹ Clackmannanshire Council – Social Services (Number 54)

⁴⁸⁰ Clackmannanshire Council – Social Services (Number 54)

⁴⁸¹ Cross Party Group in the Scottish Parliament on Men’s Violence Against Women and Children (Number 37)

⁴⁸² Crown Office Policy Group (Number 47)

⁴⁸³ Scottish Association of Sign Language Interpreters (Number 17);

⁴⁸⁴ Commission for Racial Equality (Number 35)

⁴⁸⁵ Scottish Association of Sign Language Interpreters (Number 17)

⁴⁸⁶ Scottish Rape Crisis Network (Number 51)

⁴⁸⁷ Renfrewshire Council – Social Work Department (Number 69)

- It is a useful way to avoid further stress to child witnesses⁴⁸⁹
101. Suggestions as to how the system of pre-trial video-recorded cross-examination would work were advanced by these Consultees and include:
- Interviewing should only be conducted by accredited⁴⁹⁰ and appropriately trained⁴⁹¹ professionals
 - Commissioners should be present at interviews⁴⁹²
 - All interviews should be conducted in accordance with written guidelines⁴⁹³
 - The statement could be taken nearer to the time of the incident⁴⁹⁴
 - Cross examination could take place away from the court setting⁴⁹⁵
102. It was suggested by two Consultees that the findings of a review of the English and Welsh scheme should be considered prior to any change in use being implemented.⁴⁹⁶
103. The Consultees who did not feel the use of separate pre-trial video-recorded cross-examination would be a positive development (n=5) advanced the view that:
- Use of pre-trial video-recorded cross-examination would affect the accused's right to a fair trial which could result in an infringement of human rights legislation⁴⁹⁷
 - In addition, it would undermine the defence's ability to cross-examine a witness⁴⁹⁸
 - "It is doubtful that the proposal would be workable without some injustice being capable of being alleged by an accused after trial"⁴⁹⁹
 - Those conducting the interview may not follow the rules appropriate to the court⁵⁰⁰
104. Some Consultees expressed concerns that if evidence was edited as the paper suggests this could distort what is being said⁵⁰¹, or that editing could detract from the evidence.⁵⁰² Another Consultee pointed out that the "paper ignores the fact that hearsay evidence is an option for witnesses."⁵⁰³

488 Scottish Association of Sign Language Interpreters (Number 17)
489 Barnado's Scotland (Number 42); Scottish Child Law Centre (Number 45)
490 Children 1st (Number 60)
491 Clackmannanshire Council – Social Services (Number 54)
492 Barnado's Scotland (Number 42)
493 Scottish Association of Sign Language Interpreters (Number 17)
494 Scottish Rape Crisis Network (Number 51)
495 Clackmannanshire Council – Social Services (Number 54)
496 Perth & Kinross Area Child Protection Committee (Number 52); The Highland Council - Social Work (Number 70)
497 Scottish Law Agents Society (Number 65)
498 Criminal Bar Association (Number 46)
499 Ferguson, P W (Number 3)
500 Criminal Bar Association (Number 46)
501 Society of Editors (Number 27)
502 Victim Support (Number 53)
503 Mental Welfare Commission for Scotland (Number 18)

Question 15a: Does the role of a supporter require clarification?

Total Submissions Received	No comment made (n=54)	Consultees that commented (n=22)	Of those that commented				
			Yes (n=20)	Yes – Conditional (n=0)	No (n=0)	Not in favour of use (n=1)	Not Specified (n=1)
76	71%	29%	91%	0%	0%	5%	5%

105. Seventy one per cent (n=54) of the submissions received did not specifically address Question 15a. Of those that did (n=22), 91% (n=20) were of the view that the role of supporter required clarification; 5% (n=1) expressed opposition to the use of supporters, while 5% (n=1) did not specify a view.

106. Consultees for whom clarification of the role of supporter was desirable (91%) of these that commented expressed the following views:

- The use of a supporter varies between courts: it is largely based on the personal preference of court officials and therefore there is a need for further guidance on use⁵⁰⁴
- At present the witness is unaware of their chance to use a supporter until they are about to enter the court⁵⁰⁵
- If the role was clarified then witnesses would know what level of support to expect⁵⁰⁶
- The role is ‘inconsistent and unpredictable’:⁵⁰⁷ there is a need for consistency⁵⁰⁸ and certainty⁵⁰⁹, especially for children⁵¹⁰ and in rape cases⁵¹¹
- Clarification is also important for the supporter so that they can be clear what their role is⁵¹²
-

107. One Consultee commented that the use of supporters has been a positive development and therefore use should be extended to other vulnerable witnesses.⁵¹³

108. Suggestions as to what the role of the supporter should entail were advanced by some of the Consultees:

⁵⁰⁴ City of Edinburgh Council, Social Work Unit (Number 1)
⁵⁰⁵ Scottish Rape Crisis Network (Number 51)
⁵⁰⁶ East Renfrewshire Council – Social Work Department (Number 57)
⁵⁰⁷ Fiona Raitt University of Dundee – Department of Law (Number 41)
⁵⁰⁸ Crown Office Policy Group (Number 47); Scottish Women’s Aid (Number 56); Children 1st (Number 60); The Faculty of Advocates (Number 74)
⁵⁰⁹ Children 1st (Number 60)
⁵¹⁰ Barnado’s Scotland (Number 42)
⁵¹¹ Scottish Rape Crisis Network (Number 51)
⁵¹² Clinical & Counselling Psychology Services – Motherwell/Clydesdale Department (Number 12)
⁵¹³ ACPOS (Number 5)

- The role of the supporter should be limited⁵¹⁴
- It should be similar to that of an Appropriate Adult⁵¹⁵
- A supporter needs to be detached from,⁵¹⁶ or unconnected with, the case⁵¹⁷ and there exists a danger of an emotional relationship with the witness distorting the evidence⁵¹⁸
- Conversely, if a supporter is required to be present it can result in witnesses not knowing or trusting the supporter⁵¹⁹
- S/he should not interfere with the proceedings⁵²⁰
- A supporter should be able to highlight to the court any distressing issues faced by the witness⁵²¹
- S/he should be able to comfort and support a child “in an age appropriate manner.”⁵²² It is hoped that the [Lord Advocate’s] guidance will allow for appropriate physical contact to comfort the child⁵²³
- The supporter should be allowed to sit in view of the witness or behind them⁵²⁴
- Guidance for the Lord Advocate's Working Group is a good starting point⁵²⁵

109. While in support of the view that the role of supporter requires clarification (in particular in relation to adult witnesses with mental health problems⁵²⁶), Consultees advanced the suggestion that the role of the supporter should be determined by the presiding Judge.⁵²⁷ In child witness cases and in adult cases the use of a supporter should be at their discretion; s/he should not be bound by the rules governing a supporter.⁵²⁸

110. The consultee not in favour of the use of supporters (n=1) suggested that the use detracts from evidence of the witness;⁵²⁹ and it is costly.⁵³⁰ Another suggested the need for a supporter would diminish if prior recorded statements or evidence on commission were used.⁵³¹

514 Ayrshire & Arran NHS Trust (Number 34); Arrol Park Resource Centre (Number 72)

515 ACPOS (Number 5)

516 Clinical & Counselling Psychology Services – Motherwell/Clydesdale Department (Number 12)

517 Criminal Bar Association (Number 46)

518 Ferguson, P W (Number 3)

519 Perth & Kinross Area Child Protection Committee (Number 52)

520 Criminal Bar Association (Number 46)

521 ACPOS (Number 5)

522 Childline (Number 6)

523 NCH Scotland (Number 64)

524 Scottish Women’s Aid (Number 56)

525 Crown Office Policy Group (Number 47)

526 Scottish Law Agents Society (Number 65)

527 Scottish Law Agents Society (Number 65)\

528 The Scottish Association for the Study of Delinquency (Number 31); Scottish Law Agents Society (Number 65)

529 Open Secret (Number 22)

530 Open Secret (Number 22)

531 Dumfries & Galloway Council – Social Services Department (Number 23)

Question 15b: Would written guidance be helpful?

Total Submissions Received	No comment made (n=42)	Consultees that commented (n=34)	Of those that commented				
			Yes (n=32)	Yes – Conditional (n=0)	No (n=1)	Not in favour of use (n=0)	Not Specified (n=1)
76	55%	45%	94%	0%	3%	0%	3%

111. Half of the submissions received (55%) did not specifically address this section of Question 15. Of those that did (n=34), 94% (n=32) expressed the view that written guidance on the role of the supporter would be helpful and 3% (n=1) were opposed to this view while a further 3% (n=1) did not specify a view on the matter.

112. Consultees who considered guidance would be helpful (n=32) advanced the following suggestions:

- Witnesses should know, in advance,⁵³² if they can use a supporter and what to expect from this service⁵³³
- If the supporter was to be based on the Appropriate Adult Scheme it would be worth updating the Circular pertaining to this from 1990⁵³⁴
- While guidance would be useful, the court should have ultimate discretion⁵³⁵
- Guidance should deal with ‘appointment, rights and responsibilities of support persons’⁵³⁶
- It is recommended that leaflets should be available in courts for witnesses or would be supporters⁵³⁷

113. One Consultee pointed out that there already exists written guidance in the form of the ‘NSPCC Young Witness Pack’ Home Office guidance on Achieving Best Evidence’, 2002.⁵³⁸

114. Another Consultee expressed that view that the need for a Supporter would diminish if prior recorded statements were taken or evidence on commission used.⁵³⁹

⁵³² City of Edinburgh Council – Social Work Unit (Number 1)
⁵³³ Scottish Rape Crisis Network (Number 51)
⁵³⁴ ACPOS (Number 5)
⁵³⁵ Mental Welfare Commission for Scotland (Number 18)
⁵³⁶ Crown Office Policy Group (Number 47)
⁵³⁷ Scottish Law Agents Society (Number 65)
⁵³⁸ Plotnikoff & Woolfson (Number 4)
⁵³⁹ Dumfries & Galloway Council – Social Services Department (Number 23)

Question 16: What would be the advantages and disadvantages of a combined approach involving elements of video recorded evidence on commission, live link and a supporter?

Total Submissions Received	No comment made (n=46)	Consultees that commented (n=30)
76	61%	39%

115. Sixty one per cent (n=46) of Consultees did not offer a view on what the advantages and disadvantages of a combined approach involving elements of video recorded evidence on commission, live links and a supporter would be. Following is an overview of the suggestions advanced by the 39% (n=30) of Consultees that proffered a view on this matter:

Advantages of a combined approach

- A combined approach could be tailored to fit the needs of an individual vulnerable witness⁵⁴⁰
- It would alleviate the stress caused to the mentally ill and those with learning disabilities⁵⁴¹
- It would also reduce the stress experienced by child witness as:
 - Child witnesses would not need to appear in court⁵⁴²
 - It would avoid children having to undergo repeat evidence giving⁵⁴³
- The approach would result in a reduction in questioning for witnesses⁵⁴⁴
- Witnesses would not need to go through multiple precognition statements⁵⁴⁵
- It would also reduce multiple interviewing of witnesses⁵⁴⁶ and the occurrence of repeat questioning⁵⁴⁷
- The approach would allow for evidence to be taken within a more efficient timescale⁵⁴⁸ and allow evidence to be taken while the witness' memory was closer to events⁵⁴⁹

⁵⁴⁰ ACPOS (Number 5)
⁵⁴¹ Highland Users Group (Number 7)
⁵⁴² Clinical & Counselling Psychology Services – Motherwell/Clydesdale Department (Number 12); Crown Office Policy Group (Number 47)
⁵⁴³ Crown Office Policy Group (Number 47)
⁵⁴⁴ Open Secret (Number 22); Dumfries & Galloway Council – Social Services Department (Number 23)
⁵⁴⁵ Scottish Rape Crisis Network (Number 51); The Law Society of Scotland (Number 76)
⁵⁴⁶ University of Dundee – Department of Law (Number 41); Child & Adolescent Section of the Royal College of Psychiatrists (Scottish Division) (Number 43); East Renfrewshire Council – Social Work Department (Number 57)
⁵⁴⁷ Cross Party Group in the Scottish Parliament on Men’s Violence Against Women and Children (Number 37)
⁵⁴⁸ Cross Party Group in the Scottish Parliament on Men’s Violence Against Women and Children (Number 37); Scottish Rape Crisis Network (Number 51); East Renfrewshire Council - Social Work Department (Number 57)
⁵⁴⁹ The Law Society of Scotland (Number 76)

- It would also assist witnesses in giving more ‘lucid and consistent’ evidence⁵⁵⁰
- Questioning would be more appropriate to the witness⁵⁵¹
- A Commissioner should be used as:
 - Using a Commissioner would avoid aggressive questioning from the defence⁵⁵²
 - Witnesses may be able to give more accurate evidence as they would feel more supported by the use of a Commissioner⁵⁵³
- It would be less traumatic for the witness as the witness could avoid facing the accused⁵⁵⁴, and also avoid the court experience⁵⁵⁵
- The approach would result in more support for witnesses and in turn better evidence would be given⁵⁵⁶
- This approach has the needs of the witness at its core: it is the “most effective basis for making changes”⁵⁵⁷

Disadvantages of a combined approach

116. The combined approach was described by one Consultee as a ‘recipe for confusion and procedural difficulties’.⁵⁵⁸ Following is an overview of some of the points raised by other Consultees on this matter:

- The combined approach would result in an additional administration burden for the Crown Office, the Procurator Fiscal Service, the Courts⁵⁵⁹ and community agencies⁵⁶⁰
- Additional resources and funding would be required⁵⁶¹
- There may be difficulties in terms of cost and management⁵⁶²
- One of the biggest difficulties of a combined approach would be timing as parties to proceedings would need to be prepared at a stage earlier than often occurs at present.⁵⁶³ the timescale from service of indictment to trial and the operation of a sitting rather than fixed diet system make any substantial procedure “well before trial” virtually unachievable⁵⁶⁴

550 Fife Council – Social Work Service (Number 59)
 551 Cross Party Group in the Scottish Parliament on Men’s Violence Against Women and Children (Number 37)
 552 Scottish Rape Crisis Network (Number 51)
 553 Clackmannanshire Council – Social Services (Number 54)
 554 Scottish Women’s Aid (Number 56)
 555 East Renfrewshire Council – Social Work Department (Number 57)
 556 East Renfrewshire Council – Social Work Department (Number 57)
 557 Children 1st (Number 60)
 558 Scottish Law Agents Society (Number 65)
 559 Scottish Association of Sign Language Interpreters (Number 17); The Scottish Association for the Study of Delinquency (Number 31); Clackmannanshire Council – Social Services (Number 54)
 560 East Renfrewshire Council – Social Work Department (Number 57)
 561 East Renfrewshire Council – Social Work Department (Number 57)
 562 ACPOS (Number 5)
 563 SCRA (Number 75)
 564 Criminal Bar Association (Number 46)

- There may be difficulties at early stages in a case due to a lack of disclosure of the Crown case. Such evidence could only be taken where the case is fully prepared or the evidence fully disclosed⁵⁶⁵
- The accused may be disadvantaged as they will need to have legal representation at an earlier stage in proceedings⁵⁶⁶
- The defence may not be “in a position to deal with this at an early stage”⁵⁶⁷
- Lawyers and the accused must be able to be flexible on questioning and instructions based on what the witness says⁵⁶⁸
- “In criminal proceedings trial should take place in presence of accused, to ensure accused has a fair trial,⁵⁶⁹
- The exacting professional standards of counsel and solicitors could not be accommodated if only the commissioner was to be allowed to ask questions of a vulnerable witness and therefore any questioning on commission needs to be conducted by a representative of the accused⁵⁷⁰
- Vulnerable witnesses may need to give evidence more than once⁵⁷¹
- It may take time to conduct: this could be more stressful for witnesses⁵⁷²
- There could be errors depending on the complexity of the legislation: there is a need for a 'simple framework of legislation'⁵⁷³
- There exists a concern that the information obtained could be released and exploited by the defence⁵⁷⁴

117. It was suggested that there is a need for a 'collaborative multi-agency approach to decision making at all stages' of the process⁵⁷⁵ in addition to the requirement for clear guidelines on the matter.⁵⁷⁶

⁵⁶⁵ The Law Society of Scotland (Number 76)
⁵⁶⁶ East Renfrewshire Council – Social Work Department (Number 57)
⁵⁶⁷ The Scottish Association for the Study of Delinquency (Number 31)
⁵⁶⁸ Criminal Bar Association (Number 46)
⁵⁶⁹ The Faculty of Advocates (Number 74)
⁵⁷⁰ The Faculty of Advocates (Number 74)
⁵⁷¹ ACPOS (Number 5)
⁵⁷² British Psychological Society (Number 24)
⁵⁷³ Mental Welfare Commission for Scotland (Number 18)
⁵⁷⁴ Cross Party Group in the Scottish Parliament on Men’s Violence Against Women and Children (Number 37)
⁵⁷⁵ NCH Scotland (Number 64)
⁵⁷⁶ East Renfrewshire Council – Social Work Department (Number 57)

Question 17: Is the existing law on clearing the court operating satisfactorily?

Total Submissions Received	No comment made (n=53)	Consultees that commented (n=23)	Of those that commented			
			Yes (n=16)	No (n=4)	Yes – Conditional (n=0)	Not Specified (n=3)
76	70%	30%	70%	17%	0%	13%

118. Seventy per cent of Consultees (n=53) did not specifically address the question on whether the existing law on clearing the court is operating satisfactorily. Of those that did (n=23), 70% (n=16) were satisfied that the current law is operating satisfactorily, 17% (n=4) did not agree with this view while the remaining 13% (n=3) did not specify a view.

119. Consultees happy with the law commented that the judiciary currently has sufficient powers⁵⁷⁷, and “experience suggests courts are cleared frequently and effectively in appropriate cases.”⁵⁷⁸ In relation to access to the media, Consultees commented that the press operate in a responsible manner⁵⁷⁹ and therefore there is no need to grant courts more power to exclude the press.⁵⁸⁰ However, it was suggested that it might be advantageous if the witness was briefed on the media's participation before giving evidence, thereby preventing any anxiety and misunderstanding by the witness on the role of the press.⁵⁸¹ One Consultee expressed concern that if the court was cleared outwith existing guidelines the jury may be prejudiced.⁵⁸²

120. Consultees not content with the current law on clearing of the courts suggested that:

- The presence of the media creates anxiety for the witness⁵⁸³
- The Court should have more flexible powers with regard to closing the court to the public⁵⁸⁴
- Witnesses are more likely to feel humiliated or threatened by the possible presence of the accused's family etc⁵⁸⁵
- It seems reasonable to extend the same consideration of a closed court to the accused⁵⁸⁶

⁵⁷⁷ Crown Office Policy Group (Number 47)

⁵⁷⁸ The Faculty of Advocates (Number 74)

⁵⁷⁹ The Scottish Daily Newspaper Society (Number 14). A view shared by Society of Editors (Number 27)

⁵⁸⁰ The Scottish Daily Newspaper Society (Number 14)

⁵⁸¹ Society of Editors (Number 27)

⁵⁸² Criminal Bar Association (Number 46)

⁵⁸³ The Highland Council – Social Work (Number 70)

⁵⁸⁴ City of Edinburgh Council, Social Work Unit (Number 1);

⁵⁸⁵ City of Edinburgh Council, Social Work Unit (Number 1)

⁵⁸⁶ City of Edinburgh Council, Social Work Unit (Number 1)

121. One Consultee noted that clearing of the courtroom is not the most important thing: witness anonymity is far more essential.⁵⁸⁷

⁵⁸⁷ Ferguson, P W (Number 3)

SECTION FIVE: NEW SPECIAL MEASURES

Question 18: Should any accused outwith sexual offence cases be banned from personal cross-examination and if so in what circumstances?

Total Submissions Received	No comment made (n=29)	Consultees that commented (n=47)	Of those that commented			
			Yes (n=33)	No (n=12)	Yes – Conditional (n=0)	Not Specified (n=2)
76	38%	62%	70%	26%	0%	4%

122. Thirty eight per cent of Consultees did not specifically address this question. Of those that did (n=47), 70% (n=33) were in favour of the ban on personal cross-examination of witnesses by an accused being extended to cases outwith sexual offences. Twenty six per cent (n=12) were opposed to an extension, while the remaining 4% (n=2) did not specify a view.

123. One Consultee expressed the view that a vulnerable witness should never be cross examined by the accused.⁵⁸⁸

124. Those in favour of a partial extension expressed the view that the ban should be extended to cases involving:

- child witnesses if the accused is a close relative⁵⁸⁹
- children⁵⁹⁰
- child abuse⁵⁹¹
- domestic abuse⁵⁹²
- domestic abuse where the accused is related to the witness⁵⁹³

⁵⁸⁸ Dumfries & Galloway Council – Social Services Department (Number 23)

⁵⁸⁹ West Lothian Council – Community & Support Services (Number 28); Scottish Child Law Centre (Number 45); The Faculty of Advocates (Number 74)

⁵⁹⁰ Ferguson, P W (Number 3); Plotnikoff & Woolfson (Number 4); Clinical & Counselling Psychology Services – Motherwell/Clydesdale Department (Number 12); Mental Welfare Commission for Scotland (Number 18); Ross, Margaret (Number 25); Scottish Women’s Aid (Number 56); Children 1st (Number 60); Angus Council - Social Work (Number 61)

⁵⁹¹ South Lanarkshire – Social Work Resources (Number 32); Perth & Kinross Area Child Protection Committee (Number 52); Angus Council - Social Work (Number 61); Aberdeenshire Council – Housing & Social Work (Number 66)

⁵⁹² Fife Domestic Abuse Forum (Number 9); Soroptimist International of Aberdeen (Number 11); South Lanarkshire – Social Work Resources (Number 32); Commission for Racial Equality (Number 35); Fiona Raitt University of Dundee – Department of Law (Number 41); Scottish Rape Crisis Network (Number 51); Clackmannanshire Council – Social Services (Number 54); Scottish Women’s Aid (Number 56); East Renfrewshire Council - Social Work Department (Number 57); Angus Council - Social Work (Number 61); The Highland Council - Social Work (Number 70)

⁵⁹³ The City of Edinburgh Council – Social Work (Number 20)

- domestic abuse if it is too costly to extend to all cases⁵⁹⁴
- mentally ill⁵⁹⁵
- violence⁵⁹⁶
- intimidation⁵⁹⁷ or ‘significant harassment’,⁵⁹⁸
- sexual offences⁵⁹⁹
- stalking⁶⁰⁰
- a suggestion of a “degree of pleasure or premeditation”⁶⁰¹
- crimes of hatred⁶⁰²
- witnesses with learning disabilities⁶⁰³
- a personal element between the accused and witness⁶⁰⁴
- in children’s hearing court proceedings a witness who is the alleged victim of, or witness to, abuse allegedly perpetrated by the defendant⁶⁰⁵
- the Court should be able to exercise some discretion in this matter⁶⁰⁶

125. One Consultee suggested that there is a need to re-assess the ban based on the results of the Sexual Offences (Procedure and Evidence) Act.⁶⁰⁷

126. The Consultee expressing conditional support for the proposal was in favour of each case being assessed on its merits, with due consideration being accorded to the provisions of the European Convention on Human Rights.⁶⁰⁸ Another said that failure to afford an accused the right to cross examine a witness may have implications in terms of compliance with human rights legislation.⁶⁰⁹

127. Twenty six per cent of Consultees (n=12) were not in favour of an extension of the ban on cross-examination. Their opposition was based on the opinion that (a) an accused has the right to test all evidence by cross-examining a witness: the presiding officer can control the accused if the need arises;⁶¹⁰ (b) there does not exist the same

⁵⁹⁴ Dumfries & Galloway Council – Social Services Department (Number 23)

⁵⁹⁵ Mental Welfare Commission for Scotland (Number 18); Ross, Margaret Deputy Head of School of Law University of Aberdeen (Number 25)

⁵⁹⁶ Scottish Association of Sign Language Interpreters (Number 17); East Renfrewshire Council – Social Work Department (Number 57)

⁵⁹⁷ Scottish Association of Sign Language Interpreters (Number 17)

⁵⁹⁸ West Lothian Council – Community & Support Services (Number 28)

⁵⁹⁹ Plotnikoff & Woolfson (Number 4); ADSW (Number 55)

⁶⁰⁰ Scottish Women’s Aid (Number 56)

⁶⁰¹ Edinburgh & East of Scotland Deaf Society (Number 29)

⁶⁰² Commission for Racial Equality (Number 35)

⁶⁰³ British Psychological Society (Number 24)

⁶⁰⁴ The Highland Council – Social Work (Number 70)

⁶⁰⁵ SCRA (Number 75)

⁶⁰⁶ Mental Welfare Commission for Scotland (Number 18); Ross, Margaret Deputy Head of School of Law University of Aberdeen (Number 25)

⁶⁰⁷ North Ayrshire Criminal Justice Services (Number 39)

⁶⁰⁸ The Faculty of Advocates (Number 74)

⁶⁰⁹ Scottish Human Rights Centre (Number 50)

⁶¹⁰ Criminal Bar Association (Number 46); Scottish Human Rights Centre (Number 50)

Failure to afford an accused the right to cross examine a witness may have implications in terms of compliance with human rights legislation (Scottish Human Rights Centre (Number 50)); The Law

level of risk that an accused may seek further gratification/power by questioning the complainer;⁶¹¹ and, (c) the premise of the Sexual Offences (Procedure and Evidence) (Scotland) Act is unsound.⁶¹²

128. It was further suggested by Consultees that (a) the ban would be unnecessary if evidence on commission was allowed;⁶¹³ (b) the matter should depend on the case and the ability of the witness;⁶¹⁴ and (c) an extension of the ban is not necessary at the moment but the Executive should review the matter at a later stage.⁶¹⁵

⁶¹¹ Society of Scotland (Number 76)
⁶¹² City of Edinburgh Council, Social Work Unit (Number 1)
⁶¹³ Scottish Law Agents Society (Number 65)
⁶¹⁴ Arrol Park Resource Centre (Number 72)
⁶¹⁵ Ayrshire & Arran NHS Trust (Number 34)
Fife Council – Social Work Service (Number 59)

Erratum : The data for Question 19 has been revised since initial publication of the analysis of responses to the consultation. The revision does not materially alter the findings of the original analysis to this question, but more accurately reflects the views of one Consultee.

Question 19: Do Consultees have views on the possible use of intermediaries?

Total Submissions Received	No comment made (n=24)	Consultees that commented (n=52)	Of those that commented				
			Supports use (n=23)	Supports limited use (n=6)	Not in favour of use (n=9)	Not Specified (n=3)	Pro-pilot / await pilot results (n=11)
76	32%	68%	44%	12%	17%	6%	21%

129. A third of Consultees (32%) did not address this question. Opinion among those that did (n=52) was divided with 44% (n=23) supporting use of intermediaries, 12% (n=6) in favour of limited use while 17% (n=9) were opposed to use. Twenty one per cent (n=11) were in favour of either (a) awaiting the results of the pilot in England and Wales or (b) undertaking a pilot in Scotland. The remaining 6% (n=3) were undecided on the matter.

130. Supporters described the use of intermediaries as an “excellent idea”⁶¹⁶ and a “highly sensible way forward.”⁶¹⁷ It was suggested that “the advantages far outweigh the disadvantages.”⁶¹⁸ One Consultee stated that use of intermediaries would be “one of the most far-reaching reforms that would improve children's experience of criminal proceedings in Scotland.”⁶¹⁹

131. Other Consultees in favour of the use of intermediaries contributed the following opinions:

- Use of intermediaries is a way of reducing stress to the witness and therefore assist more accurate evidence giving⁶²⁰
- Intermediaries would be a welcome addition to existing special measures⁶²¹
- They could be a valuable resource and help in translating questions for witnesses:⁶²² they could also provide a translation of the witnesses replies and thoughts⁶²³

⁶¹⁶ Perth & Kinross Area Child Protection Committee (Number 52)
⁶¹⁷ Aberdeenshire Council – Housing & Social Work (Number 66)
⁶¹⁸ SCRA (Number 75)
⁶¹⁹ Scottish Child Law Centre (Number 45)
⁶²⁰ Clackmannanshire Council – Social Services (Number 54)
⁶²¹ South Lanarkshire – Social Work Resources (Number 32)
⁶²² ACPOS (Number 5)
⁶²³ Aberdeenshire Council – Housing & Social Work (Number 66)

- They could aid communication⁶²⁴
 - Use would be beneficial for those deaf people who have fewer language skills⁶²⁵
 - Intermediaries would be particularly useful for witnesses with dual sensory loss, that is those who are deafblind⁶²⁶
- They could complement the Appropriate Adult scheme⁶²⁷
- Intermediaries could prevent the mentally ill becoming overwhelmed by the courtroom experience⁶²⁸
- Intermediaries should be used in cases involving children:⁶²⁹
 - The use of intermediaries is a good way of getting children through the experience⁶³⁰ and to avoid further stress to the child witness⁶³¹
 - Intermediaries would be able to adopt language and behaviour a child could understand⁶³²

132. One Consultee, while in favour of use of intermediaries, highlighted a potential problem in that the intermediary might be deemed a stranger by the witness and therefore use might not make a vulnerable witness feel more comfortable.⁶³³ Another supporter indicated that there might be a danger of misinterpretation of evidence and, therefore, the role of intermediary should be filled by “trained specialists.”⁶³⁴ One submission suggested that intermediaries should be recruited from the ranks of professionals such as speech therapists, nursery teachers and special needs teachers.⁶³⁵ The financial implications of use of intermediaries was recognised by the Consultees.⁶³⁶ In addition, it was noted that use of intermediaries may be limited due to a lack of sufficiently trained professionals.⁶³⁷

133. Additional suggestions put forward by the Consultees include:

- Existing Home Office Guidance should be referred to⁶³⁸
- Reference should be made to the Home Office pilot in terms of learning from experience⁶³⁹ and guidelines on use⁶⁴⁰

⁶²⁴ ACPOS (Number 5); The City of Edinburgh Council – Social Work (Number 20)

⁶²⁵ The Scottish Council on Deafness (Number 33)

⁶²⁶ Glasgow and West of Scotland Society for the Blind (Number 13)

⁶²⁷ ACPOS (Number 5)

⁶²⁸ Miss Garry Robertson (Number 7)

⁶²⁹ The City of Edinburgh Council – Social Work (Number 20); Scottish Child Law Centre (Number

45); Scottish Women’s Aid (Number 56)

⁶³⁰ Scottish Child Law Centre (Number 45)

⁶³¹ Scottish Women’s Aid (Number 56)

⁶³² Perth & Kinross Area Child Protection Committee (Number 52)

⁶³³ Soroptimist International of Aberdeen (Number 11)

⁶³⁴ ACPOS (Number 5)

⁶³⁵ South Lanarkshire – Social Work Resources (Number 32)

⁶³⁶ ACPOS (Number 5); Scottish Legal Aid Board (Number 8)

⁶³⁷ East Renfrewshire Council – Social Work Department (Number 57)

⁶³⁸ Clinical & Counselling Psychology Services – Motherwell/Clydesdale Department (Number 12)

⁶³⁹ Scottish Women’s Aid (Number 56); The Law Society of Scotland (Number 76)

- The use of intermediaries should be informed by the Appropriate Adult scheme⁶⁴¹
- Screening of the appropriate people could be undertaken⁶⁴²
- The standards to be applied to intermediaries should be the standards which judges expect of advocates⁶⁴³
- Intermediaries would need expertise in witness vulnerability and legal matters⁶⁴⁴
- Intermediaries would need to be aware of Sign Language and deaf issues⁶⁴⁵
- While it is a “reasonable idea”, it should not be used as a substitute for trained legal staff⁶⁴⁶

134. Twelve per cent (n=6) of Consultees advocated limited use of intermediaries, with one Consultee suggesting that intermediaries would be useful in cases of child sexual abuse but of little value in other cases.⁶⁴⁷

135. Overall, 17% (n=9) of Consultees did not support the use of intermediaries. Opposition to the suggestion was based on a number of factors (an overview of which is provided below) but included the view that the practice would be “unworkable”.⁶⁴⁸

- The “filtering of witness’ evidence through an intermediary is too far removed from the direct evidence on the part of the witness”,⁶⁴⁹
- The issue may be resolved by greater training of lawyers or by identifying specialist counsel, judges etc.⁶⁵⁰
- Alternatively, the use of a Commissioner would be an effective measure⁶⁵¹
- The Appropriate Adult service could be used to advise the court if they assess that the witness is not understanding – it would also be possible to provide a service to the vulnerable accused⁶⁵²
- There exists a danger of ‘contamination of evidence’ by the intermediary⁶⁵³ or misinterpretation of evidence⁶⁵⁴
- Could objectivity of the intermediary be ensured?⁶⁵⁵ Safeguards should be put in place so that the intermediary does not misinterpret the lawyer's questions or allow their own views to influence the witness⁶⁵⁶

⁶⁴⁰ Clinical & Counselling Psychology Services – Motherwell/Clydesdale Department (Number 12)

⁶⁴¹ Aberdeenshire Council – Housing & Social Work (Number 66); The Highland Council - Social Work (Number 70)

⁶⁴² Soroptimist International of Aberdeen (Number 11)

⁶⁴³ Plotnikoff & Woolfson (Number 4)

⁶⁴⁴ Clinical & Counselling Psychology Services – Motherwell/Clydesdale Department (Number 12)

⁶⁴⁵ Edinburgh & East of Scotland Deaf Society (Number 29)

⁶⁴⁶ Edinburgh & the Lothians Child Protection Office (Number 30)

⁶⁴⁷ Ayrshire & Arran NHS Trust (Number 34)

⁶⁴⁸ The Faculty of Advocates (Number 74)

⁶⁴⁹ The Faculty of Advocates (Number 74)

⁶⁵⁰ City of Edinburgh Council, Social Work Unit (Number 1)

⁶⁵¹ Children 1st (Number 60); NCH Scotland (Number 64)

⁶⁵² City of Edinburgh Council, Social Work Unit (Number 1)

⁶⁵³ Mental Welfare Commission for Scotland (Number 18)

⁶⁵⁴ Open Secret (Number 22)

⁶⁵⁵ Scottish Law Agents Society (Number 65)

⁶⁵⁶ Angus Council – Social Work (Number 61)

- There could be problems in identifying suitable people to conduct this role⁶⁵⁷
- Use of intermediaries would 'clutter up' the system⁶⁵⁸
- It might result in elongated or complicated proceedings⁶⁵⁹
- There is a danger of confusion of roles and therefore there is a need for clear guidelines⁶⁶⁰
- Use is not necessary unless the individual circumstances of each witness are genuinely taken into account and intermediaries are made available to all witnesses⁶⁶¹
- The jury should be warned of the risk of contamination⁶⁶²

136. Consultees expressed concern at the financial and administrative implications of introducing this measure with one Consultee suggesting that the cost would “likely to be met from legal aid”.⁶⁶³ In addition, concern was expressed that it might prove difficult to find suitably trained personnel to fill the role in rural areas.⁶⁶⁴

137. The view was advanced that lessons should be learnt from the pilot schemes in England and Wales,⁶⁶⁵ and some added that a Scottish pilot should be introduced.⁶⁶⁶

⁶⁵⁷ Glasgow City Council – Social Work Services (Number 67)

⁶⁵⁸ Arrol Park Resource Centre (Number 72)

⁶⁵⁹ The Faculty of Advocates (Number 74)

⁶⁶⁰ Scottish Association of Sign Language Interpreters (Number 17)

⁶⁶¹ Aberdeen City Council – Social Work (Number 71)

⁶⁶² Ross, Margaret Deputy Head of School of Law University of Aberdeen (Number 25)

⁶⁶³ Scottish Legal Aid Board (Number 8)

⁶⁶⁴ Shetland Islands Council – Social Care Service (Number 16)

⁶⁶⁵ The Scottish Association for the Study of Delinquency (Number 31); Commission for Racial Equality (Number 35); Fiona Raitt University of Dundee – Department of Law (Number 41); Crown Office Policy Group (Number 47); Scottish Human Rights Centre (Number 50); Scottish Rape Crisis Network (Number 51); Fife Council - Social Work Service (Number 59); The Law Society of Scotland (Number 76)

⁶⁶⁶ Open Secret (Number 22); British Psychological Society (Number 24)

Question 20: Would the appointment of an amicus be beneficial in particular cases?

Total Submissions Received	No comment made (n=24)	Consultees that commented (n=52)	Of those that commented			
			Yes (n=23)	No (n=21)	Yes – Conditional (n=6)	Not Specified (n=2)
76	32%	68%	45%	40%	11%	4%

138. Thirty two per cent of Consultees (n=24) did not specifically address this question. Opinion was divided among the 68% that did with 45% (n=23) expressing the view that the appointment of an amicus would be beneficial in particular cases; 11% (n=6) expressed conditional support while 40% (n=21) were opposed to the appointment and 4% (n=2) did not specify a view.

139. According to Consultees in favour of the appointment of an amicus, appointment should not be left to judicial discretion⁶⁶⁷ as judges do not always have the knowledge to deal with all types of witnesses' needs.⁶⁶⁸ Instead, appointment should occur in cases involving:

- rape or sexual assault⁶⁶⁹
- cases of stalking⁶⁷⁰
- child sexual abuse⁶⁷¹
- abuse of the elderly⁶⁷²
- abuse of those with learning disabilities⁶⁷³
- those with hearing difficulties⁶⁷⁴
- domestic abuse⁶⁷⁵
- An amicus should be available for any vulnerable or intimidated witness but not for the accused⁶⁷⁶

140. It was suggested that the costs involved should be met by central government.⁶⁷⁷

⁶⁶⁷ Scottish Women's Aid (Number 56)

⁶⁶⁸ Aberdeenshire Council – Housing & Social Work (Number 66)

⁶⁶⁹ Victim Support (Number 53); Scottish Women's Aid (Number 56)

Introduced in Denmark in 1980 for victims of sexual assault. It is regarded as successful. Similar schemes were subsequently introduced in Norway and Sweden. University of Sussex - Centre for Legal Studies (Number 21).

⁶⁷⁰ Scottish Women's Aid (Number 56)

⁶⁷¹ Clackmannanshire Council – Social Services (Number 54)

⁶⁷² Clackmannanshire Council – Social Services (Number 54)

⁶⁷³ Clackmannanshire Council – Social Services (Number 54)

⁶⁷⁴ The Scottish Council on Deafness (Number 33)

⁶⁷⁵ Scottish Women's Aid (Number 56)

⁶⁷⁶ Scottish Women's Aid (Number 56)

⁶⁷⁷ West Lothian Council – Community & Support Services (Number 28)

141. While in support of the principle of an amicus, one Consultee noted that there might not be a requirement for use if other special measures were in place and the “bench continues the role of strong witness protection within court.”⁶⁷⁸
142. Eleven per cent (n=6) of Consultees expressed conditional support for the appointment of an amicus in particular cases. It was suggested that appointment should be “a rare event”,⁶⁷⁹ determined on a case-by-case basis and at the judge's discretion.⁶⁸⁰ Additionally, it was mooted that there might be scope for giving the court power to appoint someone to “advocate the stance of the witness but it should only be used on order of the court to assist the court in hearing the case”.⁶⁸¹
143. As the data indicate, 40% (n=21) of Consultees were opposed to the appointment of an amicus for witnesses in particular cases. Opposition was based on the view that:
- Appointment is unnecessary and expensive⁶⁸²
 - Witnesses should have enough support under the current system⁶⁸³
 - The court provides sufficient adjudication⁶⁸⁴
 - Lawyers and judges should be capable of looking after the witness' interests:⁶⁸⁵ judges should be aware of how to deal with vulnerability⁶⁸⁶
 - There would be no need for the appointment of an amicus if other special measures⁶⁸⁷ and better arrangements for evidence taking were in place⁶⁸⁸
 - The role of amicus would overlap with the judge's role⁶⁸⁹
 - There should be greater training for lawyers, judges etc. or by identifying specialist counsel/judges for 'child victim' cases⁶⁹⁰
 - The Appropriate Adult service could be used to advise the court if the witness does not understand⁶⁹¹
 - A Supporter could fulfill this role⁶⁹²

⁶⁷⁸ ACPOS (Number 5)

⁶⁷⁹ The Faculty of Advocates (Number 74)

⁶⁸⁰ Scottish Law Agents Society (Number 65)

⁶⁸¹ Ross, Margaret Deputy Head of School of Law University of Aberdeen (Number 25)

⁶⁸² The UK Men's Movement (Number 10)

⁶⁸³ Scottish Human Rights Centre (Number 50)

⁶⁸⁴ Ferguson, P W (Number 3); Crown Office Policy Group (Number 47)

⁶⁸⁵ Mental Welfare Commission for Scotland (Number 18);

Commission for Racial Equality (Number 35); Criminal Bar Association (Number 46)

⁶⁸⁶ Open Secret (Number 22); Cross Party Group in the Scottish Parliament on Men's Violence

Against Women and Children (Number 37); East Renfrewshire Council - Social Work Department (Number 57); Fife Council - Social Work Service (Number 59)

⁶⁸⁷ The Scottish Association for the Study of Delinquency (Number 31)

⁶⁸⁸ Children 1st (Number 60); SCRA (Number 75)

⁶⁸⁹ Edinburgh & East of Scotland Deaf Society (Number 29)

⁶⁹⁰ City of Edinburgh Council, Social Work Unit (Number 1)

⁶⁹¹ City of Edinburgh Council, Social Work Unit (Number 1)

⁶⁹² Barnado's Scotland (Number 42)

- Appointment of an amicus would introduce another person into the equation: there is a need for consistency of support for the child⁶⁹³ and an amicus would simply be another person that the child was unfamiliar with⁶⁹⁴

144. One Consultee suggested that the proposal requires further exploration and expressed the view that appointment of an amicus in particular cases would be tantamount to admitting failings in the current system.⁶⁹⁵

145. Overall, two Consultees were ‘undecided’ on the matter with one expressing concern at the cost and administrative implications of introducing such a scheme.⁶⁹⁶

⁶⁹³ Barnado’s Scotland (Number 42)

⁶⁹⁴ Children 1st (Number 60)

⁶⁹⁵ Scottish Rape Crisis Network (Number 51)

⁶⁹⁶ Scottish Legal Aid Board (Number 8);

SECTION SIX: RANGE OF PROCEEDINGS

Question 21: Should some or all special measures available in the criminal courts also be available in court proceedings connected with children’s hearings?

Total Submissions Received	No comment made (n=25)	Consultees that commented (n=51)	Of those that commented			
			Yes (n=43)	No (n=3)	Yes – Conditional (n=0)	Not Specified (n=5)
76	33%	67%	84%	6%	0%	10%

146. Sixty seven per cent of Consultees (n=51) specifically addressed this question. As the data demonstrate, 84% (n=43) were in favour of some or all special measures available in the criminal courts being made available in court proceedings connected with children’s hearings, 6% (n=3) were opposed to this view while a further 10% (n=5) were undecided.

147. Support for the proposal was based on the view that:

- There is no reason to differentiate between children's hearings and criminal proceedings⁶⁹⁷
- Lack of availability of these measures appears “anomalous” given the content of the proceedings⁶⁹⁸
- Proceedings can be no less worrying or traumatising to the witness than appearing in a criminal trial⁶⁹⁹
- It is immaterial to a child witness whether they are appearing in a proof or in relation to a criminal case: the distinction is “lost”⁷⁰⁰ on them. The experience can be intimidating to them whatever the nature of the court proceedings is⁷⁰¹
- The hearings are judicial proceedings and subject to the same rules⁷⁰²
- Availability would ensure that the vulnerable witness is supported through the process⁷⁰³
- Measures should be made available in the interests of consistency and fairness⁷⁰⁴

⁶⁹⁷ Ferguson, P W (Number 3)

⁶⁹⁸ Glasgow City Council – Social Work Services (Number 67)

⁶⁹⁹ South Lanarkshire – Social Work Resources (Number 32)

Scottish Child Law Centre (Number 45) suggested that the test employed in South Africa could be

used. The test is "whether the witness is a person who may be exposed to undue mental stress or suffering were she to give evidence."

⁷⁰⁰ East Renfrewshire Council – Social Work Department (Number 57)

⁷⁰¹ Child & Adolescent Section of the Royal College of Psychiatrists (Scottish Division) (Number 43)

⁷⁰² Edinburgh & East of Scotland Deaf Society (Number 29)

⁷⁰³ ACPOS (Number 5)

⁷⁰⁴ Shetland Islands Council – Social Care Service (Number 16)

148. In particular, Consultees suggested these measures should be made available where:

- Children and young people have a learning disability and/or mental health problem⁷⁰⁵
- The child has to testify against a parent or a carer who has sexually abused them⁷⁰⁶
- The witness is giving evidence in cases of sexual⁷⁰⁷ or violent crime⁷⁰⁸
- The case involves child care and child protection matters⁷⁰⁹

149. One Consultee suggested that consideration should be had to copying the facility available in the Children’s Hearings system of excluding a relevant person (a person with rights in respect of the proceedings as defined in the 1995 Act) whilst a child gives evidence.⁷¹⁰

150. Again, the issue of the financial implications of introducing these measures was raised. It was suggested that the measures should be funded through the public purse⁷¹¹ but consideration would need to be given to financing these measures outwith the current legal aid framework.⁷¹² The view was advanced that the courts should determine the request while “bearing in mind the interests of parties, availability, costs and other factors relevant to fairness of proceedings.”⁷¹³

151. One Consultee, while in favour of implementation of special measures in children's hearings, suggested that consideration should be given to removing alleged victims of abuse from contested proofs altogether.⁷¹⁴

152. Six per cent (n=3) of Consultees were opposed to the availability of special measures in proceedings connected with children’s hearings. Opposition was based on the view that it would add extra expense and a layer of court bureaucracy to proceedings.⁷¹⁵ In addition, the issues covered by the consultation papers are already treated with sensitivity by the judges etc. and therefore “significant problems” do not arise.⁷¹⁶

⁷⁰⁵ Mental Welfare Commission for Scotland (Number 18)

⁷⁰⁶ Open Secret (Number 22)

⁷⁰⁷ Women Supporting Women (Number 36); Scottish Rape Crisis Network (Number 51)

⁷⁰⁸ Women Supporting Women (Number 36)

⁷⁰⁹ Scottish Women’s Aid (Number 56)

⁷¹⁰ SCRA (Number 75)

⁷¹¹ North Ayrshire Criminal Justice Services (Number 39)

⁷¹² Shetland Islands Council – Social Care Service (Number 16)

⁷¹³ Ross, Margaret Deputy Head of School of Law University of Aberdeen (Number 25)

⁷¹⁴ Plotnikoff & Woolfson (Number 4)

⁷¹⁵ The UK Men’s Movement (Number 10)

⁷¹⁶ Scottish Law Agents Society (Number 65)

153. A Consultee, undecided on the matter, highlighted the fact that legal aid is not currently available for proceedings involving children's hearings. Therefore, a new form of legal aid may be required or, if special measures are to be made available in these proceedings, a method of meeting costs within the children's hearing system may need to be considered.⁷¹⁷

⁷¹⁷ Scottish Legal Aid Board (Number 8)

Question 22: Should the restrictions on use of character and sexual history evidence in criminal trials also apply in court proceedings connected with children’s hearings?

Total Submissions	No comment made (n=29)	Consultees that commented (n=47)	Of those that commented			
			Yes (n=41)	No (n=5)	Yes – Conditional (n=0)	Not Specified (n=1)
76	38%	62%	87%	11%	0%	2%

154. Sixty two per cent (n=47) of Consultees specifically addressed this question. Of those, 87% (n=41) were in favour of the restrictions on the use of character and sexual history evidence in criminal trials also applying in court proceedings connected with children’s hearings. Eleven per cent (n=5) were opposed to this proposal, while one consultee was undecided.

155. Consultees in favour of the restriction on the use of character and sexual history evidence also applying in court proceedings connected with children’s hearings, expressed the following views in support of their opinion:

- Children/adolescents should have same protection as adults:⁷¹⁸ it is “anomalous” that they are not protected by such measures⁷¹⁹
- Unless there is a good reason to draw a distinction then the difference of treatment of such witnesses is difficult to rationalise⁷²⁰
- The measures should be available based on the logic of the Sexual Offences Act⁷²¹
- It is difficult to see how a 14 year olds’ sexual history is any more relevant than an adults⁷²²
- Adolescents are reluctant to report abuse as they are aware that any consensual sex they have had will be used to diminish their evidence⁷²³
- Such questioning can embarrass children and compound their feelings of shame and guilt⁷²⁴
- Witnesses may have been more vulnerable to succumbing to sexual relationships,⁷²⁵ or acting inappropriately, due to abuse experienced⁷²⁶

⁷¹⁸ Open Secret (Number 22)

⁷¹⁹ Dundee City Council – Social Work Department (Number 40)

⁷²⁰ Fiona Raitt University of Dundee – Department of Law (Number 41)

⁷²¹ Ferguson, P W (Number 3)

⁷²² Edinburgh & East of Scotland Deaf Society (Number 29)

⁷²³ Open Secret (Number 22)

⁷²⁴ South Lanarkshire – Social Work Resources (Number 32)

⁷²⁵ Child & Adolescent Section of the Royal College of Psychiatrists (Scottish Division) (Number 43)

⁷²⁶ South Lanarkshire – Social Work Resources (Number 32); Child & Adolescent Section of the Royal College of Psychiatrists (Scottish Division) (Number 43)

- Measures should be available as children might be asked about abuse with the alleged abuser present⁷²⁷
- It is against the spirit of the Kilbrandon report and recognition that children in need of care and protection to impune motivation of a child due to previous sexual experience⁷²⁸
- Measures should be made available on the decision of the sheriff or judge⁷²⁹
- The test should be one of relevance to the issue in the case⁷³⁰

156. Two Consultees called for children or young people not to be subjected to questioning of this nature.⁷³¹

157. Eleven per cent (n=5) of Consultees were opposed to the restriction on use of character and sexual history evidence in criminal trials applying in court proceedings connected with children’s hearings. In the view of some of these Consultees:

- The relevance of a particular line of cross-examination is a matter for the Sheriff to determine⁷³²
- Questioning “should be left to the professional responsibility of the questioner who is subject to the Court’s jurisdiction to prevent offensive and unnecessary questioning of any witness, especially a child”⁷³³
- “Restrictions should not operate in any trial however unpleasant for the witness. An unpleasant experience of a witness pales into insignificance against the consequences of a wrongful conviction”⁷³⁴

⁷²⁷ Childline (Number 6)
⁷²⁸ Clinical & Counselling Psychology Services – Motherwell/Clydesdale Department (Number 12)
⁷²⁹ Ayrshire & Arran NHS Trust (Number 34)
⁷³⁰ Mental Welfare Commission for Scotland (Number 18); Ross, Margaret (Number 25)
⁷³¹ Scottish Rape Crisis Network (Number 51); Angus Council - Social Work (Number 61)
⁷³² The Faculty of Advocates (Number 74)
⁷³³ The Faculty of Advocates (Number 74)
⁷³⁴ The UK Men’s Movement (Number 10)

Question 23: Should special measures be available in civil proceedings, and if so in what types of case?

Total Submissions Received	No comment made (n=26)	Consultees that commented (n=50)	Of those that commented			
			Yes (n=45)	No (n=2)	Yes – Conditional (n=1)	Not Specified (n=2)
76	34%	66%	90%	4%	2%	4%

158. Two thirds of Consultees (n=50) specifically addressed this question. Of those, 90% (n=45) were in favour of special measures being made available in civil proceedings. Two per cent (n=1) expressed conditional support; 4% (n=2) were opposed to this proposal while 4% (n=2) were undecided.

159. Consultees suggested that availability of special measures in civil proceedings was in the wider public interest⁷³⁵ and in the interests of fairness.⁷³⁶ In addition, the experience of vulnerable witnesses in civil courts is not greatly dissimilar to those in criminal courts⁷³⁷ and the experience can be no less worrying or traumatising to said witnesses than appearing in a criminal trial.⁷³⁸ It was also noted that availability of the measures in civil proceedings may be required in order to ensure compliance with Article 6 of the European Convention on Human Rights.⁷³⁹

160. In terms of the type of case for which these measures should be made available, Consultees suggested that:

- The measures should be available in any civil proceedings involving vulnerable witnesses⁷⁴⁰
- In cases involving
 - Children⁷⁴¹
 - Children or people with mental health problems or learning difficulties⁷⁴²
 - Mental health⁷⁴³ and in cases under the Adults with Incapacity (Scotland) Act 2000⁷⁴⁴
- Abuse⁷⁴⁵

⁷³⁵ Fiona Raitt University of Dundee – Department of Law (Number 41)

⁷³⁶ Arrol Park Resource Centre (Number 72)

⁷³⁷ ADSW (Number 55)

⁷³⁸ South Lanarkshire – Social Work Resources (Number 32)

⁷³⁹ Scottish Human Rights Centre (Number 50)

⁷⁴⁰ Scottish Rape Crisis Network (Number 51)

⁷⁴¹ Clinical & Counselling Psychology Services – Motherwell/Clydesdale Department (Number 12); Ayrshire & Arran NHS Trust (Number 34); Barnado’s Scotland (Number 42); Child & Adolescent

⁷⁴² Commission for Racial Equality (Number 35)

⁷⁴³ SCRA (Number 75); The Law Society of Scotland (Number 76)

⁷⁴⁴ The Law Society of Scotland (Number 76)

- Neglect⁷⁴⁶
- Sexual exploitation of children⁷⁴⁷
- Elderly abuse/neglect⁷⁴⁸
- Crimes of hatred⁷⁴⁹
- Harassment⁷⁵⁰
- Domestic abuse⁷⁵¹ where a case is brought following years of abuse and intimidation⁷⁵²
- Proof hearings, parental responsibility order Application hearings and adoption, residency and contact hearings⁷⁵³
- Sexual abuse as abuse tends to take place in family settings and children/vulnerable adults should be protected in these proceedings⁷⁵⁴
- Family proceedings⁷⁵⁵ involving allegations of abuse & anti-social behaviour.⁷⁵⁶
- When the penalty may result in a criminal sanction being imposed; for example, an anti-social behaviour order or sex offender orders⁷⁵⁷

161. One Consultee expressed the view that research on the matter would be of assistance.⁷⁵⁸

162. As the data indicate, 2% (n=1) of Consultees expressed conditional support for the proposal. This consultee expressed the view that special measures should not be in place unless financed by the parties.⁷⁵⁹ One Consultee who was undecided expressed the view that while priority should be given to provision of the measures in criminal trials, a cost benefit analysis on the widening of special measures would be welcome.⁷⁶⁰

⁷⁴⁵ South Lanarkshire – Social Work Resources (Number 32)
⁷⁴⁶ South Lanarkshire – Social Work Resources (Number 32)
⁷⁴⁷ South Lanarkshire – Social Work Resources (Number 32)
⁷⁴⁸ Ayrshire & Arran NHS Trust (Number 34)
⁷⁴⁹ Commission for Racial Equality (Number 35)
⁷⁵⁰ East Renfrewshire Council – Social Work Department (Number 57)
⁷⁵¹ Fife Domestic Abuse Forum (Number 9); Ayrshire & Arran NHS Trust (Number 34); Commission for Racial Equality (Number 35); Scottish Women’s Aid (Number 56); SCRA (Number 75)
⁷⁵² Fife Domestic Abuse Forum (Number 9)
⁷⁵³ Edinburgh & the Lothians Child Protection Office (Number 30)
⁷⁵⁴ Open Secret (Number 22)
⁷⁵⁵ Dundee City Council – Social Work Department (Number 40); Perth & Kinross Area Child Protection Committee (Number 52); East Renfrewshire Council - Social Work Department (Number 57)
⁷⁵⁶ Dundee City Council – Social Work Department (Number 40)
⁷⁵⁷ Angus Council – Social Work (Number 61)
⁷⁵⁸ Fife Council – Social Work Service (Number 59)
⁷⁵⁹ North Ayrshire Criminal Justice Services (Number 39)
⁷⁶⁰ West Lothian Council – Community & Support Services (Number 28)

163. Another Consultee advised that while they have “no objection in principle” they are concerned that a "vulnerable witness culture" may become prevalent.⁷⁶¹ Another opponent of the proposal expressed the view that, as it stands, judges are perfectly placed to protect all participants from abuse.⁷⁶² It was also opined that the provision of special measures in civil proceedings would result in an extra and expensive layer of court bureaucracy⁷⁶³ and matters would be further complicated by funding issues.⁷⁶⁴

⁷⁶¹ Scottish Law Agents Society (Number 65)

⁷⁶² The UK Men’s Movement (Number 10)

⁷⁶³ The UK Men’s Movement (Number 10)

⁷⁶⁴ Glasgow City Council – Social Work Services (Number 67)

Question 24: How would the costs involved be met?

Total Submissions Received	No comment made (n=54)	Consultees that commented (n=22)
76	71%	29%

164. As the data above indicate, less than a third of Consultees (n=22) addressed the issue of costs. Of the Consultees to address the question, half (n=11) were in favour of the costs being met by the state,⁷⁶⁵ perhaps through the legal aid system⁷⁶⁶ or the Scottish Court Service.⁷⁶⁷ Four consultees suggested that the costs should be met in the normal way.⁷⁶⁸ One consultee advocated payment by either the state or the applicant.⁷⁶⁹ A further Consultee suggested that the costs of the special measures should be met by the parties to the proceedings generally.⁷⁷⁰

⁷⁶⁵ Scottish Association of Sign Language Interpreters (Number 17); University of Dundee – Department of Law (Number 41); Scottish Rape Crisis Network (Number 51); Clackmannanshire Council – Social Services (Number 54); Scottish Women’s Aid (Number 56); Aberdeenshire Council - Housing & Social Work (Number 66); The Highland Council - Social Work (Number 70); The Faculty of Advocates (Number 74); SCRA (Number 75); The Law Society of Scotland (Number 76)

⁷⁶⁶ Scottish Association of Sign Language Interpreters (Number 17); Fiona Raitt University of Dundee Department of Law (Number 41); The Highland Council - Social Work (Number 70); The Faculty of Advocates (Number 74); SCRA (Number 75); The Law Society of Scotland (Number 76)

⁷⁶⁷ The Faculty of Advocates (Number 74)

⁷⁶⁸ Dumfries & Galloway Council, Social Services Department (Number 23); West Lothian Council, Community & Support Services (Number 28); Commission for Racial Equality (Number 35); Scottish Law Agents Society (Number 65)

⁷⁶⁹ Perth & Kinross Area Child Protection Committee (Number 52)

⁷⁷⁰ North Ayrshire Criminal Justice Services (Number 39)

SECTION SEVEN: THE COMPETENCE TEST

Question 25a: Should the competence test be retained, modified or abolished (a) for children only and (b) for all witnesses?

(a) Children

Total Submissions Received	No comment made (n=19)	Consultees that commented (n=57)	Of those that commented			
			Retain (n=9)	Modify (n=12)	Abolish (n=34)	Not Specified (n=2)
76	25%	75%	16%	21%	60%	3%

165. As the data in the above table indicate, a quarter of Consultees (n=19) did not specifically address this question. Of those that did (n=57), 60% (n=34) were in favour of abolishing the competence test for children; 21% (n=12) advocated modification while 16% (n=9) were in favour of retention of the test. Three per cent (n=2) of Consultees did not specify a view.

(i) Abolition

166. Abolition of the competence test for children was favoured by 60% (n=34) of the Consultees that addressed this question. Overall, they favoured abolition on the basis that:

- The current procedures are unsatisfactory⁷⁷¹
- Retention of the test is another “instance of inequitable justice by geography” as the test has been abolished for all witnesses in England and Wales⁷⁷²
- The competency test applied to child witnesses could be viewed as discriminatory and may amount to a breach of Article 14 of the European Convention on Human Rights since adult witnesses are not presumed incompetent in the same way⁷⁷³
- Giving evidence can be a distressing enough prospect for children without being required to undergo a competency test⁷⁷⁴
- The test could leave certain groups open to the possibility of abuse without recourse to justice⁷⁷⁵
- Assessment of a persons’ competence cannot be properly tested by a judge sitting alone⁷⁷⁶
- There appears to be no clear cut rules or guidelines as to how the test should be applied.⁷⁷⁷ This lack of guidelines and rules can result in inconsistency of

⁷⁷¹ Clinical & Counselling Psychology Services – Motherwell/Clydesdale Department (Number 12); Scottish Law Agents Society (Number 65)

⁷⁷² Plotnikoff & Woolfson (Number 4)

⁷⁷³ Crown Office Policy Group (Number 47)

⁷⁷⁴ Scottish Rape Crisis Network (Number 51)

⁷⁷⁵ Dundee City Council – Social Work Department (Number 40)

⁷⁷⁶ Commission for Racial Equality (Number 35)

application⁷⁷⁸ and potentially discriminatory outcomes⁷⁷⁹ with judges determining their own criteria⁷⁸⁰ or formulating their own questions⁷⁸¹

- The test does not offer any advantage to the evidential process⁷⁸²
- On the basis of the judgment in *T v T 2000 SLT 1442* which held that, when concerned with hearsay evidence, children's evidence is valuable for courts and additional barriers to the hearing of this evidence should not be in place⁷⁸³
- The test infers that the child's evidence may be unsatisfactory before they have an opportunity to give said evidence⁷⁸⁴
- Witness competence should not be a bar to admission of evidence⁷⁸⁵

167. Some of the Consultees in favour of abolition of the test advanced a number of alternatives:

- The test should be replaced by interpretation as to the weight such evidence should carry⁷⁸⁶ and whether it is reliable and credible⁷⁸⁷, after all the evidence has been heard⁷⁸⁸ and in the context of the other testimony⁷⁸⁹
 - The age, maturity and understanding of child witnesses would be factors to be taken into account in assessing the reliability of their evidence:⁷⁹⁰ proper professional advice should be taken on this matter when there is any doubt⁷⁹¹
- A person should give evidence in the normal way and leave it to the judge and/or jury to assess their competence like any other witness⁷⁹²
 - Sheriffs and Judges should be given appropriate awareness training and then they would be able to weigh the evidence of a vulnerable witness in the same way as any other witness⁷⁹³

⁷⁷⁷ Scottish Law Agents Society (Number 65)
⁷⁷⁸ Commission for Racial Equality (Number 35); Scottish Law Agents Society (Number 65)
⁷⁷⁹ Commission for Racial Equality (Number 35)
⁷⁸⁰ British Psychological Society (Number 24)
⁷⁸¹ Fiona Raitt University of Dundee – Department of Law (Number 41)
⁷⁸² Fiona Raitt University of Dundee – Department of Law (Number 41)
⁷⁸³ Scottish Child Law Centre (Number 45)
⁷⁸⁴ Barnado's Scotland (Number 42)
⁷⁸⁵ Ross, Margaret Deputy Head of School of Law University of Aberdeen (Number 25); SCRA (Number 75)
⁷⁸⁶ Dundee City Council – Social Work Department (Number 40); East Renfrewshire Council - Social Work Department (Number 57); Glasgow City Council - Social Work Services (Number 67)
⁷⁸⁷ Mental Welfare Commission for Scotland (Number 18); East Renfrewshire Council - Social Work Department (Number 57)
⁷⁸⁸ Cross Party Group in the Scottish Parliament on Men's Violence Against Women and Children (Number 37)
⁷⁸⁹ University of Dundee – Department of Law (Number 41)
⁷⁹⁰ ACPOS (Number 5); Childline (Number 6); Clinical & Counselling Psychology Services – Motherwell/Clydesdale Department (Number 12); Child & Adolescent Section of the Royal College of Psychiatrists (Scottish Division) (Number 43); Scottish Human Rights Centre (Number 50); ADSW (Number 55); Fife Council - Social Work Service (Number 59); Children 1st (Number 60); NCH Scotland (Number 64)
⁷⁹¹ Scottish Child Law Centre (Number 45); NCH Scotland (Number 64)
⁷⁹² Commission for Racial Equality (Number 35)
⁷⁹³ Disability Rights Commission (Number 58)

- Children are no more likely to lie in court than any adult and therefore their evidence should be heard and judged on its merits⁷⁹⁴
- It should be established that the witness knows the difference between truth and lies and appropriate acknowledgement made of their age and ability⁷⁹⁵
- The appropriate adult scheme should be extended to compensate⁷⁹⁶

(ii) Modification

168. As indicated, 21% (n=12) of Consultees advocated modification of the competence test for children. These Consultees commented that:

- There should be some formal and independent procedure to ensure that all child witnesses are assessed by a specialist prior to the trial⁷⁹⁷
- It may be appropriate to reformulate the competence test in terms of some pre-determinable objective measures⁷⁹⁸
- Competence should be established before a court case and not in court when a vulnerable person is already anxious and may be confused as to why the judge is asking particular questions⁷⁹⁹
- It should be either put aside completely or applied to all witnesses who meet the criteria of vulnerability⁸⁰⁰

(iii) Retention

169. Sixteen per cent (n=9) of Consultees that addressed this question were in favour of retaining the competence test for children. Suggestions advanced by these Consultees include:

- A test should be retained for all witness particularly when the issue is in dispute⁸⁰¹
- The test should be retained as at present: judges should rule on the competence of a witness but should seek expert assistance where feasible⁸⁰²
- The test helps a child's ability to distinguish between truth and lies and understand what is required of him/her in giving evidence⁸⁰³

170. A Consultee in favour of retaining the test commented that the test has to be impartial and fairly applied; however, concern was expressed it has not been applied uniformly in relation to children.⁸⁰⁴ Another suggested that there may be scope for

⁷⁹⁴ Scottish Rape Crisis Network (Number 51)
⁷⁹⁵ Scottish Human Rights Centre (Number 50)
⁷⁹⁶ Aberdeen City Council – Social Work (Number 71)
⁷⁹⁷ City of Edinburgh Council, Social Work Unit (Number 1)
⁷⁹⁸ Criminal Bar Association (Number 46)
⁷⁹⁹ Open Secret (Number 22)
⁸⁰⁰ Edinburgh & the Lothians Child Protection Office (Number 30)
⁸⁰¹ The Faculty of Advocates (Number 74)
⁸⁰² The UK Men’s Movement (Number 10); Soroptimist International of Aberdeen (Number 11)
⁸⁰³ South Lanarkshire – Social Work Resources (Number 32)
⁸⁰⁴ The Highland Council – Social Work (Number 70)

“reconstructing and redefining” a test in respect of any witness, in particular child witnesses.⁸⁰⁵

(iv) Undecided

171. Overall, two (3%) Consultees did not specify a view either way on whether the competence test for children should be abolished, modified or retained. One of these Consultees pointed out that retaining the test should be “dependent on the expertise of Sheriffs and judges who administer it.”⁸⁰⁶ This Consultee advised that Sheriffs and judges who informed the study which evaluated Child Witness Support had difficulties assessing children's competencies and suggested that practical guidance on age appropriate questioning would be useful. It was further suggested that the “comprehensive checklist on communicating with witnesses (children or young persons) and compiled by researchers Plotnikoff and Woolfson should be considered for use with similar guidance being compiled for other categories of vulnerable witnesses.” However, they also proffered the view that if adequate measures were in place to support all vulnerable witnesses there might not be any need for a competency test.⁸⁰⁷

⁸⁰⁵ The Faculty of Advocates (Number 74)

⁸⁰⁶ Clackmannanshire Council – Social Services (Number 54)

⁸⁰⁷ Clackmannanshire Council – Social Services (Number 54)

Question 25(b): Should the competence test be retained, modified or abolished for (a) children only and (b) for all witnesses?

(b) All Witnesses

Total Submissions Received	No comment made (n=25)	Consultees that commented (n=51)	Of those that commented (n=49)			
			Retain (n=9)	Modify (n=12)	Abolish (n=27)	Not Specified (n=3)
76	33%	67%	17%	24%	53%	6%

172. A third of Consultees (n=25) did not specifically address this section of Question 25. Of those that did (n=51), 53% (n=27) were in favour of abolishing the competence test for all witnesses; 24% (n=12) were in favour of modification while 17% (n=9) advocated retention. Six per cent (n=3) of Consultees did not specify a view on the matter.

(i) Abolition

173. Overall, half of the Consultees (n=27) that addressed this question were in favour of abolition of the competence test for all witnesses. In the main, sentiments expressed by Consultees in relation to abolition of the test for all witnesses echoed the views advanced in relation to abolition for child witnesses. Nevertheless, following is an overview of same:

- Retention of the test is an example of inequitable ‘justice by geography’ as it has been abolished for all witnesses in England and Wales⁸⁰⁸
- The competence test has been applied inconsistently with judges determining their own criteria⁸⁰⁹
- Witness competence should not be a bar to admission⁸¹⁰
- Assessment of a person’s competence cannot be properly tested by a judge sitting alone⁸¹¹
- The test of competence may vary between judges with inconsistent, potentially discriminatory outcomes⁸¹²
- The test does not offer any advantage to the evidential process⁸¹³
- The administering of the test leaves certain groups open to the possibility of abuse, without recourse to justice⁸¹⁴

⁸⁰⁸ Plotnikoff & Woolfson (Number 4)

⁸⁰⁹ British Psychological Society (Number 24)

⁸¹⁰ Ross, Margaret Deputy Head of School of Law University of Aberdeen (Number 25)

⁸¹¹ Commission for Racial Equality (Number 35)

⁸¹² Commission for Racial Equality (Number 35)

⁸¹³ University of Dundee – Department of Law (Number 41)

⁸¹⁴ Dundee City Council – Social Work Department (Number 40)

174. These Consultees advanced a number of suggestions as to what could replace the competence test:

- Provision of evidence with accompanying information about a person's level of understanding and how this might affect their testimony would be better procedure⁸¹⁵
- The Court should evaluate the evidence of the witness in the context of the special measures proposal⁸¹⁶
- The court should hear all pertinent evidence and weigh up the reliability of evidence given by an individual witness, including their level of maturity and understanding⁸¹⁷
- The test should be replaced with an assessment of needs⁸¹⁸
- Sheriffs and judges should be given appropriate awareness training. They would be able to weigh the evidence of a vulnerable witness in the same way as any other witness⁸¹⁹

(ii) Modification

175. As the data indicate, 24% (n=12) of Consultees that expressed a view on this matter were in favour of modification of the competence test for all witnesses. Suggestions for modification include:

- The test should be modified so that children and adults with learning disabilities are afforded the opportunity to participate in their court case⁸²⁰
- Improved case management and appropriate training for the Crown Prosecution Service and Sheriffs would enable greater understanding of a person's competence as a witness⁸²¹
- Competence should be established before a court case commences and not in court when a vulnerable person is already anxious⁸²²
- The competence test could be set aside if an appropriate assessment tool was available⁸²³
- It should be either put aside completely or applied to all witnesses who meet the criteria of vulnerability⁸²⁴

⁸¹⁵ Clinical & Counselling Psychology Services – Motherwell/Clydesdale Department (Number 12)

⁸¹⁶ British Psychological Society (Number 24)

⁸¹⁷ ACPOS (Number 5); Mental Welfare Commission for Scotland (Number 18); Commission for Racial Equality (Number 35); Cross Party Group in the Scottish Parliament on Men's Violence Against Women and Children (Number 37); Dundee City Council – Social Work Department (Number 40); Crown Office Policy Group (Number 47); East Renfrewshire Council - Social Work Department (Number 57); Fife Council - Social Work Service (Number 59)

⁸¹⁸ Arrol Park Resource Centre (Number 72)

⁸¹⁹ Disability Rights Commission (Number 58)

⁸²⁰ Shetland Islands Council – Social Care Service (Number 16)

⁸²¹ Shetland Islands Council – Social Care Service (Number 16)

⁸²² Open Secret (Number 22)

⁸²³ Ayrshire & Arran Primary Care NHS Trust (Number 34). The Consultee suggested that mentally impaired individuals should have their competencies assessed under AWIA, which would be undertaken on individual merit.

⁸²⁴ Edinburgh & the Lothians Child Protection Office (Number 30)

- In any case involving a vulnerable adult it is likely that a report will already have been obtained from a Psychologist. This report could be used to address the issue of competence if the report was identified as independent and not Crown property⁸²⁵
- “The competence test is still of value in filtering out evidence upon which no reasonable finder of fact should be prepared to rely.” It may therefore be appropriate to reformulate the test in terms of some pre-determinable objective measures⁸²⁶
- “It is difficult to legislate or to provide rules as to the ability of a witness to give evidence.” The relevance of witnesses is likely to vary enormously and it would be better to deal with each case at the judge's discretion⁸²⁷

(iii) Retention

176. Of the Consultees to address this issue, 17% (n=9) advocated retention of the competence test for all witnesses on the basis that:

- Letting the jury decide on competence (along with the other evidence) would result in the trial being protracted to the detriment of witnesses and accused alike.⁸²⁸ Also, juries may not be best equipped to make this judgement⁸²⁹
- Judges should rule on the competence of a witness but should seek expert assistance where feasible⁸³⁰

(iv) Undecided

177. Six per cent (n=3) of Consultees did not specify a view on the matter. One Consultee advanced the idea that retaining the competence test for all witnesses “would be dependent on the expertise of Sheriffs and Judges who administered it.”⁸³¹ Additionally, it was opined that if adequate measures were in place to support all vulnerable witnesses, including persons suffering from a mental illness, there might not be any need for a competency test.⁸³²

⁸²⁵ City of Edinburgh Council, Social Work Unit (Number 1)

⁸²⁶ Criminal Bar Association (Number 46)

⁸²⁷ Scottish Law Agents Society (Number 65)

⁸²⁸ Ferguson, P W (Number 3)

⁸²⁹ The Highland Council – Social Work (Number 70)

⁸³⁰ The UK Men’s Movement (Number 10); Soroptimist International of Aberdeen (Number 11)

⁸³¹ Clackmannanshire Council – Social Services (Number 54)

⁸³² Clackmannanshire Council – Social Services (Number 54)

Question 25(c): How should the courts deal with the giving of evidence by witnesses who may have mental disorder or impairment?

Total Submissions Received	No comment made (n=58)	Consultees that commented (n=18)
76	71%	29%

178. Seventy one per cent (n=58) of Consultees did not specifically address this strand of Question 25. The Consultees that did address the matter (n=18) suggested that the courts should deal with the giving of evidence through use of:

- An *amicus curiae* or intermediary to support anyone with learning difficulties or mental illness⁸³³
- Expert psychological evidence⁸³⁴
- Psycho-metric analysis in conjunction with assessment by other individuals such as a psychiatrist, psychologist, nurse or social worker, and someone from the criminal justice system such as a solicitor⁸³⁵
- The use of expert psychological or psychiatric reports should be routine⁸³⁶
- In the case of a mentally disordered witness, the court may, with the witness' consent, want to arrange a psychiatric examination. It should however be left for the judge and jury to decide what weight they give to the evidence⁸³⁷
- A similar approach to be adopted to that used in the Appropriate Adult Scheme where questioning is undertaken by the police⁸³⁸
- The procedure outlined in paragraph 7.14⁸³⁹ of the Consultation paper should be adopted⁸⁴⁰

179. It was highlighted by one Consultee that the competence test could become a hurdle which many mentally ill people find “both distressing and probably insurmountable.”⁸⁴¹

⁸³³ Soroptimist International of Aberdeen (Number 11); Aberdeenshire Council - Housing & Social Work (Number 66)

⁸³⁴ Aberdeenshire Council – Housing & Social Work (Number 66)

⁸³⁵ Community Forensic Mental Health Services (Number 62)

⁸³⁶ Crown Office Policy Group (Number 47)

⁸³⁷ Edinburgh & East of Scotland Deaf Society (Number 29)

⁸³⁸ University of Dundee – Department of Law (Number 41)

⁸³⁹ Para 7.14 states that “Evidence might still be lead about the nature and extent of the witness’ mental impairment or disorder, but it would be for the judge or jury to weigh that evidence, along with the evidence the witness had actually given, and decide whether the evidence given by the witness was reliable or credible. If the witness had not been able to understand or take the oath, that would simply be another factor to be considered.”

⁸⁴⁰ Crown Office Policy Group (Number 47); Scottish Women’s Aid (Number 56)

⁸⁴¹ Highland Users Group (Number 7)

SECTION EIGHT: RELATED ISSUES

Question 26: Should greater use be made of expert evidence in cases involving vulnerable witnesses, and if so in what circumstances?

Total Submissions Received	No comment made (n=23)	Consultees that commented (n=53)	Of those that commented			
			Yes (n=34)	No (n=11)	Yes – Conditional (n=1)	Not Specified (n=7)
76	30%	70%	64%	21%	2%	13%

180. Thirty per cent of Consultees (n=23) did not specifically address this question. Of those that did (n=53), 64% (n=34) were in favour of greater use being made of expert evidence in cases involving vulnerable witnesses. Two per cent (n=1) expressed conditional support, 21% of Consultees (n=11) were opposed to the proposal and 13% (n=7) did not specify a view.

181. The Consultees in favour of greater use being made of expert evidence in cases involving vulnerable witnesses advocated use in cases involving:

- Child sexual abuse:⁸⁴² a pilot scheme set up should be established⁸⁴³
- Abuse⁸⁴⁴
- Sexual abuse/offences⁸⁴⁵
- Rape⁸⁴⁶
- Domestic violence⁸⁴⁷
- Murder, when the accused has killed the perpetrator of domestic abuse⁸⁴⁸
- Cases involving children⁸⁴⁹: In the English case of *DPP v A and BC Chewing Gum Ltd*⁸⁵⁰ the judge summed up by saying “any jury and any justices need all the help they can get...as to effect [of something] on different children”⁸⁵¹
- Crimes of violence⁸⁵²

⁸⁴² Open Secret (Number 22); West Lothian Council – Community & Support Services (Number 28); South Lanarkshire – Social Work Resources (Number 32); Barnado’s Scotland (Number 42); Scottish Women’s Aid (Number 56)

⁸⁴³ North Lanarkshire Council – Social Work Department (Number 68)

⁸⁴⁴ Children 1st (Number 60)

⁸⁴⁵ Scottish Women’s Aid (Number 56); The Highland Council - Social Work (Number 70)

⁸⁴⁶ Scottish Women’s Aid (Number 56); Fife Council - Social Work Service (Number 59)

⁸⁴⁷ South Lanarkshire – Social Work Resources (Number 32); Scottish Women’s Aid (Number 56)

⁸⁴⁸ Scottish Women’s Aid (Number 56)

⁸⁴⁹ Scottish Women’s Aid (Number 56); Children 1st (Number 60)

⁸⁵⁰ (1967) 3 WLR 493

⁸⁵¹ Crown Office Policy Group (Number 47)

⁸⁵² Fife Council – Social Work Service (Number 59); The Highland Council - Social Work (Number 70)

- Exceptional circumstances where, for example, there is an identified difficulty in explaining a child's behaviour⁸⁵³
- Witnesses with learning disabilities,⁸⁵⁴ or hearing/sight difficulties⁸⁵⁵

182. According to Consultees, greater use of expert evidence would be advantageous as for example, it would result in the court being afforded greater scope and ability to interpret,⁸⁵⁶ human behaviour. It could also lead to a greater understanding of the “dynamics of abuse”,⁸⁵⁷ the “predatory nature of perpetrators” of child abuse,⁸⁵⁸ and the behaviour of those who have been subjected to crimes such as rape, abuse, domestic violence, etc.⁸⁵⁹ In addition, greater use of expert evidence would provide the courts with information on the long term effects such experiences have on the victim and, from a greater knowledge of what the witnesses have experienced, the court would be in a better position to understand the problems that can arise from these experiences, such as drug abuse, alcoholism, self harming, mental illness etc.⁸⁶⁰ However, there is still a need for the legal profession to receive training on the issues surrounding vulnerability,⁸⁶¹ child development and how abuse affects those involved,⁸⁶² in addition to training on the effects of domestic abuse and rape.⁸⁶³

183. Consultees suggested that (a) further research should be undertaken on the use of expert evidence;⁸⁶⁴ (b) a working party should be established to examine the measure further;⁸⁶⁵ and, (c) information on how the witnesses' disabilities have impacted on their capability within the court environment should be provided by Chartered Clinical Psychologists.⁸⁶⁶

184. Some Consultees were opposed to greater use of expert evidence in cases involving vulnerable witnesses, while others were concerned over the financial implications.

- There could be problems with conflicting expert advice being given to the court⁸⁶⁷
- It may lead to an unnecessary overburdening of the court⁸⁶⁸

⁸⁵³ City of Edinburgh Council, Social Work Unit (Number 1)

⁸⁵⁴ British Psychological Society (Number 24)

⁸⁵⁵ Scottish Association of Sign Language Interpreters (Number 17); The Scottish Council on Deafness (Number 33)

⁸⁵⁶ The City of Edinburgh Council – Social Work (Number 20)

⁸⁵⁷ Perth & Kinross Area Child Protection Committee (Number 52)

⁸⁵⁸ South Lanarkshire – Social Work Resources (Number 32)

⁸⁵⁹ South Lanarkshire – Social Work Resources (Number 32); Scottish Women’s Aid (Number 56); Children 1st (Number 60)

⁸⁶⁰ South Lanarkshire – Social Work Resources (Number 32)

⁸⁶¹ Child & Adolescent Section of the Royal College of Psychiatrists (Scottish Division) (Number 43)

⁸⁶² Children 1st (Number 60)

⁸⁶³ Cross Party Group in the Scottish Parliament on Men’s Violence Against Women and Children (Number 37)

⁸⁶⁴ Scottish Women’s Aid (Number 56)

⁸⁶⁵ Scottish Women’s Aid (Number 56)

⁸⁶⁶ British Psychological Society (Number 24)

⁸⁶⁷ ACPOS (Number 5)

- It could confuse issues and divert attention away from the evidence⁸⁶⁹
- There is a risk of making the court experience more difficult for the witness due to increased questioning⁸⁷⁰
- Witnesses may be more stressed if expert witnesses are arguing over the cases⁸⁷¹
- There would be financial implications as both parties could employ the services of an expert which, in the case of the defence, would probably be met from legal aid⁸⁷²
- Opinions could be challenged,⁸⁷³ which could lead to lengthier trials which would bring more costs to be met⁸⁷⁴
- There would be no need for greater use of expert evidence if evidence on commission was adopted⁸⁷⁵
- The proposal could lead to generalisations about how witnesses in certain categories of crime (for example, rape) behave⁸⁷⁶

185. As indicated, 13% of Consultees (n=7) were undecided on whether there should be an increase in the use of expert evidence in cases involving vulnerable witnesses. However, they did offer views on the matter:

- The use of a ‘medical model’ (that is, generalising reactions to events/actions) could be used to assess individual’s reactions to an action (for example, rape) and this could be employed to discredit a witness⁸⁷⁷
- It could lead to delays in proceedings⁸⁷⁸
- The case could become a "trial by expert": there is a danger of jurors accepting the word of experts over their own assessment of the witness⁸⁷⁹
- An accredited panel of experts should be used⁸⁸⁰
- There needs to be a change so as to remove the battle of the experts from the court context⁸⁸¹
- A party to the proceedings should have the opportunity to ask the court to appoint an expert witness. The court must have the power to grant or refuse that request, dependent on its own view as to the need for the expert⁸⁸²
- Alternatively, the decision on whether to appoint expert witnesses should rest with the court⁸⁸³

868 ACPOS (Number 5)
 869 Scottish Human Rights Centre (Number 50)
 870 Edinburgh & East of Scotland Deaf Society (Number 29)
 871 Miss Garry Robertson (Number 7); Clinical & Counselling Psychology Services – Motherwell/Clydesdale Department (Number 12)
 872 Scottish Legal Aid Board (Number 8)
 873 The UK Men’s Movement (Number 10); Glasgow City Council - Social Work Services (Number 67)
 874 Scottish Legal Aid Board (Number 8)
 875 Dumfries & Galloway Council – Social Services Department (Number 23)
 876 Criminal Bar Association (Number 46)
 877 Scottish Rape Crisis Network (Number 51)
 878 Angus Council – Social Work (Number 61)
 879 Scottish Law Agents Society (Number 65)
 880 SCRA (Number 75)
 881 SCRA (Number 75)
 882 SCRA (Number 75)

- The use of expert evidence is complex and therefore the issue would benefit from exploration through the establishment of a working group⁸⁸⁴
- The area would benefit from further research⁸⁸⁵

⁸⁸³ Angus Council - Social Work (Number 61)

⁸⁸⁴ Scottish Rape Crisis Network (Number 51)

⁸⁸⁵ Scottish Law Agents Society (Number 65)

Question 27: Should the Scottish Law Commission’s recommendations on identification evidence be implemented in full?

Total Submissions Received	No comment made (n=48)	Consultees that commented (n=28)	Of those that commented			
			Yes (n=25)	No (n=2)	Yes – Conditional (n=0)	Not Specified (n=1)
76	63%	37%	89%	7%	0%	4%

186. Sixty three per cent of submissions (n=48) did not offer any comments or suggestions in response to Question 27. Of the Consultees that addressed this question (n=28), 89% (n=25) were in favour of implementation, in full, of the Scottish Law Commission’s recommendations on identification evidence. Two Consultees expressed opposition to implementation of the recommendations while one was ‘undecided’ on the matter.

187. Consultees in favour of implementation of the recommendations of the Commission were so on the basis that the recommendations:

- “Seek to safeguard the integrity and dignity of the vulnerable witness”⁸⁸⁶
- Are vital to prevent child witnesses coming face to face with the accused⁸⁸⁷
- Are essential if special measures suggested in the consultation document are to be successful⁸⁸⁸
- Will result in a reduction in the number of court identifications⁸⁸⁹

188. One of the Consultees expressing support for implementation of the recommendations was concerned that “procedural safeguards” would be put in place in addition to the accused having the right to dispute the identification.⁸⁹⁰

189. Two Consultees were opposed to implementation of the Scottish Law Commission’s recommendations on identification evidence. According to one Consultee identification of the accused “is essential”.⁸⁹¹ The other Consultee suggested that Section 271(11) of the 1995 Act “goes far enough.” Implementation of the Law Commission’s recommendations would “place the onus on an accused person to take procedural steps to protect their rights. Identification of the accused should remain a matter for the Crown to establish positively, except where statute already provides otherwise.”⁸⁹²

⁸⁸⁶ ACPOS (Number 5)

⁸⁸⁷ Barnado’s Scotland (Number 42)

⁸⁸⁸ Scottish Rape Crisis Network (Number 51)

⁸⁸⁹ East Renfrewshire Council – Social Work Department (Number 57)

⁸⁹⁰ Scottish Law Agents Society (Number 65)

⁸⁹¹ Criminal Bar Association (Number 46)

⁸⁹² The Faculty of Advocates (Number 74)

190. The Consultee undecided on the matter expressed the view that, while the arguments in favour of implementation are persuasive and anxiety could be reduced for those with learning difficulties, the views of defence counsel need to be taken into account.⁸⁹³

⁸⁹³ British Psychological Society (Number 24)

ANNEX A: CONSULTATION MAILING LIST

Aberdeen Bar Association
Aberdeenshire Council
Aberdeen City Council
Aberdeen City Council
Aberdeen & NE Society for the Deaf
Aberdeen Rape Crisis Centre
Aberdeen Soroptimist
Aberdeen Women's Aid
Aberdeenshire Council
Aberdeenshire Women's Aid
Aberdeen Zero Tolerance Action Group
Aberlour Childcare Trust
Action of Churches Together in Scotland
Advocacy 2000
Advocacy Service Aberdeen
Affinity-Scottish Ethnic Women
African Women's Group-Aberdeen
Age Concern Scotland
Age Concern Scotland -Black & Minority Ethnic Elders Group
All Pakistani Women's Association
All Women Centre
Alzheimer Scotland Action on Dementia
Amnesty International
Angus Council
Angus Council
Angus Women's Aid
Argyll & Bute Council
Argyll & Bute Council
Argyll & Bute Women's Aid
Asian Women Group
Asian Women's Action Group
Association of Baha'I Women-Scotland
Association of Chief Police Officers in Scotland
Association of Childrens' Reporters
Association of Curators Ad Litem
Association of Directors of Social Work
Association of Scottish Police Superintendents
Ayr Rape Crisis Centre
Barnardos Scotland
Baha'I Council for Scotland
Belhaven Young Women's Group
Beyond Barriers
Body Positive (Fife)
Body Positive Tayside
Borders Primary Care Trust
Border Women's Aid
Breakthrough for Women
British Association of Social Workers
British Deaf Association (Scotland)

British Deaf Association
 British Medical Association (Scotland Office)
 British Psychological Society
 Bruce (W & A S)
 Campaign Against Domestic Violence
 Campbell Blair Drummond Trust
 Campbeltown Faculty of Solicitors
 Canongate YouthProject YoungWomen's Group
 Capability
 Capability Scotland
 CAPS Edinburgh
 Carers and National Association Scotland
 Carruthers
 Castlemilk Domestic Violence Forum
 Castlemilk Law Centre
 Catholic Parliamentary Office
 Centre for Independent Living (Glasgow)
 Central Scotland Chinese Association -
 Central Scotland Racial Equality Council
 Centre for Human Ecology
 Centre for Women's Health
 Central Scotland Rape Crisis Centre
 Childline Scotland
 Children First
 Children in Scotland
 Church Of Scotland
 Church of Scotland Guild
 Church of Scotland Offices
 Citizen's Advice Bureaux Scotland
 City Edinburgh Council-Capital City Partnership
 City of Edinburgh Council
 City of Edinburgh Council
 City of Edinburgh Council-Equalities Unit
 City of Edinburgh Council-Equalities Unit
 City of Edinburgh Council
 Clackmannanshire Council
 Clackmannanshire Council
 Clackmannanshire Women's Aid
 Clydebank Women's Aid
 Commission for Racial Equality
 Community Psychiatric Nurses Association
 Confederation of Scotland's Elderly
 Convention of Scottish Local Authorities
 Cranhill Women's Forum
 Criminal Law Group of the Faculty of Advocates
 Crisis Centre (Turnaround)
 Crossroad (Scotland) Care Attendant Schemes
 Cumbernauld & Kilsyth Women's Aid Ltd
 Cumnock and Doon Women's Aid
 Deafblind UK
 Disability Rights Commission
 District Courts Association

Drumchapel Law & Money Advice Centre
Drumchapel Women's Aid
Duff
Drylaw/Telford Women's Group
Dumbarton and Vale of Leven Disabled Women
Dumbarton Women's Aid
Dunfermline Area Abuse Survivors Project
Dunfermline Women's Aid
Dumfries and District Women's Aid
Dumfries & Galloway Council
Dumfries & Galloway Council
Dumfries & Galloway Primary Care NHS Trust
Dumfries & Galloway Rape Crisis Centre
Dumfries & Galloway Women's Forum
Dundee City Council
Dundee City Council
Dundee North Law Centre
Dundee Rape Crisis Centre
Dundee Women's Aid Collective Limited
Dunfermline District Society of Solicitors
Dunoon Faculty of Procurators
East Ayrshire Council
East Ayrshire Council
East Dunbartonshire Council
East Dunbartonshire Council
East Dunbartonshire Women's Aid
East End Community Law Centre
East Ayrshire Women's Aid
East Fife Women's Aid
East Kilbride Women's Aid
East Lothian Council
East Lothian Council
East Lothian Council Women's Network
East Lothian Women's Aid
East Lothian Faculty of Procurators
East Renfrewshire Council
East Renfrewshire Council
Edinburgh Advocacy & Representative Service
Edinburgh Association of Women Graduates
Edinburgh Association For Mental Health
Edinburgh Bar Association
Edinburgh and East of Scotland Deaf Society
Edinburgh & Lothians Racial Equality Council
Edinburgh Rape Crisis Centre
Edinburgh Women's Aid
Edinburgh Women's Equality Forum
ENABLE
Engender
Women Against Domestic Violence
Episcopal Church of Scotland
Equality Network
Equal Opportunities Commission

Equal Opportunities Committee
Ethnic Minorities Law Centre
EVA Project
Evangelical Alliance (Scotland)
Faculty of Advocates
Faculty of Procurators of Berwickshire
Faculty of Procurators of Caithness
Faculty of Procurators of Dumfriesshire
Faculty of Procs/Sols in Dundee
Faculty of Procurators of Greenock
Faculty of Procurators in Paisley
Faculty of Procs for Stewartry of Kirkcudbright
Faculty of Solicitors of Dunbartonshire
Faculty of Solicitors in Bute
Faculty of Solicitors of the Highlands
Faculty of Solicitors of Kincardine/Deeside
Faculty of Solicitors of Ross-shire & Sutherland
Faculty of Solicitors in Shetland
Faculty of West Lothian Solicitors
Falkirk Council
Falkirk Council
Falkirk Women's Aid
Falkirk and District Faculty of Solicitors
Families of Murdered Children
Fife Advocacy Project
Fife Council
Fife Council
Fife Domestic Abuse Forum
Fife Primary Care NHS Trust
Fife Racial Equality Council
Fife Women's Network
Fife Zero Tolerance Campaign
Focus on Women
Forth Valley Primary Care NHS Trust
Free Church of Scotland
Glasgow & West of Scotland Soc for the Blind
Glasgow Association For Mental Health
Glasgow Bar Association
Glasgow Caledonian University
Glasgow Chinese Women's Association
Glasgow City Council
Glasgow City Council
Glasgow Graduate School of Law
Glasgow Old People's Welfare Committee
Glasgow Rape Crisis
Glasgow Women's Aid
Group on Women Religion and Violence
Govan Law Centre
Grampian Primary Care NHS Trust
Grampian & Aberdeenshire Women's Aid
Grampian Women's Aid
Grampian Racial Equality Council

Grangepans Women's Group
Greater Glasgow Primary Care NHS Trust
Greater Easterhouse Women's Aid
W Green & Son Ltd
Haddington Women's Rural Institute
Hallglen Women's Group
Hamilton Women's Aid
Help the Aged
Hemat Gryffe Women's Aid
Heriot-Watt University
Highland Council
Highland Primary Care NHS Trust
Highland Users Group
Home Office
Inclusion Scotland
Inverclyde Council
Inverclyde Council
Inverclyde Women's Aid
Inverness Women's Aid
International Women's Group - Fife
Interpretation and Translation Service
Journal of the Law Society of Scotland
Justice for Victims (Scotland)
Kairnhill Women's Group
Key Housing Association
Kilmarnock Faculty of Solicitors
Kilmarnock Women's Aid
Kirkcaldy Law Society
Kirkcaldy Women's Aid
Lanarkshire Primary Care NHS Trust
Law Society of Scotland
Legal Services Agency
Leonard Cheshire Foundation
Lomond & Argyll Primary Care NHS Trust
Lord Advocate
Lothian Association for the Care of the Elderly
Lothian Coalition of Disabled People
Lothian Primary Care NHS Trust
Manic Depression Fellowship Scotland
Men's Aid
The Mental Health Foundation
Mental Welfare Commission for Scotland
Meridian
Midlothian Council
Midlothian Council
Midlothian Women's Aid
Moirra Anderson Foundation
Monklands Women's Aid
Moray Council
Moray Council
Moray Faculty of Solicitors
Moray Women's Aid

Mothers of Sexually Abused Children
Motherwell Women's Aid
Napier University
The National Deaf Blind League
National Library of Scotland
NCH Scotland
NEECAG
North Ayrshire Council
North Ayrshire Council
North Ayrshire Law Centre
North Ayrshire Women's Aid
North Dundee Law Centre
North Lanarkshire Council
North Lanarkshire Council
NSF(Scotland)
Nuffield Centre for Community Care
NSPCC
Oban Faculty of Solicitors
Open Secret
Orkney Islands Council
Orkney Islands Council
Outright Scotland
Paisley Law Centre
Paisley and District Women's Aid
Pathway Project
Penumbra
Perth & Kinross Council
Perth & Kinross Council
Perth Rape Crisis Centre
Perth Women's Aid
PETAL
PHACE WEST
Positive Action in Housing
The Princess Royal Trust
Procurator Fiscals Society
Public Defence Solicitor's Office
Quarrier's Homes
Rape and Abuse Line
Rape Counselling and Resource Centre
Rape Crisis Centre
Renfrewshire Council
Renfrewshire Council
Renfrewshire & Inverclyde Primary Care Trust
Robert Gordon University
Ross-shire Women's Aid
Royal College of Physicians
Royal Faculty of Procurators in Glasgow
Royal National Institute for the Blind
Royal National Institute for Deaf People
R & R Urquhart
SACRO
SAGE

Saheliya
The Samaritans
Save the Children Scottish Council Office
SAY Women
SCID
SCOLAG
Scotland Older People's Advisory Group
Scots Law Times
Scottish Action on Dementia
Scottish Association for the Deaf
Scottish Association of Care Home Owners
Scottish Association of Children's Curators
Scottish Assoc. of Sign Language Interpreters
Scottish Association for Mental Health
Scottish Association for Study of Delinquency
Scottish Borders Council
Scottish Borders Council
Scottish Child Law Centre
Scottish Children's Reporter Administration
Scottish Civic Forum
Scottish Civil Law Reports
Scottish Churches Parliamentary Office
Scottish Conservative & Unionist Central Office
Scottish Consortium on Crime/Criminal Justice
Scottish Consumer Council
Scottish Council on Alcohol Ltd
Scottish Council for Civil Liberties
Scottish Council on Deafness
Scottish Court Service Agency
Scottish Criminal Law Reports
Scottish Down's Syndrome Association
Scottish Ex-Service Charitable Organisations
Scottish Green Party
Scottish Hansel Village Ltd
Scottish Human Rights Centre
Scottish Institute of Human Relations
Scottish Inter Faith Council for Scotland
Scottish Labour Party
Scottish Law Agents' Society
The Scottish Law Gazette
Scottish Legal Action Group
Scottish Legal Aid Board
Scottish Liberal Democrats
Scottish National Party
Scottish Old Age Pensioners Association
The Scottish Parliament
Scottish Parliament Information Centre
Scottish Pensions Association
Scottish Police College
Scottish Police Federation
Scottish Prison Officers Association
Scottish Prison Service

Scottish Law Commission
 Scottish Daily Newspaper Society
 Scottish Media Lawyers Society
 Scottish Pensioners Forum
 Scottish Publishers Association
 Scottish Refugee Council
 Scottish Safeguarders Association
 Scottish Society of Editors
 Scottish Socialist Party
 Scottish Trade Union Council
 Scottish Traveller Consortium
 Scottish Trust for the Physically Disabled Ltd
 Scottish Women's Action Network
 Scottish Women's Aid
 Scottish Women's Rural Institutes
 SCVO
 SCVO
 SENSE Scotland
 Shakti Women's Aid
 Shelter Scotland
 Sheriff Principal's Association
 Shetland Islands Council
 Shetland Islands Council
 Shetland Women's Aid
 Sheriffs' Association
 SHS Ltd
 Sisterhood (Edinburgh)
 Society of Advocates in Aberdeen
 Society of Solicitors Airdrie
 Society of Solicitor Advocates
 Society of Procurators and Solicitors of Angus
 Society of Solicitors of Ayr
 Society of Solicitors of Banffshire
 Society of Solicitors of Clackmannanshire
 Society of Sols/Procs for Eastern District Fife
 Society of Solicitors of Hamilton and District
 Society of Solicitors in Orkney
 Society of Procs/Sols in City/County of Perth
 Society of Sols in Peterhead/Fraserburgh
 Society of Procs/Sols of Roxburgh
 Society of Sols in the Shires of Selkirk/Peebles
 Society of Sols/Procs of Stirling
 Society of Solicitors to Supreme Courts of Scotland
 Society of Writers to HM Signet
 Office of the Solicitor to the Scottish Executive
 Soroptimist International of Dundee
 Soroptimist International
 Soroptimist International
 Soroptimist International
 Soroptimist International Scotland South
 Soroptimist International Scotland North
 South Ayrshire Council

South Ayrshire Council
South Ayrshire Women's Aid
South Lanarkshire Council
South Lanarkshire Council
SPRIG
Stipendiary Magistrates
Stirling Council
Stirling Council
Stirling Women's Aid
Stonewall Scotland
Stonewall Youth Project
Strathclyde Asian Women's Association
Strathclyde Elderly Forum
Strathclyde Forum on Disability
Strathclyde Gay and Lesbian Switchboard
Strathkelvin Association of Solicitors
STUC Women's Committee
Students Association Women's Group
The Talbot Association
Tayside Primary Care NHS Trust
Tayside Racial Equality Council
TGWU (Scotland)
Thistle Foundation
Tinlin
UK Asian Women's Conference
UNISON Scotland
United Kingdom Men's Movement (Scotland)
University of Aberdeen
University of Abertay Dundee
University of Cambridge
University of Dundee -PAMIS
University of Dundee
University of Edinburgh
University of Glasgow
University of Paisley
University of Stirling
University of Strathclyde
Victim Support Scotland
VOCAL
Waverley Care Trust
West Dunbartonshire Council
West Dunbartonshire Council
W Dumbarton Domestic Abuse Partnership
West Lothian Women's Aid
West of Scotland Community Relations Council
West of Scotland Seniors Forum
Western Isles Faculty of Solicitors
Western Isles Islands Council
Western Isles Islands Council
Western Isles Women's Aid
West Lothian Council
West Lothian Council

Who Cares? Scotland
Wigtown District Faculty of Solicitors
Wigtownshire Women's Aid
Women in the Community
Women's Forum Scotland
Women's National Commission
Women's Rape and Sexual Abuse Centre
Women's Rights Project
Women's Royal Voluntary Service
Women's Support Project
Women Supporting Women
Womenzone
Young Woman's Project
Young Women's Centre
Zero Tolerance Charitable Trust

ANNEX B: LIST OF CONSULTEES

Submission Number	Name	Organisation Title	Category
1	Margaret Allison	City of Edinburgh Council Social Work Unit	c) Local Authority/Social Work
2	Confidential		
3	Peter Ferguson	Advocate	h) Other Legal
4	Joyce Plotnikoff	Consultants in Management, ICT and Law	f) Academic
5	William Rae – Chief Constable	Association of Chief Police Officers in Scotland - ACPOS	e) Professional Association
6	Anne Houston – Director	Childline	b) Voluntary Organisation
7	Garry Johnston (Miss) – Volunteer	Highland Users Group	b) Voluntary Organisation
8	Tom Murray – Director Legal Services	Scottish Legal Aid Board	d) Public/ Statutory Body
9	Sheila Noble	Fife Domestic Abuse Forum	b) Voluntary Organisation
10	George McAulay – Chairman	The U.K. Men's Movement	b) Voluntary Organisation
11	Audrey Masson	Soroptimist International of Aberdeen	e) Professional Association
12	Dr K E Anderson – Consultant Clinical Psychologist	Clinical & Counselling Psychology Services, NHS Lanarkshire	d) Public/ Statutory Body
13	Fiona Sandford – Chief Executive Officer	Glasgow & West of Scotland Society for the Blind	e) Professional Association
14	J B Raeburn – Director	The Scottish Daily Newspapers Society	e) Professional Association
15	Susan M Duff - Secretary	Society of Solicitors & Procurator for Eastern District of Fife	h) Other legal
16	Head of Social Work	Shetland Islands Council Community Services Dept	c) Local Authority
17	Doreen Mair - Director	Scottish Association of Sign Language Interpreters	b) Voluntary Organisation
18	Alison McRae – Secretary to the Commission	Mental Welfare Commission for Scotland	d) Statutory Body
19	Brenda Doyle	ADSW Children & Families Standing Committee	c) Local Authority/Social Work
20	Leslie McEwan – Director	The City of Edinburgh Council	c) Local Authority/ Social Work
21	Jennifer Zellick – Professor	University of Sussex – Centre of Legal Studies	f) Academic
22	Pauline McGee – Development Officer	Open Secret	b) Voluntary Organisation
23	Daniel McKeever	Dumfries & Galloway Council Social Services Dept	c) Local Authority/ Social work
24	Dr Nigel Beail	British Psychological Society	e) Professional Association
25	Margaret Ross – Deputy Head of Law	Aberdeen University	f) Academic
26	Janette Gardner - President	National Schizophrenia Fellowship (Scotland)	b) Voluntary Organisation
27	Sallyanne Duncan – Vice Chair	Society of Editors (Scotland)	e) Professional Association

Submission Number	Name	Organisation Title	Category
28	Grahame Blair – Head of Social Policy	West Lothian Council	c) Public/ Statutory Body
29	Gill Wood – PA to Director	Edinburgh & East of Scotland Deaf Society	b) Voluntary Organisation
30	Martin Henry – Child Protection Co-ordinator	Edinburgh & Lothian Child Protection Office	c) Local Authority/ Social Work
31	Irene Guild	The Scottish Association for the Study of Delinquency	e) Professional Association
32	Sandy Cameron – Executive Director	South Lanarkshire Council Social Work	c) Local Authority/ Social Work
33	Lilian Lawson - Director	The Scottish Council on Deafness	d) Other public/ Statutory body
34	Dr Allan Gunning – Chief Executive	Ayrshire & Arran NHS Trust	d) Other Public/ Statutory body
35	Chris Oswald - Public Policy Officer	Commission for Racial Equality	d) Other Public/ Statutory body
36	Cath Kane	Women supporting Women	b) Voluntary Organisation
37	Gil Paterson MSP - Covenor	Cross Party Group in the Scottish Parliament on Men's violence against women and children	b) Voluntary Organisation
38	Wilma Fraser – Disability Service Officer	Argyll & Bute Council	c) Local Authority/ Social Work
39	Rennie McLean – Principal Officer	North Ayrshire Criminal Justice Services	c) Local Authority/ Social Work
40	Graham Oliver - (on behalf of Director of Social Work)	Dundee City Council	c) Local Authority/ Social Work
41	Fiona Raitt	University of Dundee - Department of Law	f) Academics
42	Douglas Hamilton - Research & Policy Officer	Barnado's Scotland	b) Voluntary Organisation
43	Dr Sandra Davies - Chair	Child & Adolescent Section of the Royal College of Psychiatrists (Scottish section)	e) Professional Association
44	Douglas J Keil QPM – General Secretary	Scottish Police Federation	e) Professional Association
45	Alison Cleland	Scottish Child Law Centre	b) Voluntary Organisation
46	John Hamilton - Treasurer	Faculty of Advocates Criminal Bar Association	h) Other legal
47	Susan Burns	Crown Office Policy Group	h) Other legal
48	Bill O'Neill - Scottish Secretary	British Medical Association	e) Professional Assoc.
49	Deidre Daw	Who Cares Scotland	b) Voluntary Organisation
50	Rosemarie McILwhan – Director	Scottish Human Rights Centre	b) Voluntary Organisation
51	Sandy Brindley	Scottish Rape Crisis Network	b) Voluntary Organisation
52	Sharon Nicoll	Perth & Kinross Child Protection Committee	c) Local Authority/ Social Work
53	Barry Jackson - Policy and information officer	Victim Support Scotland	b) Voluntary Organisation
54	Ian Shovlin - Performance & Monitoring Officer	Clackmannanshire Council	c) Local Authority / Social Work

Submission Number	Name	Organisation Title	Category
55	David Crawford - Director of Social Work	Association of the Directors of Social Work	e) Professional Association
56	Legal Issues Policy & Development Group of SWA	Scottish Women's Aid	b) Voluntary Organisation
57	Wendy Harrington on behalf of Social Work Directorate	East Renfrewshire Council	c) Local Authority/ Social Work
58	Lynn Welsh - DRS Scottish Solicitor	Disability Rights Commission	d) Other public/ statutory body
59	Mike Sawyer - Head of Social Work	Fife Council	c) Local Authority / Social Work
60	Natalie Morgan - Klein	Children 1st	b) Voluntary Organisation
61	W B Robertson - Director of Social Work	Angus Council	c) Local Authority/ Social Work
62	Paul Gilius - Team Leader	Community Forensic Mental Health Services	d) Other public/ statutory body
63	Paul Martin - Chief Executive	Highland Primary Care NHS Trust	d) Other public/ statutory body
64	Alison Clancy - (on behalf of head of public policy)	NCH Scotland	b) Voluntary Organisation
65	A Patrick Fordyce	Scottish Law Agents Society	h) Other legal.
66	Colin Mackenzie - Director of Housing & Social Work	Aberdeenshire Council	c) Local Authority/ Social Work
67	Rosie O'Connor - Director of Social Work Services	Glasgow City Council	c) Local Authority/ Social Work
68	Margaret French - Service Manager (Children & Families)	North Lanarkshire Council	c) local Authority/ Social Work
69	David Crawford - Director of Social Work	Renfrewshire Council	c) Local Authority / Social Work
70	Harriet Dempster – Director of Social Work	The Highland Council	c) Local Authority/ Social Work
71	Jenny Bew – Social Work Manager	Aberdeen City Council	c) Local Authority/ Social Work
72	Dr Colin McLaren – Clinical Psychologist	Arrol Park Resource Centre	c) Local Authority/ Social Work
73	Confidential		
74	Michelle Barbour, Deans Secretariat	Faculty of Advocates	e) Professional Association
75	Alan Miller, Principal Reporter	Scottish Children's Reporter Administration (SCRA)	d) Other Public/Statutory Body
76	Michael P Clancy	The Law Society of Scotland	e) Professional Association

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