

CHAPTER 16 - CHILDREN

A new Chapter 16 dealing with children is now issued.

The new Chapter reflects legislative changes to date, current policy and best practice. It will be kept under review by the Standing Committee on Children and any proposals for amendments or additions should be made to that Committee.

One matter dealt with is our dealings with the Children's Reporter. We have a clear policy on which cases should be passed to the Reporter (16.17) and should minimise any delay in so doing (16.18). This matter is emphasised as the Scottish Children's Reporter Association is currently examining all aspects of the children's hearing system with a view to consistency of practice and the reduction of delay and we can and should assist in the achievement of this aim in relation to the cases we deal with.

LEGISLATIVE CHANGES

The Criminal Procedure (Scotland) Act 1995 consolidates certain enactments relating to criminal procedure in Scotland. That Act came into force on 1 April 1996 and refers to certain provisions in the Children (Scotland) Act 1995 which came into force on 1 November 1996 (Part 1) and 1 April 1997 (Parts II and III).

The Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 provides for repeals, consequential amendments and transitional matters in connection with the consolidation of enactments including the Criminal Procedure (Scotland) Act 1995 and the Children (Scotland) Act 1995.

The Criminal Law (Consolidation) (Scotland) Act 1995 consolidates the law in relation to certain types of criminal offences, including incest and related offences (section 1-4), sexual offences against children (section 5 and 6) and offences in connection with procuring and prostitution (sections 7-12). The offences specified in sections 5-12 replace the corresponding provisions of the Sexual Offences (Scotland) Act 1976. Which was repealed by the Crime and Punishment (Scotland) Act 1997.

The Crime and Punishment (Scotland) Act 1997 amends the Criminal Law (Consolidation) (Scotland) Act 1995 by increasing the maximum penalty of certain sexual offences against children (Section 14) and amends the Criminal Procedure (Scotland) Act 1995 in relation inter alia to proof of age (Section 27), the use of alternative means of giving evidence (Section 29), liberation of arrested children by the police (Section 55) and remand or committal of children (Section 56). These provisions came into force on 1 August 1997.

Note: Throughout the Chapter, the Criminal Procedure (Scotland) Act 1995 and the Crime and Punishment (Scotland) Act 1997 are referred to as "the 1995 Act" and "the 1997 Act" respectively.

CHAPTER 16 - CHILDREN

PART 1: INTRODUCTION AND DEFINITIONS

16.00 INTRODUCTION

This chapter deals with the subject of children. Part 1 considers general matters affecting children both as offenders and witnesses, Part II deals with the child offender and Part III deals with the child witness. The chapter is supplemented by annexes which are intended to provide a practical framework in respect of particular issues.

16.01 UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

The Convention was ratified by the United Kingdom in December 1991 and came into effect on 15 January 1992. It recognises and guarantees certain fundamental rights of the child. Article 1 defines a child as a human being under the age of 18 years unless, under the law applicable to the child, majority is attained earlier. Article 3 provides that in all actions concerning children, including actions in courts of law, the best interests of the child shall be a primary consideration. This has to be borne in mind when dealing with witnesses or accused under 18 years of age.

16.02 CHILDREN AT COMMON LAW

The common law crime of lewd, indecent and libidinous practices and behaviour involves conduct directed at children under the age of puberty, which is 12 years for girls and 14 years for boys. The age of the child is not however critical provided the conduct falls within the scope of the crime of shameless indecency. Where the child is below the age of puberty, the nature of the conduct and the age of the child will be

sufficient; where however the child is at or above the age of puberty, something else will be needed to demonstrate the quality of shamelessness which is required to render the conduct criminal at common law (Batty -v- HMA 1995 SCCR 525).

16.03 STATUTORY DEFINITION OF CHILD

For the purposes of the 1995 Act (except Section 46(3) and Schedule 1) "child" is defined by section 307(1) as having the meaning assigned to it by section 93(2)(b) of the Children (Scotland) Act 1995, namely,

- (i) a child under 16;
- (ii) a child aged 16 or 17 who is subject to a supervision requirement;
- (iii) a child whose case has been referred to a children's hearing by virtue of section 33 of that Act (which deals with children moving between England, Wales or Northern Ireland and Scotland)

The definition of a child in other statutes may differ and the relevant statute should be checked.

16.04 PRESUMPTION OF AGE

- (a) Age Specified in Indictment or Complaint

Section 255A of the 1995 Act as inserted by Section 27 of the 1997 Act provides that where the age of any person is specified in an indictment or complaint, the age shall, unless challenged by preliminary objection (or later in summary proceedings in special circumstances), be held as admitted. This provision affects both the complainer and

accused.

(b) Age Not Specified in Indictment or Complaint:-

(i) Accused

Section 46(1) of the 1995 Act provides that where an accused person is brought before the court and it appears to the court that he is a child, the court must make due enquiry as to his age. Thereafter the age presumed or declared by the court to be his age shall be deemed to be his age for the purposes of the 1995 Act or the Children and Young Persons (Scotland) Act 1937.

(ii) Accused or Complainer

Section 46(3) provides that in relation to offences

- (a) under the Children and Young Persons (Scotland) Act 1937
- (b) mentioned in paragraphs 3 and 4 of Schedule 1 to the 1995 Act
- (c) under Sections 1, 10(1) to (3) or 12 of the Criminal Law (Consolidation) (Scotland) Act 1995

where it is alleged that the accused or complainer was a child of a specified age at the date of the offence and this appears to the court to have been the case, a rebuttable presumption to that effect shall arise.

16.05 AGE OF CRIMINAL RESPONSIBILITY

No child under the age of 8 years can be guilty of any offence (Section 41 of the 1995 Act).

PART II: CHILD OFFENDERS

16.06 DETENTION/ARREST: INTIMATION TO AND ACCESS BY PARENT

In terms of Section 15(4) of the 1995 Act, where a child is detained or arrested the police are required to intimate this fact to the child's parent without delay and the parent must be permitted access to the child except where there is reasonable cause to suspect that parent of involvement in the offence. In that situation access can be limited or refused where the police consider that such access might hamper further investigation or may be detrimental to the well-being of the child.

16.07 POLICE QUESTIONING

The admissibility of statements made to the police by children in police custody is governed by the normal rules of evidence. In short, admissibility will be determined by fairness - see for example Cadona -v- HMA 1996 SCCR 300.

16.08 PREVENTION FROM ASSOCIATION WITH CRIMINALS

Section 42(9) of the 1995 Act provides that where a child is detained in a police station or being conveyed to or from a criminal court or waiting before or after attendance in such court he must be prevented from associating with an adult accused (not being a relative) unless jointly charged with that adult.

16.09 CARE OF FEMALE CHILDREN

Section 42(10) of the 1995 Act provides that a female child shall, while detained, being conveyed or waiting as mentioned in 16.08 above, be kept under the care of a woman.

16.10 ARREST: INTIMATION TO

PARENT OF COURT APPEARANCE

Where a child is arrested, the police are required by Section 42(3) of the 1995 Act to cause his parent or guardian, if found, to be warned to attend the court before which he will appear. Attendance at all stages is thereafter required unless the court is satisfied that this requirement is unreasonable (Section 42(2)) or the child has been removed from the care or charge of his parent by an order of court (Section 42(6)).

16.11 LIBERATION ON UNDERTAKING/UNCONDITIONAL LIBERATION/DETENTION IN CUSTODY

In terms of Section 43 of the 1995 Act as amended by Section 55 of the 1997 Act, where a child has been apprehended and the police intend to submit a report to the Procurator Fiscal, he may be

- (a) liberated on a written undertaking to appear at a diet, or
- (b) liberated unconditionally, or
- (c) detained in custody.

Where the child is liberated on an undertaking, the child or his parent or guardian must sign the undertaking. A breach of this undertaking is an offence by the child under Section 43(6) of the 1995 Act but he can only be penalised for this breach if and when convicted of any charge on which he was liberated.

In terms of Section 43(3) of the 1995 Act, a child is not to be liberated where

- (a) the charge is one of homicide or other grave crime;
- (b) it is necessary in his interest to remove the child from association with a reputed criminal or

prostitute; or

- (c) there is reason to believe that his liberation would defeat the ends of justice.

16.12 DETENTION IN PLACE OF SAFETY

In terms of Section 43(4) of the 1995 Act, where a child is not liberated he must be kept in a place of safety other than a police station until he can be brought before a sheriff unless the police certify that

- (a) it is impracticable to do so;
- (b) the child is of so unruly a character that he cannot safely be so detained; or
- (c) it is inadvisable to so detain the child because of his health or mental or bodily condition.

This certificate must thereafter be produced to the court when the child appears.

REPORTING OF OFFENCES**16.13 OFFENCES WHICH THE POLICE MUST REPORT TO PROCURATORS FISCAL**

The Lord Advocate has issued a direction to Chief Constables (copied at Annex 2) concerning the reporting of offences alleged to have been committed by children. In terms of this direction, the following categories of offences are to be reported to Procurators Fiscal for consideration of prosecution:-

- (1) SERIOUS OFFENCES, being offences which are required by law to be prosecuted on indictment or are so serious as normally to give rise to solemn proceedings;

- (2) certain ROAD TRAFFIC OFFENCES, namely offences alleged to have been committed by children aged 15 which, in the event of conviction, oblige or permit a court to order disqualification from driving (and which are not merely minor offences involving discretionary disqualification); and
- (3) OFFENCES BY CHILDREN AGED 16 OR 17 WHO ARE UNDER THE SUPERVISION OF A CHILDREN'S HEARING

In relation to cases outwith the above categories, the police retain a discretion to report where, for special reasons, it is thought that prosecution might be considered. These reasons must be clearly stated in the police report.

16.14 CASES REFERRED BY THE CHILDREN'S REPORTER

Cases outwith the above categories may be brought to the attention of Procurators Fiscal by Reporters for consideration of prosecution where the Reporter is of the view that the child can no longer appropriately be dealt with by him.

PROSECUTION OF CHILDREN

16.15 AUTHORITY FOR PROSECUTION

Section 42(1) of the 1995 Act provides that no child under the age of 16 years shall be prosecuted for any offence except on the instructions of the Lord Advocate, or at his instance. Such instructions may be specific to a particular case or general for certain types of offences (M v Dean 1974 SLT 229). See also Paragraphs 16.19 to 16.21.

16.16 JURISDICTION OVER CHILDREN

Section 42(1) of the 1995 Act provides that no court other than the High Court and the Sheriff Court shall have jurisdiction over a child under 16 for an offence. Accordingly, a child under 16 cannot be prosecuted in the District Court.

There is no restriction on the forum for prosecution of children aged 16 or over.

16.17

16.18 LIAISON WITH THE CHILDREN'S REPORTER

Procurators Fiscal are required to liaise with the Reporter concerning cases against children who are reported for consideration of proceedings. Such liaison should take place as a matter of urgency so as to avoid any unnecessary delay in dealing with these cases.

In discussions with the Reporter, Procurators Fiscal should bear in mind the policy guidelines detailed in paragraph 16.17.

Where this liaison results in a decision that a case should be retained meantime by the Procurator Fiscal with a view to precognition and reporting to Crown Counsel, this precognition and reporting should be completed as soon as possible in order that if the matter is ultimately referred to the Reporter, the delay in his dealing with it is kept to a minimum. Such cases often involve allegations of sexual abuse or violence by children upon other children.

Any report to Crown Office for instructions on proceedings against a child should contain the views of the Reporter as well as the recommendations of the Procurator Fiscal.

LORD ADVOCATE'S AUTHORITY FOR

PROSECUTION OF CHILDREN**16.19 GENERAL INSTRUCTIONS**

As indicated in paragraph 16.15, prosecution of a child under 16 can only proceed on the general or specific instructions of the Lord Advocate. There are general instructions enabling Procurators Fiscal to prosecute a 15-year-old child reported for an offence falling within category 2 of the direction to Chief Constables (see paragraph 16.13) and such a case does not therefore require to be reported to Crown Office before proceedings are commenced. Category 2 involves road traffic offences which, in the event of conviction, oblige or permit a court to order disqualification from driving. Proceedings for such offences should be taken only if the Procurator Fiscal considers that

- (a) it would be in the public interest to obtain a disqualification which would still be in force when the child becomes 16 years and
- (b) in the event of a conviction it is likely that the court will impose such a disqualification.

16.20 SPECIFIC INSTRUCTIONS

Cases which do not come within the parameters set out in paragraph 16.19 must be referred to Crown Office for specific instructions. The nature of the instructions required depends on the age of the child as follows:-

CHILDREN UNDER 13

Where a report is received concerning a child who was under the age of 13 years at the time of the offence, the prior, express authority of the Lord Advocate must be obtained before proceedings can be taken. Accordingly where proceedings are

considered appropriate, the matter must be reported at once to Crown Office for instructions. In cases of urgency, for example where the child is in custody, such a report should be submitted to the High Court Unit at Crown Office by fax or by telephone.

CHILDREN AGED 13, 14 AND 15

Subject only to paragraph 16.19, no proceedings may be taken against a child aged 13, 14 or 15 years without the instructions of the Lord Advocate or Crown Counsel. Instructions must be obtained before proceedings are commenced except where a child is in custody and the Procurator Fiscal considers that immediate solemn proceedings are justified, in which case the child should be placed on petition and the matter reported to Crown Office within 3 days for instructions.

Where solemn proceedings have been instructed as described above and the Procurator Fiscal thereafter considers that the matter should be reduced to summary complaint, Crown Counsel's instructions should be obtained.

16.21 PROCEEDINGS AGAINST A CHILD ACTING ALONG WITH AN ADULT

In cases where a child is accused of committing an offence while acting along with an adult, the police should report the case to both the Reporter and the Procurator Fiscal for their respective interests. Reporters and Procurators Fiscal should consult with each other about such cases. It should be borne in mind that if the child and adult are dealt with separately and both deny guilt, considerable inconvenience may be caused to witnesses.

For the avoidance of doubt, it should be

noted that paragraphs 16.19 and 16.20 apply in the case of a child who is accused along with an adult.

In such cases where the child is dealt with by the Reporter, the Procurator Fiscal should advise the Reporter of the decision on proceedings against the adult, and, where appropriate, discuss access to the productions. (See Protocol at Annex 4A).

SPECIAL PROCEDURAL PROVISIONS FOR THE PROSECUTION OF CHILDREN

16.22 NOTICE TO LOCAL AUTHORITY OF CHARGE AGAINST A CHILD

Section 42(7) of the 1995 Act provides that where a child is to be brought before a court, notification of the day and time when, and the nature of the charge on which, the child is to be brought shall be sent by the Chief Constable of the area in which the offence is alleged to have been committed to the local authority for the area in which the court will sit.

The local authority is then required to submit a background report to the court (Section 42(8)).

16.23 NOTIFICATION TO SHERIFF CLERK

Procurators Fiscal should ensure that when a child is to be prosecuted, the Sheriff Clerk is notified in advance to allow him to make such arrangements for the child's appearance as will ensure compliance with Sections 42(9) and (10) and 142(1) of the 1995 Act. (See paragraphs 16.08, 16.09 and 16.24).

16.24 PROCEEDINGS AGAINST CHILDREN

Section 142(1) of the 1995 Act provides that where summary proceedings are brought in respect of an offence alleged to have been committed by a child (as defined

in paragraph 16.03), the Sheriff shall sit either in a different building or room from that in which he usually sits or on different days from those on which other courts in the building are engaged in criminal proceedings and that no persons shall be present except -

- (a) members and officers of the court;
- (b) parties to the case before the court, their solicitors and counsel, and witnesses and other persons directly concerned in that case;
- (c) bona fide representatives of the press; and
- (d) such other persons as the court may specially authorise to be present.

This provision does not apply where the child is charged jointly with an adult (Section 142(5)).

Failure to comply with this Section constitutes a procedural irregularity but does not produce a fundamental nullity (Heywood v B 1994 SCCRC 554).

16.25 DUTIES OF PARENT: ATTENDANCE AT COURT AND SECURITY FOR GOOD BEHAVIOUR

The parent or guardian of a child who is prosecuted is normally required to attend court at all stages (Section 42(2) of the 1995 Act). In custody cases, notification of the requirement to appear at the first calling should be given by the police (Section 42(3)) and Procurators Fiscal dealing with such cases should ensure that reasonable steps have been taken to give such notification. In cited cases the Procurator Fiscal should either send notification via the police or send it direct to the parent or guardian. A suggested style of notification is given at Annex 5.

The parent or guardian of a child charged with an offence may be required by the court in terms of Section 45(1) of the 1995 Act to give security for his co-operation in securing the child's good behaviour.

A parent or guardian may assist an unrepresented child in conducting his defence (Rule 6.3 of Act of Adjournal (Criminal Procedure Rules) 1996).

16.26 RESTRICTION ON REPORTING OF PROCEEDINGS INVOLVING CHILDREN

Section 47 of the 1995 Act prohibits, in relation to a child accused or complainer,

- (1) the disclosure of his name, address or school or any other particulars calculated to identify him in any newspaper, radio or television report of the proceedings and
- (2) the publication of a picture of him

unless the court or the Secretary of State lifts this prohibition. Further details are given in Annex 8.

16.27 BAIL

Article 37(b) of the United Nations Convention on the Rights of the Child provides that arrest, detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest period of time. Accordingly, a child accused should be released on bail or ordained to appear unless there are compelling reasons for having him detained pending trial (in which case see paragraphs 16.29 and 16.30).

16.28 SPECIAL CONDITIONS OF BAIL

Procurators Fiscal should ensure that special conditions of bail involving residence in secure accommodation are

not imposed. Historically, this type of condition was imposed as the courts did not have power to order committal to a local authority for detention in secure accommodation. The granting of bail subject to such a condition is equivalent to a remand in custody and the custody time limits apply. (K- v- HMA 1991 SCCR 343). Section 51 of the 1995 Act now enables the court to commit a child to secure accommodation. Section 32(5) gives the High Court the same power when disposing of a bail appeal.

Where a bail condition requiring residence in secure accommodation is imposed, Procurators Fiscal should appeal and immediately report the position to Crown Office.

16.29 REMAND AND COMMITTAL OF CHILDREN

In terms of Section 51 of the 1995 Act as amended by Section 56 of the 1997 Act, where a court remands or commits a child for trial or for sentence and does not release him on bail or ordain him to appear, the court shall

- (1) if he is not certified by the court as unruly or depraved and is
 - (a) under 16 - commit him to an appropriate local authority to be detained in secure accommodation (where necessary) or a suitable place of safety
 - (b) over 16 and under supervision - commit him to an appropriate local authority to be detained as in (a) above or to prison
- (2) if he is over 14 and is certified by the court as unruly or depraved, commit him to prison (the remand centre alternative specified in Section 51 not being available as there are currently no remand centres in

Scotland).

16.30 UNRULY CERTIFICATES

Procurators Fiscal should not seek to have a child over 14 certified by the court in terms of Section 51 of the 1995 Act as unruly or depraved (certification below that age being incompetent) unless there are sound reasons for so doing. The result of such certification will be that the child will be committed to prison and this will only be appropriate in exceptional cases. Accordingly, where a child is reported in custody and certified by the police as unruly in terms of Section 43(4) of the 1995 Act, Procurators Fiscal should reconsider the question of unruly certification taking into account all information from the police, the Reporter and the local authority. In most cases it will be preferable for a child to be committed to a place of safety or, if that is considered inadequate, secure accommodation. Unruly certification should only be sought where the child is so unruly that he cannot safely be committed to secure accommodation (see for example M, Petitioner 1996 SCCR 92).

Each local authority will have provided the courts and Procurators Fiscal in their area with a list of suitable accommodation for children and the name of a local authority officer who can advise on whether such accommodation is available. Prior to the child's court appearance, Procurators Fiscal should confirm with the local authority that accommodation is available and is, if necessary, secure.

In terms of Section 43(4) any police certificate that a child is unruly must be produced to the court before which the child is brought.

It should be noted that an unruly certificate attaches to the warrant for committal; thus, in appropriate solemn cases it will be

necessary to renew a motion for such certification at full committal.

SENTENCING

16.31 PREVIOUS APPEARANCES BEFORE CHILDREN'S HEARINGS

In any case in which a child or adult is prosecuted, no reference should be made in the notice of previous convictions to any previous appearance before a children's hearing. Procurators Fiscal can however advise the court of such appearances in appropriate circumstances, e.g. at bail applications or when informing the court about a convicted accused's personal history.

16.32 REFERENCE AND REMIT TO CHILDREN'S HEARING

In terms of Section 49 of the 1995 Act where a child who is not subject to a supervision requirement pleads guilty to or is found guilty of an offence, the court may:

- a) remit the case to the Principal Reporter to arrange for the disposal of the case by a children's hearing, or
- b) request the Principal Reporter to arrange a children's hearing to obtain its advice as to the treatment of the child, whereupon the court, after consideration of such advice, may itself dispose of the case or remit it to the Principal Reporter to arrange for the disposal of the case by a children's hearing.

If a child is subject to a supervision requirement, the Sheriff Court must and the High Court may request the Principal Reporter to arrange a children's hearing to obtain its advice whereupon the court can itself dispose of the case or remit the case as mentioned at (b) above.

An accused aged between 16 and 17½ who is not under supervision and who is not therefore a child within the meaning of the 1995 Act may, in terms of Section 49(6), be dealt with as indicated at (b) above.

Procurators Fiscal should advise the sentencing court as to whether a supervision requirement is in force and, where Section 49(6) applies, remind the court of this provision.

16.33 DETENTION OF CHILDREN

Section 44 of the 1995 Act relates to the detention of a child who, in summary proceedings, pleads guilty to or is found guilty of an offence in respect of which a person aged 21 years or more could be sentenced to imprisonment.

In such proceedings the Sheriff may order the child's detention in residential accommodation provided by the local authority under Part II of the Children (Scotland) Act 1995 for a period of up to one year.

PART III: CHILD WITNESSES

16.34 INTRODUCTION

For the purposes of this part of the chapter a child is a person under the age of 16 years.

16.35 STATUTORY OFFENCES AFFECTING CHILDREN

A list of the types of offences which may affect children is provided at Annex 1. This list is not exhaustive but is intended to indicate the type of cases in which children may be involved as potential witnesses.

16.36 REGIONAL RESOURCE FOR CHILD WITNESSES

Each region has specialist legal and precognition staff who form a regional resource for cases involving child witnesses. Colleagues are encouraged to seek their advice in cases of difficulty. In particularly difficult or sensitive cases it may be appropriate to arrange for a precognition or part of a precognition to be undertaken, or for the prosecution to be conducted, by a member of the regional resource team.

A list of members of the regional resource teams is provided at Annex 3.

It is recommended that representation on Child Protection Committees (CPCs) should be by members of the regional resource team. A member of each team has been nominated to the Standing Committee on Children and has responsibility for communicating information between the Committee and the relevant region.

16.37 GENERAL APPROACH TO CHILD WITNESS CASES

Many adults find the experience of giving evidence stressful but children are considered to be particularly vulnerable and may find the process very difficult. This vulnerability entitles every child witness to special consideration within the criminal justice system. This should be reflected in a well-structured and expeditious investigation, a high priority being given to the case throughout its history and by a sensitive approach to the child at every stage of the investigation and prosecution. Delays should be kept to a minimum and, in particular, any precognition work should be completed as soon as possible and early diets of trial sought. When High Court proceedings are likely, the F32 intimation to the High Court Unit at Crown Office should highlight the involvement of a child witness, specify his age and indicate whether an

application for screens etc is likely to be necessary.

16.38 LIAISON WITH OTHER AGENCIES

The need for good communication and co-operation with other agencies involved is obvious and local arrangements should be made to promote effective liaison from the outset. This is particularly important as regards contact with the Reporter (and the special features of the relationship with the Reporter are dealt with at Annex 4). Effective liaison implies a sharing of information and consultation prior to decisions being made.

16.39 INTERVIEW/MEDICAL EXAMINATION

These matters are dealt with later in the chapter but two general principles should be borne in mind, namely:-

- (a) no child should be subjected to unnecessary interview;
- (b) no child should be subjected to unnecessary medical examination.

16.40 ROLE OF CHILD PROTECTION COMMITTEES

Experience suggests that a well-structured approach to an investigation is best achieved through prior agreement by the different agencies. CPCs provide an appropriate forum to agree and monitor procedures and their use for this purpose is encouraged.

INVESTIGATION

16.41 PLANNING AN INVESTIGATION

Joint or co-ordinated investigation will normally proceed on the basis of an initial strategy meeting between the police and social work department to plan and agree

an approach to the enquiry. It is a matter for the Procurator Fiscal whether to attend the meeting but he should, in any event, be available for consultation and advice. The purpose of a joint approach is to avoid duplication of effort and minimise distress to the child.

16.42 DISCLOSURE OF ABUSE

Disclosure by children of physical or sexual abuse is frequently made to friends, teachers, doctors and social workers. Teachers, in particular, are well placed to note physical or behavioural signs which may indicate abuse and most education authorities have issued detailed instructions outlining procedures to be adopted where abuse is suspected. These should emphasise the need for careful observation and recording and specify clear lines of reporting. They should also instruct that where there is obvious and immediate evidence of abuse, teachers should make direct contact with the police and that where there is concern for the immediate safety of the child, the Reporter should immediately be notified.

Inter-agency co-operation should ensure that disclosure of suspicions to one agency automatically involves the others.

Disclosure is often made in stages and a child may expand on his original allegation, disclosing more details or more serious abuse over a period of time. The extent of the disclosure may depend on a number of factors, including the reactions of those to whom the information is given.

Procurators Fiscal should fully investigate the circumstances of such disclosure and in particular, should obtain statements from friends or relatives to whom disclosures were made prior to the formal investigation. These can assist in assessing the credibility and reliability of the child.

In certain circumstances, evidence of what the child said may be admissible as evidence in causa. (See paragraph 16.105).

16.43 INITIAL INTERVIEW

Arrangements for the initial interview should take account of the circumstances of each case and in particular the age and confidence of the witness. In many cases it will be appropriate for the interview to be conducted jointly by the police and social workers. In exceptional cases it may be appropriate to use another person with particular expertise, e.g. a child psychologist. In many police areas such interviews will be conducted by the personnel of a specialist unit. The remainder of any criminal investigation and, in particular, the interview of the suspect, is the responsibility of the police and their responsibility should be accepted by other agencies.

MEDICAL EXAMINATION

16.44 RESPONSIBILITIES OF PROCURATORS FISCAL

It is the responsibility of Procurators Fiscal to obtain the necessary evidence of requisite quality with a minimum of distress to the child. Unnecessary, repeated examination resulting from an unco-ordinated approach by different agencies must be avoided.

Medical examination should take place only within a proper framework and at a suitable location by doctors fully qualified in this area of work. The Procurator Fiscal should draw up and maintain a list of suitable experts for his area and ensure that the Reporter, social work department and police are aware of and abide by this list. Any medical examination should take place at the child's pace and in a child-centred manner.

Obtaining suitable experts may be difficult in the more remote geographical areas and difficulties may arise in relation to hospital catchment areas. The operation of local arrangements for such medical examinations should be monitored by the appropriate Child Protection Committee.

16.45 QUALIFICATION OF EXPERT MEDICAL WITNESSES

Medical practitioners engaged in these cases should be skilled in the field of child sexual abuse and the securing of forensic evidence e.g. experienced paediatricians and suitably trained police surgeons. Procurators Fiscal should seek to ensure that they:

- a. are trained in the fine differential diagnoses of paediatric problems and those related to sexual abuse;
- b. have undergone specialised training in the collection of forensic medical evidence;
- c. are involved in ongoing local and national training and updating of knowledge in this field; and
- d. have the capacity to take a sensitive medical, paediatric and social history from victims.

If possible, the child should be given a choice as to whether the examination is carried out by a male or female doctor.

16.46 LOCATION OF MEDICAL EXAMINATION

Medical examinations of children should be carried out where appropriate vulnerable witness facilities are available e.g. dedicated suites at police offices and at hospitals. If such facilities are not available, the Procurator Fiscal should

pursue the matter of availability with the Chief Constable or through the local Child Protection Committee.

16.47

16.48 CONSENT OF CHILD TO MEDICAL EXAMINATION

Section 2(4) of the Age of Legal Capacity (Scotland) Act 1991 provides that a person under the age of 16 years shall have legal capacity to consent on his own behalf to any surgical, medical or dental procedure or treatment where, in the opinion of a qualified medical practitioner attending him, he is capable of understanding the nature and possible consequences of the procedure or treatment. In such cases the medical practitioner should request the child's consent. Where the child does not appear capable of the necessary understanding, the medical practitioner should seek the consent of the child's parent or guardian. In exceptional circumstances where the child is unable to consent and the parent or guardian refuses to consent to a medical examination, consideration should be given to obtaining a warrant for this purpose. (K Petitioner 1986 SCCR 709).

No child should be subjected to a forcible medical examination.

16.49 NATURE OF EXAMINATION

The medical examination should be a full medical examination into the general health of the child and should not be carried out only for the purpose of gathering evidence. Except in cases of urgency, the examination should be deferred until a full history is available for the doctor, which history should include details of the investigation to date. Under no circumstances should Procurators Fiscal instruct or agree to a medical examination of a child witness under general

anaesthesia when the sole purpose of the examination is to obtain evidence for use in a potential prosecution.

16.50 COLPOSCOPY

The colposcope is an optical instrument which can be used unobtrusively to provide a close-up, magnified and illuminated view and video record of injuries.

Colposcopy allows the examination of a child to be carried out in one room and to be viewed on a video screen in another room. Such arrangements make the process less intimidating for the child because only one person is required to carry out the examination. There is also the subsequent advantage that there is a video record of the examination which can be made available for viewing by a defence expert if there is any dispute about the nature or interpretation of the injuries.

Procurators Fiscal should urge local Child Protection Committees to ensure that, where possible, local medical experts are suitably trained in the use of colposcopes and that such equipment is made available for the examination of children. CPCs may wish to take this matter up with local health boards.

16.51 COMMUNICATING MEDICAL INFORMATION TO CHILD AND PARENT

When a medical examination takes place there can be no objection to the examining doctor providing the child or his parent or guardian with the result of the examination.

OTHER CONSIDERATIONS

16.52 COUNSELLING

Where a child has been traumatised as a result of a criminal act, the provision of some form of counselling may be beneficial. Various different types of

counselling can be provided by social workers, therapists, psychologists, etc. Decisions on the provision of counselling are the responsibility of the child's carers and the Procurator Fiscal does not have a locus other than to advise where appropriate on whether the proposed counselling is likely to have an adverse effect on any subsequent criminal proceedings, by for example 'contaminating' the evidence or assisting the child to put the incident behind him, and to advise that the counsellor may be cited as a witness. (It is not anticipated that the Crown would generally wish to cite a counsellor but the defence may wish to do so if they are suggesting that the witness has been coached.)

In such a case the precognition should include details of (a) the nature of the counselling, its purpose and its duration, and (b) the counsellor.

16.53 PROVISION OF EVIDENCE TO THE PRINCIPAL REPORTER

Some cases involve care and protection proceedings at the instance of the Reporter and for the purpose of these proceedings he may require evidence held by the Procurator Fiscal. In terms of the Children (Scotland) Act 1995 Section 53(4) the Procurator Fiscal has a duty in certain circumstances to comply with a Reporter's request for evidence unless, in terms of Section 53(5), he reasonably believes that it is necessary to retain the evidence for the purposes of the criminal proceedings.

A joint protocol giving detailed guidance on this matter has been drawn up by the Crown Office and the Scottish Children's Reporter Administration and is copied at Annex 4A. That guidance should be followed in relation to requests for evidence and related matters and it is no longer necessary to report such requests to Crown Office. Where there is doubt or difficulty however, the matter should be

referred to the Crown Office Policy Group.

It should be noted that the Lord Advocate has not issued any direction in terms of Section 53(6). The need for such a direction will be reviewed in light of the operation of Section 53 and the protocol.

Procurators Fiscal should bear in mind the interests of the Reporter when considering disposal of evidence and should ensure that the police only dispose of evidence once satisfied that the Reporter has no further interest in it.

It should be noted that, in terms of paragraph 2.5 of the protocol, copy precognitions of child victims can be made available to the Reporter.

16.54 EVIDENCE IN CARE AND PROTECTION PROCEEDINGS

Where there is evidence of admissions arising out of care and protection proceedings or from a case conference, it will be necessary to consider carefully whether it is appropriate to lead such evidence in the context of criminal proceedings. The aim of care and protection proceedings is to safeguard the interests and welfare of the child and those providing information for this purpose should not be inhibited from so doing. In general, if there is sufficient reliable evidence otherwise available, it will not be appropriate to lead evidence of admissions made in the context of such proceedings. Where it is considered appropriate to lead such evidence, Crown Counsel's instructions should first be obtained.

16.55 IDENTIFICATION PARADE - WHETHER NECESSARY

Where there is a possibility of an application under Section 271 of the 1995 Act for one of the special options for taking the evidence of a child and there is no

evidence of a prior identification which appears sufficiently reliable (see paragraph 16.95), it will generally be necessary to instruct the police to hold an identification parade.

In guidelines issued by the Lord Advocate to Chief Constables (copied at Annex 7) in relation to Section 271, it is emphasised that early consideration has to be given to the question of identification evidence, and the police should therefore be mindful of the need to hold a parade in appropriate cases.

Attendance by an accused at an identification parade can be made a special condition of bail (Section 24(4) of 1995 Act).

Where screens are used, the whole of the child's evidence has to be given in this manner and dock identification is not possible (HMA -v- McGrattan 1997 GWD 10-407).

Similarly, where a live television link is used, the whole of the child's evidence has to be given by this means. Identification via a live television link is possible but raises questions of fairness and is not recommended. (Brotherston -v- HMA 1995 SCCR 613). The fairness issue arises from the possibility that the child will be distressed by being shown a picture of the accused by means of the live television link and will in consequence be less able to give evidence in cross-examination. This consideration led the court in Brotherston to say that where such distress is likely, the child should not be asked to identify by this means.

16.56 IDENTIFICATION PARADE - SPECIAL ARRANGEMENTS

As indicated in the Lord Advocate's Guidelines to Chief Constables (Annex 7), where a child witness is to view a parade,

the use of a one-way screen is recommended. The use of the screen should be explained to the child and, if necessary, demonstrated. In the case of young children, identification procedures may require to be modified with, for example, picture symbols being substituted for numbers to enable a child with poor numeracy skills to identify persons in the line up.

Details of any special arrangements or procedures during a parade must be recorded in the parade report by the officer in charge who must ensure that any variations from the standard procedure take account of the general rules of fairness which apply to the conduct of identification parades as laid down in the Secretary of State's guidelines. Procurators Fiscal should ensure that the local police are aware of the need to make special arrangements for these cases.

CONSIDERATION OF PROCEEDINGS

16.57 BEST INTERESTS OF CHILD

If a child is an essential witness in a case, not only the public interest but also the best interests of that child have to be considered when deciding whether to proceed. Factors such as the seriousness of the offence, the age and vulnerability of the child and the child's relationship with the accused have to be taken into account.

16.58 PRE-SCHOOL CHILDREN AS WITNESSES

As a general rule, children of pre-school age should not be called to give evidence. Accordingly, summary proceedings will rarely be justified where they depend on the evidence of such children. Where summary proceedings are considered appropriate, Crown Counsel's instructions authorising the calling of such a child should be obtained. The report to Crown

Office should include a copy of the child's statement, a copy of the police report and the Procurator Fiscal's assessment of the child's competency to give evidence.

16.59 FORUM FOR CHILD WITNESS CASES

In general, summary cases involving child witnesses should be prosecuted in the Sheriff Court. However, exceptionally, District Court proceedings may be appropriate. Relevant considerations will be the nature of the alleged offence, the distance the witness will require to travel and the availability of transport, the facilities available at the court and the age and maturity of the child witness.

All cases of indecency towards children should be prosecuted in the Sheriff Court or High Court.

16.60 COMPETENCY OF CHILD WITNESS

- (a) Children under 12: There is no minimum age requirement and children as young as 3 have been permitted to give evidence. The trial judge must however be satisfied that the child is a competent witness. To be competent, the child must have sufficient intelligence to understand the obligation to speak the truth.

The procedure which must be adopted by the trial judge is in two stages, namely

- (1) he must satisfy himself by preliminary examination of the child in court and also, if he sees fit, by the evidence of others that the child understands the difference between telling the truth and telling lies, and
- (2) once so satisfied, he must admonish the child to tell the truth

(Kelly -v- Docherty 1991 SCCR 312).

- (b) Children aged 12 and 13: The judge should question the child to establish whether he understands the meaning of an oath. If satisfied that he does, he should place him on oath; if not, he should admonish him to tell the truth.
- (c) Children aged 14 and over: Such children should normally be placed on oath without any preliminary procedure (Quinn -v- Lees 1994 SCCR 159)

Where the accused is legally represented and the defence are not satisfied that there has been compliance with the above procedures, they should take objection to the evidence at the time (Jardine -v- Howdle 1997 SCCR 294).

16.61 PRELIMINARY ASSESSMENT OF COMPETENCY BY PROCURATOR FISCAL

Given that children under 12 will, as indicated above, require to pass a competency test before being allowed to give evidence and that a failure to do so is likely to have a significant impact on sufficiency, Procurators Fiscal must, as part of their overall assessment of a case prior to deciding upon proceedings, make their own preliminary assessment of the competency of any potential child witness under 12. Such assessment may be based on information from various sources, such as the police report, the reporting officer, the child's teacher or social worker and, if care and protection proceedings have been taken, the Reporter.

In cases of difficulty it may be appropriate for the Procurator Fiscal to interview the child for this purpose.

Procurators Fiscal should not instruct a psychological assessment of the child's ability to give evidence unless so directed by Crown Counsel. However, if the child has already been examined by a psychologist for some other purpose, the psychologist's view of the child's ability to give evidence should be canvassed and communicated in any report to Crown Counsel.

16.62 TIME BARS

Section 136 of the 1995 Act specifies a six month time bar for summary proceedings in respect of statutory offences which are triable only summarily, unless a different time limit is specified in the relevant statute.

In relation to proceedings for offences against children which are triable summarily or on indictment, the most notable time bar relating to the offence under is Section 5(3) of the Criminal Law (Consolidation) (Scotland) Act 1995 of unlawful intercourse with a girl aged 13 to 15 years. In terms of Section 5(4), proceedings for such an offence must be commenced within one year from the date of the offence.

16.63 HIGHLIGHTING CASES INVOLVING CHILDREN

Cases involving child witnesses should be made readily identifiable in order that they can be given priority.

PROCEEDINGS

16.64 MAINTAINING CONTACT WITH PARENTS OF CHILD WITNESSES

16.65 DESIGNATION OF CHILD WITNESS

Where a complainer was under 16 years at

the time of the offence, his date of birth and age at the time of the offence should be specified in the charge and his address should be specified, both in the charge and in any list of witnesses, as care of the police office from which the case originates.

In relation to any other child witness referred to in the list of witnesses attached to the indictment or provided to the defence, the child's age should be specified and he should be designated as care of the relevant police office.

Specification of a complainer's age in a charge will, in the absence of challenge, result in this being held as admitted. (See paragraph 16.04).

16.66 PSYCHIATRIC REPORT - ACCUSED AND CHILD IN SAME HOUSEHOLD

Where a case involves allegations of abuse by an adult against a child of the same household and it is believed that any child in that household is at risk, the Procurator Fiscal should obtain a psychiatric report on the accused.

Where the Procurator Fiscal has obtained a psychiatric report he should, with the consent of the psychiatrist, make the findings available to the Reporter. In disclosing such information or in discussing the facts of the case, the Procurator Fiscal should ensure that nothing is done which might prejudice the fair trial of the accused.

In particular, the Procurator Fiscal should consider the possibility of prejudice from publicity arising from a hearing or referral which precedes a trial. Where the psychiatrist consents to disclosure, there is no bar to making the findings available to a case conference provided there is no possibility of prejudice to the fair trial of the accused.

All such reports should be presented to the Court when sentence is being considered.

16.67 BAIL

Where the question of bail arises, Procurators Fiscal should consider whether any additional condition of bail is necessary to protect the child from any approach by, or contact with, the accused. Where any such additional condition is imposed, this should be intimated to interested parties.

Where appropriate, attendance at an identification parade should be made an additional condition of bail (Section 24(4) of 1995 Act).

16.68 BAIL REVIEW - BY ACCUSED

Section 30 of the 1995 Act enables an accused to apply for review of the court's decision on bail

- (a) where bail has been refused, or
- (b) where the accused has failed to accept the conditions imposed, or
- (c) where money bail has been imposed but not deposited.

The words "failed to accept" in (b) above do not imply a breach of conditions by the accused, which is provided for by Section 28 (see paragraph 16.70). What is meant is that following an initial acceptance of the conditions, which is necessary when the bail order is made, there is no longer acceptance of the conditions in the sense that the accused wishes to have them altered (Gilchrist, Petitioner 1991 SCCR 699).

16.69 BAIL REVIEW - BY PROSECUTOR

Section 31 of the 1995 Act enables the prosecutor to apply for review of bail where he can provide the court with material information which was not available to the court when bail was granted. In dealing

with an application under this section the court has power to withdraw bail or continue it, either on the same or on different conditions.

16.70 BREACH OF BAIL

In terms of Section 28(1) of the 1995 Act a constable can arrest without warrant an accused who has been released on bail where he has reasonable grounds for suspecting that the accused has broken, is breaking or is likely to break any condition imposed on his bail. Corroboration is unnecessary.

The accused is then brought back before the court which granted bail and the court can recall, continue or vary the bail order.

16.71 PLEA NEGOTIATION - DEFENCE ACCESS TO CHILD'S STATEMENT

It is recommended that there be early contact with the accused's solicitor to establish whether an acceptable plea is likely. Consideration should be given to allowing the defence to see the child's police statement if it is thought that this may result in an appropriate plea. The child's address should however not be disclosed. (For defence access to precognitions see paragraph 16.79).

If no plea is forthcoming the case should be precognosced without delay. Precognition should not be postponed because of the possibility of a plea.

16.72 PROVISION OF LIST OF WITNESSES TO THE DEFENCE

Procurators Fiscal should try to ensure that before any details of a child witness are given to the defence, any Crown precognition of the child is completed and the child or his carers are advised of the possibility of defence precognition.

In any list provided, the age of the child should be given and he should be designed as care of the relevant Police Office.

16.73 CONSIDERATION OF NEED FOR PRECOGNITION

Careful consideration should be given as to whether it is necessary to precognosce a child witness and what form of precognition should take place.

If the initial statement is sufficiently detailed it may be unnecessary to rehearse the evidence and the precognoscer may wish to concentrate on whether any other disclosures are to be made and on matters of competency, communication and special needs. If there is to be questioning on the evidence, it may be possible to restrict the matters to be discussed where preliminary discussions with the defence have identified the contentious aspects of the child's evidence. In other circumstances it may be that precognition of the child may be avoided altogether.

16.74 PRE-PRECOGNITION MEETING WITH PARENT/CARER

It may be useful to have a meeting with the child's parent or carer before precognosing the child, particularly in cases involving young children or victims of abuse. This will enable the precognoscer to:-

- (a) obtain background information and ascertain the effect of the crime on the child. There could for example be behavioural changes which may be linked to the crime such as disturbed sleep, bed wetting or problems at school. This type of evidence may assist in establishing credibility though expert evidence may be required to explain its significance.

- (b) ascertain the child's previous knowledge of sexual matters and the vocabulary used by the child to describe this.
- (c) explain the purpose of precognition and address any concerns associated with the proceedings.
- (d) plan the interview with the child and consider the most appropriate time and place to see the child.
- (e) identify a suitable support person for the child at precognition and, in the event of a trial, at court (see paragraph 16.87).

As an alternative to a meeting on an earlier date, a meeting on the same date immediately prior to the child's precognition can be of value in order to address some of these issues.

16.75 BACKGROUND INFORMATION

Background information on the case and the child can be of considerable assistance when preparing for precognition and preliminary discussion with the reporting officer, social worker or Reporter may be helpful.

16.76 PRODUCTIONS

Productions should be available when the child is precognosced but precognition should not be delayed solely for this purpose.

Where the age of the child is a material factor his birth certificate should be lodged (unless the age is agreed) in order that any challenge to the statutory presumption of age (see paragraph 16.04) can be met.

Housing or school records may be necessary to establish dates and places of

offences and these should where possible be certified in terms of Schedule 8 to the 1995 Act.

16.77 CITATION FOR PRECOGNITION

When citing a child for precognition, consideration should be given to whether the child will require to be accompanied to and supported at the precognition. The support person cannot be a witness in the case. This may preclude the child's parent or carer from fulfilling this role. It may, therefore, be necessary to send citations to the child, parent and support person. Where there has been no preliminary meeting with the child's parent or carer, a letter of explanation should accompany the citation. (See style letter at Annex 5).

16.78 PRECOGNITION

Precognition of a child should not be hurried and it may even be appropriate in exceptional cases to have a prior meeting with the child simply to gain his confidence and trust.

Any support person accompanying a child should be warned in advance not to prompt or seek to influence the child in any way. If, during the precognition, it appears that the presence of the support person is counter-productive or inhibiting the child, he should be excluded from the interview. The interview should then be continued without him or deferred until another support person can be found.

Particular care should be taken to assess the qualities, characteristics and abilities of a child witness and these should be commented upon in a note at the end of the precognition. Any problem in relation to the child's ability to give evidence may be illustrated by presenting the precognition in question and answer form. It may be convenient to tape record the precognition

for this purpose, having first fully explained the procedure to the child. The precognoscer's assessment of the child can be of considerable value to those subsequently dealing with the case.

The precognoscer should in his comments address the following matters:-

- (a) the competency of the child to give evidence (see paragraphs 16.60 and 16.61);
- (b) his ability to communicate and in particular his terminology and the requirement for any props;
- (c) his personality and maturity;
- (d) his concentration span; and
- (e) his fear of or affection for the accused.

Where there are allegations of sexual abuse, the child should not be invited to demonstrate what occurred or to point to parts of his own body by way of explanation as such practices are considered to be abusive in themselves. The situation is different where the child does this spontaneously but it is considered preferable that a drawing or toy should be used to facilitate explanations.

Precognoscers should consider whether screens, a live television link or evidence on commission may be appropriate (see paragraphs 16.88 to 16.96).

The precognition meeting with the child and his parent or carer provides an opportunity to explain what may follow and to address any concerns they may have. Matters which may appropriately be canvassed are:-

- (a) the possibility of a defence precognition and, if it is intended to disclose the child's precognition to

- the defence, this possibility and the reason for so doing (see paragraph 16.79);
- (b) the question of appropriate support arrangements for the child in the event of the case proceeding to trial, including the identification of a suitable support person for the child at court (see paragraph 16.87);
 - (c) the possibility of a pre-trial court visit in the event of a trial;
 - (d) in appropriate cases the possibility that the case may not proceed further or, in the event of proceedings, the possibility of an acquittal;
 - (e) whether the child wishes to be told the outcome of the case.

Where a decision to take no further proceedings is made after a child has been precognosed, the child or parent should be advised of the decision not to proceed as otherwise there is likely to be an expectation of proceedings at some future date.

16.79 DEFENCE ACCESS TO PRECOGNITION

Where a child has been precognosed, consideration should be given to providing a copy of the precognition to the defence where it appears that this will avoid the necessity for defence precognition or encourage a guilty plea or the agreement of evidence. Any material not to be communicated to the defence, in particular the precognoscer's assessment of the child, should be included in a confidential note at the end of the precognition and care should be taken to ensure that this is not copied to the defence. The child's address should also not be disclosed.

16.80 ANATOMICAL DOLLS

Some controversy exists about the extent to which anatomically detailed dolls should be used in connection with the investigation of child sexual abuse and their use is not encouraged. Precognoscers should bear in mind the dangers of leading or coaxing witnesses by the careless use of dolls and if dolls have been used in the initial investigation, should explore this area to assess whether there has been any apparent misuse such as could undermine the child's credibility or reliability.

The use of such dolls at precognition or in court is acceptable where necessary for certain limited purposes, namely to assist a witness in

- (a) identifying and naming anatomical parts;
- and
- (b) indicating parts of the body touched.

In exceptional cases only, where the child is inarticulate and cannot otherwise describe what actually happened, dolls may be used to facilitate the giving of evidence. The child may, for example, be allowed to use them to demonstrate the degree of violence used. However use of dolls in the sense of role playing, involving simulation of the acts complained of, is not considered acceptable.

Where dolls are used at precognition stage and it is considered that they should be available at trial, they should be lodged as productions. A note by the precognoscer explaining the extent to which the dolls were used during precognition should be included.

PRE-TRIAL PREPARATION

16.81 PRIORITISING CHILD WITNESS TRIALS

Trials involving child witnesses must be afforded high priority at all stages of proceedings. In summary cases, there should be liaison with the clerk of court to ensure an early diet of trial is fixed and that the case is timetabled so that it can proceed without having to defer to custody cases fixed for the same day. Similar considerations should be applied in solemn proceedings. Strenuous efforts should be made to avoid adjournments of the trial diet. The general aim of the Procurator Fiscal should be to have the child give evidence on as early a date as possible and to keep the child at court for as short a time as possible. Where for some pressing reason a case cannot be taken first, special arrangements may be made to have the child attend court later in the day on a stand-by basis.

16.82 CITATION

copy of the booklet "Going to Court" A citation should be sent to the child's parent or guardian, if that person is not otherwise to be cited as a witness, and to the support person, if other than the parent or guardian.

A covering letter should accompany the citation (see style at Annex 5). At this stage the offer of a pre-trial visit to the court be made (see paragraph 16.84).

16.83 INFORMATION IN RESPECT OF ACCOMMODATION, ETC

The child's parent/support person should be provided with information about the facilities which will be available at court including information as to the location of toilet accommodation and the availability of refreshment facilities.

16.84 PRE-TRIAL VISIT

The purpose of a pre-trial visit is to explain

court procedures to the child and familiarise him with the court in order to reduce some of the anxiety which arises from fear of the unknown.

It may be that the trial courtroom will be unavailable but a visit to a typical courtroom should be helpful.

Where it is known that a screen or live link facility will be used, the Sheriff Clerk's co-operation should be sought to ensure that the child will have an opportunity to see and use the equipment during the pre-trial visit.

Those taking child witnesses on pre-trial court visits must be aware of the risk of criticism that a child has been coached and guard against anything untoward being said to the child prior to trial.

The question of where the accused will sit during the trial is often raised either by the child or by the adult who brings him to court for the visit. What should be said in reply depends on whether or not a dock identification is to be sought at the trial. If it is not, the child can be told that the accused will be seated in the dock. If it is, it should be explained in simple language that the child cannot be told where the accused will be seated as such information could prejudice any identification of the accused which he is asked to make. If the matter is pressed, the child can be told that the person on trial will be sitting in the dock but that whether that person is the accused, in the sense of the person about whom the child is speaking, is a matter for the child to decide when he is asked during his evidence to identify the accused.

During the court visit the child should be encouraged to ask questions and to mention any concerns which he may have about going to court. The person conducting the court visit may be able to resolve these matters, eg by providing an

explanation to the child, but otherwise should advise the prosecutor of any difficulties.

16.85 ADVANCE NOTICE TO CLERK OF COURT

Procurators Fiscal should where appropriate ensure that advance notice is given to the Sheriff Clerk of the intention to call a child witness so that suitable facilities can be made available.

Consideration should be given to allocating the case to the least intimidating courtroom available and to whether the child needs to be brought into and out of the court building by a separate entrance/exit to avoid the possibility of meeting the accused or others who may upset him.

Procurators Fiscal should seek to ensure that separate waiting accommodation is made available for all child witnesses, particularly for those who are clearly vulnerable or who are likely to face hostility from other witnesses.

16.86 PRE-TRIAL DISCUSSIONS WITH THE DEFENCE

Apart from plea negotiation (paragraph 16.71), there should be discussion of the following matters:-

(a) Evidence

Prior to the trial, efforts should be made to negotiate the agreement of evidence so as to minimise the amount of evidence required from the child in court. In particular, where a positive pre-trial identification has been made, the fact of such identification should, in appropriate cases, be incorporated in a statement of uncontroversial evidence (Section 258 of 1995 Act) or agreement of this evidence should be sought.

Such pre-trial discussions can assist in

identifying the contentious areas of evidence and focusing the issues.

(b) Special arrangements for the trial

Where it is considered that special arrangements such as those referred to in the Lord Justice-General's Memorandum (see Annex 6 and paragraph 16.101) may be appropriate, the defence position on any proposed arrangements should be established. It may be appropriate to attempt to resolve such issues at intermediate or first diets. In any event, knowledge of the defence position may assist in advising the child of the likelihood of special arrangements, though it should be made clear that this is a matter for the trial judge.

16.87 SUPPORT PERSON

The presence of a support person for the child can be very helpful, as was acknowledged by the Scottish Law Commission in their Report on the Evidence of Children and Other Potentially Vulnerable Witnesses in 1990: "There seems little doubt that the presence, close at hand, of a parent or some other trusted adult can, in some cases, give a young child the reassurance that is required for evidence to be given clearly and confidently; and for that reason we consider this practice should be encouraged as much as possible."

Efforts should therefore be made, when a young child is to be a witness, to identify a suitable support person. In solemn cases, this can be canvassed at precognition. The child's wishes are obviously very important as he should be able to say who will best reassure him. In terms of the Lord Justice-General's Memorandum (Annex 6) a support person should not be a witness in the case and this may exclude the obvious choice of a parent. The identity of the support person should be noted on the

case papers or, in solemn cases, in the precognition.

It is possible that the defence may object to a particular person acting as the support person if they consider that that person is so closely involved with the case, albeit not a witness, that he or she may have an adverse influence on the child's evidence. To avoid the disruption caused by any successful objection at the trial, the defence should be advised in advance of the identity of the proposed support person and, where appropriate, of that person's involvement with the case or relationship with the witnesses on the basis that if there is any objection, this will be intimated and specified beforehand. The matter can appropriately be canvassed at intermediate or first diet, particularly where a ruling is sought on a defence objection.

The Procurator Fiscal should make it clear to the support person what his role is and in particular should stress that he should not prompt or seek to influence the child in any way in the course of the evidence. A similar warning should, in terms of the above Memorandum, be given by the trial judge.

As regards seating arrangements, the above Memorandum suggests that the support person should be permitted to sit alongside the child. It is however the practice of many judges to have the support person seated behind the child in order to minimise the risk of the child looking to the support person for guidance and the support person in turn giving that guidance, which can readily be done by means of a mere facial expression.

Where a live television link is used, the support person sits in the separate room with the child.

SPECIAL PROVISIONS FOR CHILDREN'S EVIDENCE

16.88 EVIDENTIAL OPTIONS

In terms of Section 271 of the 1995 Act as substituted by Section 29 of the 1997 Act, where a 'vulnerable person' (which includes a child under 16) has been or could be cited to give evidence (and prior citation is therefore no longer necessary) in the High Court or the Sheriff Court (the District Court is excluded), an application can be made to the court for one of the three following evidential options.

16.89 EVIDENCE ON COMMISSION

This involves the child's evidence being taken by a commissioner appointed by the court and a video recording of that evidence being played at the trial.

Section 271(1) of the 1995 Act provides that where a vulnerable person (which includes a child under 16) has been or could be cited to give evidence, the court may appoint a commissioner (who must have been an advocate or solicitor for at least 5 years) to take the child's evidence.

An application for the appointment of a commissioner must be made (a) in solemn proceedings before the jury is sworn (b) in summary proceedings before the first witness is sworn or (c) in exceptional circumstances, during the trial. As a matter of practice, any such application should be made as early as possible to enable appropriate arrangements to be made.

The procedure and styles of petition are set out in the Act of Adjournal (Criminal Procedure Rules) 1996 Chapter 24 and Forms 24.1-A and 24.1-B. The petition must include a detailed averment of the evidence sought from the child. The application may only be granted if the judge

is satisfied that (a) this evidence is necessary for the proper adjudication of the trial and (b) there will be no unfairness to the other party if the evidence is received in this form. Given that there will be no opportunity to cross-examine on such evidence, it will be difficult to satisfy the court that there will be no unfairness unless the evidence is formal and non-contentious (Muirhead -v- HMA 1983 SCCR 133). The judge must also be satisfied in relation to the criteria set out in Section 27(7) which apply to all three evidential options (see paragraph 16.92).

If the application is granted, the commissioner has to determine the place and date for the examination. There is no restriction on the place which can accordingly be outwith a court.

The accused is not entitled, except by leave of the commissioner, to be present in the room where the proceedings take place but is entitled to watch and hear the proceedings. This could be achieved by using a live television link or a one-way screen. The proceedings have to be recorded on video and a transcript prepared for the trial. The video recording will thereafter be admissible at the trial without being spoken to by witnesses but only in so far as it either accords with the averment of evidence in the original application or can be received without unfairness to either party. The trial judge may accordingly restrict the admissibility of such evidence and if any such problem is anticipated, an attempt should be made to resolve the matter in advance with the defence.

16.90 LIVE TELEVISION LINK

This involves the child giving evidence during the trial but from a separate room. Communication is via a live television link. The child sits in front of a television set and microphone and can normally see and hear

only the person speaking to him from the courtroom. He may however be shown productions on the screen. In the courtroom, television sets with microphones are provided for the judge, the prosecution and the defence and on these the room in which the child is and anything done or said in it can be seen and heard, as can an inset of the picture seen by the child (which generally is a picture of the questioner). There are larger sets on which the jury, the public and the accused can see and hear a close-up of the child. The judge controls what is seen and heard by the child and on the larger sets.

Section 271(5) of the 1995 Act provides that where a vulnerable person (which includes a child under 16) has been or is likely to be cited to give evidence, the court may authorise the giving of that evidence by means of a live television link.

The procedure and style of petition are set out in the Act of Adjournal (Criminal Procedure Rules) 1996 Chapter 22 and Form 22.1. The application must be made not later than 14 days before the trial diet (except on special cause shown). As a matter of practice, any such application should be made as early as possible so that the necessary equipment can be made available and the child can be advised on how he is to give evidence. The 'special cause shown' exception would allow an application to be made at the trial where a child had been called to give evidence in the conventional manner and it had proved impossible to obtain his evidence in this manner (HMA -v- Birkett 1992 SCCR 850).

The criteria for granting an application are as set out in paragraph 16.92.

Problems in practice have been pleaders reminding the child of the accused's presence and rapidly moving their faces close to the screen resulting in their looming in on the child. Practices such as

this which appear to be designed to unsettle the child should be objected to.

16.91 SCREENS

This involves the child giving evidence in court with the accused concealed from his sight by a screen. The accused must however be able to see and hear the child and this is achieved by means of a video camera and monitor screen for the accused.

Section 271(6) of the 1995 Act provides that where a vulnerable witness (which includes a child under 16) has been or is likely to be cited to give evidence, the court may authorise the use of a screen to conceal the accused from the sight of that witness while he is giving evidence.

There is no prescribed procedure or style of petition for an application for the use of a screen but the procedure and style of petition for a live television link, suitably adapted, is acceptable. There is also no prescribed time limit for applications but as a matter of practice they should be made as early as possible and normally no later than 7 days in advance of the trial (a time limit agreed with the Scottish Court Service). In exceptional circumstances, an application can be made during the trial (HMA -v- McGrattan 1997 GWD 10-407).

The criteria for granting an application are as set out in paragraph 16.92.

16.92 APPLYING FOR AND CRITERIA FOR SPECIAL EVIDENTIAL OPTIONS

The procedure is as described in the above paragraphs.

In High Court cases, the application will be to the High Court and will be dealt with by the Crown Office High Court Unit. In Sheriff Court cases, the Procurator Fiscal should apply to the Sheriff Court.

Accordingly, even though it is no longer necessary to wait until a child witness has been cited before making an application it will still be necessary to wait until the trial forum has been decided upon.

Procurators Fiscal should always consider the possibility of using one of these options when dealing with child witnesses and, when reporting solemn cases to Crown Office, make a recommendation as to whether an application should be made. If the recommendation is to use one of these options, this should be supported by the fullest information about the child, his ability to give evidence and any other factors which would assist the court in its consideration of the application. If an application is to be made, Procurators Fiscal will require to ensure that there are no difficulties in relation to identification (see paragraph 16.95).

In terms of Section 271(7) of the 1995 Act, the court may only grant the application on cause shown, having regard in particular to:

- (a) the possible effect on the child if required to give evidence in the normal manner
- (b) whether it is likely that the child would be better able to give evidence if the application was granted
- (c) the views of the child.

Relevant considerations are as specified in Section 271(8), namely

- (a) the nature of the alleged offence;
- (b) the nature of the evidence which the child is likely to be called on to give;
- (c) the relationship, if any, between the child and the accused; and

(d) the age and maturity of the child.

Courts are in general more willing to grant applications in the case of younger victims whose evidence relates to violent or sexual matters.

In order to demonstrate sufficient cause it is necessary that applications are supported by evidence. It does not suffice merely to repeat the statutory criteria in the application without providing supporting information (HMA -v- Birkett 1992 SCCR 850).

The type of evidence which the courts have considered includes reports from social workers (who are often experienced in preparing reports for the court), teachers (who often have detailed knowledge of the child), doctors and psychologists. Parents at precognition can often indicate who is best placed to prepare a report. As regards psychologists, Procurators Fiscal should not instruct a psychological assessment of the child for the purpose of assessing his ability to give evidence in the conventional court setting unless directed by Crown Counsel to do so, but if a psychologist has already seen the child for some other purpose, his views on this matter should be ascertained and included in any report to Crown Office.

The Procurator Fiscal's own knowledge of the child as a result, for example, of a precognition interview coupled with advice from other professionals who have prior knowledge of the child may suffice.

Applications should include the views of the child on the preferred evidential option, this, as indicated above, being a matter which the court is required to consider. In order to express such a view the child will require information on the available options. In solemn cases it may be possible to discuss such matters at precognition. In summary cases it may be appropriate to arrange to

see the child for this purpose. Discussion of the live link facility or the use of a screen could usefully include an opportunity to see the equipment.

16.93 AVAILABILITY OF EQUIPMENT

(i) Evidence on Commission

The availability of suitable accommodation and equipment for evidence on commission varies from district to district. The Scottish Court Service has not accepted responsibility for the provision of facilities and Procurators Fiscal will require to make the necessary arrangements.

(ii) Live Television Link

Equipment for a live television link has been installed in the Sheriff Courts at Aberdeen, Airdrie, Edinburgh, Falkirk, Glasgow and Greenock and in the High Courts in Edinburgh and Glasgow.

(iii) Screens

The Scottish Court Service has provided a set of equipment for each Sheriff Court region. The equipment is easily transported and can be moved to the appropriate court as required. One problem highlighted has been screens not properly overlapping resulting in the child being able to see the accused through the gaps; Procurators Fiscal should check this prior to commencing the evidence.

Screening equipment is also available in the High Courts in Edinburgh and Glasgow.

16.94 TRANSFER OF CASES

Where the necessary accommodation or equipment is not available in the Sheriff Court and the Sheriff would otherwise have granted an application for evidence on commission, live television link or screens, the Sheriff may by order transfer the case

to another Sheriff Court within the same sheriffdom which has such accommodation and equipment (Section 271(9) of the 1995 Act). It should be noted that the entire case is transferred, not just that part involving the child who is the subject of the application.

Where a case is transferred, the Procurator Fiscal who has made the application will retain responsibility for the case.

Given that evidence on commission can be taken outwith a court and screens can readily be transported, it is anticipated that this provision will only be used in relation to the proposed use of a live television link.

16.95 IDENTIFICATION

Where a Section 271 application has been granted, identification will require to be achieved by means other than a dock identification (see paragraph 16.55). Section 271(11) specifically deals with this matter by providing that where a child gives evidence that he recalls having identified, prior to the trial, a person alleged to have committed an offence, the evidence of a third party as to that identification shall be admissible in evidence as to such identification. This provision does not exclude other means of establishing identification and in particular 'circumstantial' identification such as that held sufficient in Robson -v- HMA 1996 SCCR 340.

Where a child gives evidence in the conventional manner and identification is in issue (as it will be unless agreed or established by an unchallenged statement of uncontroversial evidence), a dock identification should be sought in compliance with the rule laid down in Bruce -v- HMA 1936 JC 93. "Humanitarian reasons" do not justify a departure from that rule. It is only once it is established that the child is unable or unwilling to

identify the accused that other evidence of identification may be relied on (Robson -v- HMA supra).

16.96 SELECTION OF METHOD OF GIVING EVIDENCE

It is considered that most children will be able to give evidence in the conventional way with appropriate support and, if necessary, with the special arrangements detailed in the Lord Justice-General's Memorandum (paragraph 16.101).

Where an application for the use of one of the statutory options is considered appropriate, consideration should in the first instance be given to the use of screens. The live link option should be considered if it is believed that the needs of the child will not be met by the provision of screens. Evidence on commission should only be considered where neither of the other options is thought to be suitable.

TRIAL

16.97 DUTY OF PROCURATOR FISCAL

At the trial diet it is the responsibility of the Procurator Fiscal to take the initiative to reduce any anxiety and distress which the child might experience. Every child is different and the degree of care required for each child will vary according to age and maturity and the nature of the evidence which the child is to be called upon to give.

16.98 PROCEDURE WHERE NO PRE-TRIAL VISIT/PRECOGNITION

Where it has not been feasible for the child witness to have had a pre-trial visit to the court, it is recommended that the Procurator Fiscal arrange a meeting with the child on the morning of the trial before the trial begins. This will give the prosecutor an opportunity to introduce

himself to the child and to explain the court proceedings in terms which the child will understand, may allow the child to familiarise himself with the physical surroundings of the court (though the same caveat regarding the content of the pre-trial meeting, mentioned at paragraph 16.84 above, should be observed) and will give the prosecutor an opportunity to learn of any difficulties the child might have in giving evidence and to assess the linguistic ability of the child. The meeting will also provide an opportunity to confirm the child's wishes in relation to any special arrangements made for the taking of his evidence. It should be noted that an authorisation to use one of the statutory options does not necessitate its use and the child can therefore be called to give evidence in the conventional manner if this is considered more appropriate.

16.99 INTRODUCTION TO COUNSEL

It is considered to be both helpful and reassuring to a child witness if counsel on both sides speak to him briefly before he gives evidence for the purpose both of familiarisation and reassurance. There should be no objection to this taking place provided the merits of the case are not discussed and that both counsel see the witness together. Procurators Fiscal should assist in ensuring that any such meeting is kept as low key as possible.

It should not be assumed that Crown Counsel will meet with child witnesses as a matter of routine and child witnesses should not be told that there will be a meeting unless this has been confirmed by Crown Counsel. If, following precognition, the precognoscer considers it appropriate that such a meeting should take place, the precognition should contain a note to that effect specifying the reasons in support of a meeting.

16.100 AVOIDING CONTACT WITH

ACCUSED

Wherever the lay-out of a court permits, a child witness should be brought into court in such a way that he does not see the accused.

16.101 SPECIAL ARRANGEMENTS - LORD JUSTICE-GENERAL'S MEMORANDUM

The Lord Justice-General's Memorandum copied at Annex 6 was issued as guidance to judges on special arrangements which may be adopted in relation to child witnesses giving evidence in the conventional manner in order to minimise anxiety and distress. As examples of appropriate measures it refers to the removal of wigs and gowns, the child being seated at the table in the well of the court, a relative or other supporting person being seated with the child and the court being cleared of persons with no direct involvement.

Whether or not any special measures are adopted is a matter for the trial judge. In the Memorandum it is recommended that the Crown and the defence be given an opportunity to address the judge on this matter prior to the evidence being led and, in solemn cases, preferably before the jury is empanelled. Prosecutors should therefore be prepared to address the trial judge on this matter prior to calling a child witness and, where special measures are considered appropriate, should indicate a wish to do so.

Before addressing the judge, the child's views should be ascertained. It may be for example that a child will feel more secure in the witness box rather than at the table in the well of the court.

Given that in most cases it will not be possible to establish in advance of the trial what special arrangements, if any, will be

made, care should be taken not to indicate in advance to child witnesses that any particular measure will be adopted.

16.102 EXAMINATION OF CHILD WITNESSES

When examining the child, questions should be short and simple so that the child can understand them. The use of terms and expressions familiar to the child will help this understanding. Care should be taken not to proceed too quickly and questioning should be at a pace which appears to suit the child. The examination should be focused on the contentious issues with other matters being, as far as possible, agreed or spoken to by other witnesses.

16.103 WELFARE OF CHILD IN COURT

Attention should be paid to matters such as the child's concentration span and he should be watched for signs of fatigue, distress or discomfort. If, in the course of giving evidence, a child appears to be distressed or under strain, it may be appropriate to ask the court to grant a brief adjournment. During any such adjournment there should be no contact between the prosecutor and the witness - McKie -v- HMA 1997 SCCR 30. Once the child has given evidence the prosecutor should ask for him to be excused immediately, ensuring that there is a suitable person to take care of him.

16.104 POWER TO CLEAR COURT

Prosecutors should, where appropriate, remind judges of the discretionary power under Section 50(3) of the 1995 Act to clear the court of the general public when a child is giving evidence in any proceedings in relation to an offence of indecency. This provision is referred to in the Lord Justice-General's Memorandum (Annex 6, paragraph 7) where the guidance given is

that this will normally be appropriate in such cases. In other cases the court may be cleared if the judge is satisfied that this is necessary in order to avoid undue anxiety or distress to the child. Bona fide representatives of the press should not be excluded.

16.105 HEARSAY

Occasionally a child witness, having initially given a statement, refuses to give evidence at the trial. In this situation, the prosecutor should seek to have evidence of that statement admitted as evidence of its contents in terms of Section 259 of the 1995 Act. This involves satisfying the judge that

- (a) the child will not give evidence because, having been called as a witness,
 - (i) he has refused to accept an admonition to tell the truth, or to take the oath or affirmation or
 - (ii) having been admonished to tell the truth or having been sworn as a witness and having been directed by the Judge to give evidence, he has refused to do so;
- (b) the evidence in the statement would be admissible if the child gave direct oral evidence of it (and hearsay in the statement is therefore excluded);
- (c) the child would have been a competent witness when the statement was made; and
- (d) there is evidence to justify a finding that the statement was made and that
 - (i) it is contained in a document, or

- (ii) a witness giving oral evidence of the statement has direct personal knowledge of its making.

If no objection is taken to the admission of the statement, the judge does not require to be satisfied about the above matters (Section 259(7)).

“Statement” is very widely defined by Section 262(1).

The statement and relevant witnesses do not require to be listed in the indictment or specified in a Section 67(5) notice (Section 259(5)).

As regards satisfying the judge about the above matters, Section 259(8) provides that it is to be presumed that the circumstances are as stated by the party seeking to introduce the statement except to the extent that the other party insists in a challenge to them, in which case the judge is entitled to determine the matter on the balance of probabilities.

SENTENCING

16.106 NOTIFICATION TO PRISONS OF OFFENDERS AGAINST CHILDREN

With a view to promoting child protection, the Scottish Office has issued guidance to Social Work Departments on preparing for release prisoners convicted of offences against children. In this context ‘children’ means, with two exceptions, persons under 16 and relevant offences will be readily identifiable as a result of appropriate designation of the child in the charge (paragraph 16.65). The two exceptions are

- (1) female victims aged 16 or 17 of abduction with intended unlawful sexual intercourse (contrary to the Criminal Law (Consolidation)

(Scotland) Act 1995 Section 8) and

- (2) 16-year-old victims of an offence causing bodily injury.

When an accused is convicted and imprisoned in respect of either such offence, Procurators Fiscal should advise the Clerk of Court that the prison should be notified (which is usually done by marking the warrant of committal) that this is an offence against a child. To this end, it is suggested that relevant case papers are appropriately and conspicuously marked.

POST TRIAL

16.107 PROVISION OF INFORMATION POST-TRIAL

- (a) To the child or his parent

Where it is known that the child or parent wishes to be informed of the outcome of the case, the Procurator Fiscal should ensure that this information is communicated as soon as possible after the trial is concluded. The Procurator Fiscal should also ensure that the child or parent is immediately advised of the successful outcome of any application for interim liberation or appeal.

- (b) To outside agencies

After the conclusion of criminal proceedings, requests for information about the case may be received from agencies such as social work departments. Such requests should be dealt with in accordance with the provisions of Chapter 17.

Particular care is required in respect of psychological or psychiatric reports or assessments which were not used in the course of trial. These documents are confidential to the Crown. Disclosure of their contents should occur only with the

consent of the author of the report or assessment. Before any such disclosure, the contents should be carefully considered, taking into account the interests of the child and, where relevant, the person who was accused of criminal acts towards the child.

In dealing with such requests it is important to establish the reason for seeking access to the information. Where it is sought to assist in the resolution of concerns regarding the protection of the child there may be sound reasons for providing access. In such circumstances, where access would otherwise not be permitted, a report should be submitted to Crown Office seeking instructions.

ANNEX 1

STATUTORY OFFENCES CONCERNING THE PROTECTION OF CHILDREN

ABDUCTION

See **Child Abduction Act 1984** and Chapter 21 at 21.06.

ACTIVITY CENTRES

Activity Centres (Young Persons Safety) Act 1995 section 2:

Prohibition of breaching a regulation made in terms of section 1.

ALCOHOL

Children and Young Persons (Scotland) Act 1937 section 16:

Prohibition against giving or causing to be given to any child under 5 years any excisable liquor, except under the order of a duly qualified medical practitioner, or in the case of sickness, apprehended sickness or other urgent cause.

Licensing (Scotland) Act 1976 section 68:

Restriction on the sale and supply and consumption in a bar of alcoholic liquor to persons under 18 years.

Licensing (Scotland) Act 1976 section 70:

Imposition of restrictions on children under 14 years being in premises to which refreshment licenses apply.

Civic Government (Scotland) Act 1982 section 50(2):

Prohibition against being drunk in a public place in charge of a child under the age of 10 years.

ANIMALS**Pet Animals Act 1951 section 3**

Prohibition of sale of a pet to a child under 12.

Horses (Protection Headgear for Young Riders) Act 1990 section 1:

Prohibition against causing or permitting a child under 14 to ride a horse without protective headgear.

BEGGING**Children and Young Persons (Scotland) Act 1937 section 15:**

Prohibition against causing or procuring persons under 16 to be used for begging.

BETTING**Gaming Act 1968 section 7 and 17:**

Imposition of restrictions on persons under 18 years being involved in gaming.

Betting, Gaming and Lotteries Act 1963 section 21:

Prohibition against sending betting circulars to persons under 18 years.

BURNING**Children and Young Persons (Scotland) Act 1937 section 22:**

Prohibition on exposing children under the age of 7 to the risk of burning or scalding.

CREDIT**Consumer Credit Act 1974 section 50:**

Prohibition against sending a circular inviting a credit to a minor.

Consumer Credit Act 1974 section 114(2):

August 1998

Prohibition against taking an article in pawn from a minor.

CRUELTY

Children and Young Persons (Scotland) Act 1937 section 12:

Prohibition against cruelty to and exposure to moral and physical danger of children under 16 years of age.

EDUCATION

Education (Scotland) Act 1962 section 35(1):

Prohibition against parent failing to ensure regular attendance of child at public school.

Section 41 prohibition against parent failing to comply with an attendance order.

ENTERTAINMENT

Children and Young Persons (Scotland) Act 1937 section 23:

Imposition of requirement to provide for the safety of children in any building where there is an entertainment for children, or where the majority of persons attending are children.

(Note: This section does not apply to entertainment given in a private dwelling house).

EMPLOYMENT

Agriculture (Safety, Health and Welfare Provisions) Act 1956 section 2:

Prohibition against a young person (under 18) being used in agriculture to lift loads which are likely to cause injury to that young person.

Children and Young Persons (Scotland) Act 1937 section 28:

Imposition of general restrictions on the employment of children.

(See also local byelaws)

Children and Young Persons Act 1937 section 30:

Prohibition against persons under 17 years of age being engaged or employed in street trading.

Children and Young Persons Act 1963 section 37:

Imposition of restrictions on persons under 16 years of age taking part in public performances and being employed in entertainment.

Children and Young Persons (Scotland) Act 1937 section 33:

Prohibition against persons under 16 years of age taking part in performances which endanger life or limb.

Children and Young Persons (Scotland) Act 1937 section 34:

Imposition of restrictions on training persons under 12 years of age for performance of a dangerous nature.

The Employment of Children Act 1973 section 2:

Prohibition against a parent or employer failing to comply with the notice served by an education authority as to employment of a child.

Licensing (Scotland) Act 1976 section 72:

Restrictions on employment of persons under the age of 18 in bars or licensed canteens.

Licensing (Scotland) Act 1976 section 73:

Prohibition against employment of a person under 18 years for serving alcoholic liquor in premises to which a refreshment licence applies.

FIREARMS**Firearms Act 1968 section 22:**

Prohibition against acquisition of firearms and ammunition by persons under 17 years by minors.

Prohibition against possession of firearms and ammunition by persons under 14 years.

Restriction on possession of an assembled shotgun by persons under 15 years.

Restriction on possession of an air weapon or ammunition by persons under 14 years.

(Note: for exceptions see section 23 of the Firearms Act 1968).

Firearms Act 1968 section 24:

Prohibition against supplying firearms or ammunition to minors.

FIREWORKS**Explosives Act 1875 section 31:**

Prohibition against the sale of gunpowder and explosives including fireworks to persons under 16 years.

HARBOURING

Social Work (Scotland) Act 1968 section 71:

Provision of penalties for harbouring children who have absconded from residential establishments.

Children (Scotland) Act 1995 section 83

Prohibition against assisting in or inducing the harbouring of a child so as to escape from a place of safety.

Children (Scotland) Act 1995 section 89:

Prohibition against harbouring or concealing a child who is the subject of a parental responsibility order who has run away.

INDECENT PHOTOGRAPHS**Civic Government (Scotland) Act 1982 section 52:**

Prohibition against taking, distributing, possessing or publishing indecent photographs of a child under 16 years.

PUBLICATIONS**Children and Young Persons (Harmful Publications) Act 1955: (See Chapter 21 at 21.07)**

Prohibition against printing, publishing, selling etc pictorial publications portraying the commission of crimes, acts of violence or cruelty or incidents of a repulsive or horrible nature which would tend to corrupt a child.

SALE

- (a) Alcoholic liquor - see alcohol above
- (b) Explosives Fireworks - see firearms above
- (c) Firearms - see firearms above
- (d) Methylated spirit - see Methylated Spirits (Sale by Retail) (Scotland) Act 1937, section 1(2)
- (e) Pets - see Animals above
- (g) Tobacco - see Children and Young Persons (Scotland) Act 1937 section 18 as amended by the Children and Young Persons (Protection from Tobacco) Act 1991
- (h) Safety Equipment for Vehicles - see vehicles below
- (i) Knives or bladed or pointed objects - see weapons below
- (j) Crossbows - see weapons below

SEXUAL OFFENCES**Criminal Law (Consolidation) (Scotland) Act 1995 section 1:**

Prohibition against incest (includes relationships by adoption as well as consanguinity).

Criminal Law (Consolidation) (Scotland) Act 1995 section 2:

Prohibition against intercourse with a step child or former step child under the age of 21 years or who has lived in the same household and been treated as a child when under 18 years of age.

Criminal Law (Consolidation) (Scotland) Act 1995 section 3:

Prohibition against intercourse with a child under 16 years of age by a member of the same household who is in a position of trust in relation to the child.

Criminal Law (Consolidation) (Scotland) Act 1995 section 5(1)(2):

Prohibition against intercourse or attempted intercourse with a girl under 13 years of age.

Criminal Law (Consolidation) (Scotland) Act 1995 section 5(3):

Prohibition against intercourse or attempted intercourse with a girl over the age of 13 years and under the age of 16 years.

Criminal Law (Consolidation) (Scotland) Act 1995 section 6:

Prohibition against lewd, indecent and libidinous practices or behaviour used towards a girl of or over the age of 12 years and under the age of 16 years.

Criminal Law (Consolidation) (Scotland) Act 1995 section 7(1):

Prohibition against procuring or attempting to procure a woman or girl under 21 years of age to have unlawful sexual intercourse to become a prostitute or to leave home to frequent a brothel either in the UK or abroad.

Criminal Law (Consolidation) (Scotland) Act 1995 section 8:

Prohibition against abduction and unlawful detention of an unmarried girl under 18 years of age with intent that she should have unlawful sexual intercourse with a man/men.

Criminal Law (Consolidation) (Scotland) Act 1995 section 9:

Prohibition against a girl under 16 years of age being in premises for unlawful sexual intercourse with a man/men.

Criminal Law (Consolidation) (Scotland) Act 1995 section 10:

Prohibition against a person with parental responsibilities or charge or care of a girl under the age of 16 years causing or encouraging seduction/prostitution of, unlawful sexual intercourse with or the commission of an indecent assault on the girl.

Criminal Law (Consolidation) (Scotland) Act 1995 section 12:

Prohibition against a person with parental responsibilities or charge or care of a child of 4 years of age and under 16 years of age to be in a brothel.

Criminal Law (Consolidation) (Scotland) Act 1995 section 13:

Prohibition against a homosexual act with a person under the age of 18 years.

VEHICLES**Motor Vehicles (Wearing of Seat Belts by Children in rear seats) Regulations 1989, Road Traffic Act 1988, Section 15**

Imposition of requirement to wear seat belts

Agriculture (Safety, Health and Welfare Provisions) Act 1956 section 7(3):

Prohibition against allowing a child to ride/drive a vehicle or machine or agricultural implement.

Road Traffic Act 1988 section 15a:

Prohibition against sale of safety equipment for children in motor vehicles which contravenes regulations made under this section.

Road Traffic Regulations Act 1984 section 28:

Prohibition against failing to comply with the school crossing.

Road Traffic Regulations Act 1984 section 29:

Prohibition against failing to comply with a local authority order to prohibit traffic on a road used as a playground.

TATTOOING**Tattooing of Minors Act 1969 section 1:**

Prohibition against the tattooing of persons under 18 years of age.

WEAPONS**Crossbows Act 1987 section 1**

Prohibition against sale of a crossbow to a person under 17.

Crossbows Act 1987 section 3

Prohibition against a child under 17 having such an item "with him".

Criminal Law Consolidation (Scotland) Act 1995 section 49a:

Prohibition against a person having with him on school premises an offensive weapon.

Criminal Justice Act 1988 section 141a:

(See Crown Office Circular 88/1998 - Offensive Weapons Act 1996).

Prohibition against the sale of a knife blade/razor blade axe or bladed pointed item made or adapted to cause injury to a person under 16.

ANNEX 2

LORD ADVOCATE'S DIRECTION TO CHIEF CONSTABLES**REPORTING TO PROCURATORS FISCAL OF OFFENCES ALLEGED TO HAVE BEEN COMMITTED BY CHILDREN****REVISED CATEGORIES OF OFFENCES**

CATEGORY 1

Offences which require by law to be prosecuted on indictment or which are so serious as normally to give rise to solemn proceedings on the instructions of the Lord Advocate in the public interest.

CATEGORY 2

Offences alleged to have been committed by children aged 15 years or over which in the event of conviction oblige or permit a court to order disqualification from driving.

CATEGORY 3

Offences alleged to have been committed by children as described in section 30(1)(b) of the Social Work (Scotland) Act 1968.

EXPLANATORY NOTES

1. CATEGORY 1

- (i) Offences which require by law to be prosecuted on indictment fall under two heads - (1) common law offences which are within the exclusive jurisdiction of the High Court of Justiciary namely treason, murder and rape; and (2) statutory offences for which the statute only makes provision for prosecution on indictment or for a penalty on conviction on indictment - for example, contraventions of the Firearms Act 1968, Section 16, 17(1) and (2), and 18(1), the Road Traffic Act 1988, Section 1, and the Criminal Law (Consolidation) (Scotland) Act 1995 Section 5(1).
- (ii) Offences of culpable homicide, attempted murder, assault to the danger of life, sodomy, assault and robbery involving the use of firearms, attempted rape, incest and related offences (contrary to the Criminal Law (Consolidation) (Scotland) Act 1995 Sections 1-3) are offences which are normally indicted in the High Court of Justiciary.
- (iii) Other offences which may fall into this category as being those normally prosecuted on indictment are assault to severe injury or permanent disfigurement, assault with intent to rape, serious assault and robbery (in particular involving the use of weapons other than firearms), assault with intent to rob involving the use of firearms, fireraising and malicious mischief causing or likely to cause great damage to property or danger to life, all Misuse of Drugs Act offences involving possession of Class A drugs and possession with intent to supply and supply of any controlled drugs.

It should be emphasised that only offences which are normally prosecuted on indictment are to be reported.

2. CATEGORY 2

This category applies exclusively to children aged 15 years or over. Children will be prosecuted for this type of offence only if the Procurator Fiscal considers that it would be in the public interest to obtain a disqualification which would still be in force when the child became 16 and that in the event of conviction it was likely that the court would impose such a disqualification. Minor Road Traffic Act offences carrying a liability to discretionary disqualification should not normally be reported.

3. CATEGORY 3

There is no restriction on the forum for the prosecution of children of or over 16 years of age who can be proceeded against in the District Court.

4. When reporting to Procurators Fiscal cases against adults in which it is alleged that a child also committed the offence (not being an offence specified in categories 1 to 3) along with the adult, the report should state that a copy of the report has been sent to the reporter for action in respect of the child.

5. The annexed direction does not preclude you from reporting to Procurators Fiscal any other offences, alleged to have been committed by children, where you are of the opinion that, for special reasons (which must be stated in the report) prosecution might be considered.

ANNEX 3

ANNEX 4

RELATIONSHIP WITH THE SCOTTISH CHILDREN'S REPORTER ADMINISTRATION

There should be a good working relationship between the procurator fiscal and the reporter. Details of board members of the Scottish Children's Reporter Administration and of senior postholders are included at the end of this Annex.

It is important to recognise that the responsibility of the reporter relates solely to the operation of procedures for the care and protection of children. In this connection, a reporter may receive information from any source of a case which may require a children's hearing to be arranged for consideration of compulsory measures of supervision. Where a reporter receives such information he has a statutory duty (under section 56 of the Children (Scotland) Act 1995) to make an initial investigation of the circumstances. A child may be in need of compulsory measures of supervision where, *inter alia*, an offence mentioned in Schedule 1 to the Criminal Procedure (Scotland) Act 1995 has been committed in respect of that child or of a child who is a member of the same household. The reporter will normally have received a report from the police in such cases.

Following initial investigation, the reporter may decide to take no further action or to refer the child to the local authority or arrange a children's hearing (under section 56 of the Children (Scotland) Act 1995).

Central to the responsibilities of the reporter is the requirement that before a child is referred to the children's panel, there must be sufficient evidence to satisfy any of the conditions specified in section 52(2) of the 1995 Act. (Where the child has been the victim of criminal conduct, it should be noted that the civil standard of proof and rules of evidence, including hearsay, apply.) Where the child has been the victim of criminal conduct there may be a clear overlap in the interests of the procurator fiscal and the reporter and in some instances the evidence which forms the basis of a criminal charge may also establish the ground of referral. The reporter must, therefore, be made aware of the progress of any relevant criminal investigation or proceedings and should be informed, in confidence, of any decision to take no proceedings. Where criminal proceedings are in contemplation or are being taken, it is essential, for the proper performance of their respective responsibilities that there should be close liaison between procurators fiscal and reporters. The main features of this liaison should be:-

- (1) avoidance of duplication of enquiry which might be prejudicial to the well being of the child:
(see paragraphs 16.38 to 16.43)
- (2) exchange of information regarding proceedings:
(see paragraphs 16.53 and 16.54)

NOTE: The provision of evidence by the Procurator Fiscal to the reporter is now governed by Section 53 of the Children (Scotland) Act 1995. A joint protocol for the application of Section 53, drawn up by Crown Office and SCRA, is attached at Annex 4A. Procurators Fiscal, and reporters, are bound by the 1995 Act in relation to all requests for evidence falling within the criteria set out in Section 53(4), and should be guided by the protocol when dealing with these and other related requests. There is no longer a general requirement to report

requests to Crown Office for Crown Counsel's instruction, but any case of doubt or difficulty should be so reported, through the Policy Group.

In cases of abuse of a child by a parent (or another member of the household) the reporter should be notified when an accused is released on bail. The need for exchange of information about proceedings arises, in part, from the constraints imposed on reporters by their statutory time limits. In many cases, these time limits operate in such a way as to require disposal of the care proceedings in advance of the criminal proceedings. The procurator fiscal cannot dictate to the reporter the timetable which he should follow in the disposal of his proceedings, but liaison about the timing of the respective proceedings may be important. (See Ferguson 1989, SLT 681 and P -v- Kennedy 1995 SLT 476.

Wherever possible, reporters should also be informed of the result of the criminal proceedings including disposal of any appeal. Likewise, in cases where care proceedings have preceded disposal of the criminal proceedings the procurator fiscal should obtain information from the reporter about the outcome of the care proceedings or any other relevant aspects of any proof, such as an assessment of witness evidence or any problem at the proof.

The procurator fiscal should also be prepared to keep the reporter informed of the progress of cases where the complainer is not a member of the same family or household as the accused, but where it is known that there are children in the same family or household as the accused who may be at risk.

Where any offence mentioned in section 48 of the Criminal Procedure (Scotland) Act 1995 is reported to the procurator fiscal by the police, the police should be asked to provide as much information as possible about any other children in the same, or likely to be in the same household as the accused. Procurators fiscal should, where appropriate, remind judges of the provisions of sections 48 that when a person is convicted of any offence -

- (a) under section 21 of the Children and Young Person (Scotland) Act 1937;
- (b) of an offence mentioned in Schedule 1 to the Criminal Procedure (Scotland) Act 1995; or
- (c) in respect of a female person aged 17 years or over which constitutes a crime of incest;

the court may in relation to (a) and (b) refer the child offended against to the reporter and, in the case of (b) and (c) refer any child who is or is likely to become a member of the same household as the offender to the reporter with a certificate stating "that the said offence shall be ground established for the purposes of Chapter 3 of Part II of the Children (Scotland) Act 1995.

The provisions of section 48 can be of particular use to reporters to the children's panel when a conviction has been obtained at an early date.

Attendance at Case Conferences -

If a procurator fiscal is invited to attend a case conference about a child witness he should try to attend personally if at all possible or be represented if he cannot go himself. If a parent or relative of the child is to be in attendance during any part of the case conference, the procurator fiscal should not be present at that part of the meeting unless he is entirely satisfied that any information which will be disclosed to the conference by the procurator fiscal does not require to be treated as confidential. If the procurator fiscal considers it appropriate to divulge information to members of the case conference which he considers should not be passed to the parent or relative, the procurator fiscal should contact the chairperson of the case

conference before the meeting commences so that this can be made clear to those who will be in attendance at the meeting.

Where the procurator fiscal decides to attend the case conference, the provisions contained in the Access to Personal Files Act 1987 and Access to Personal Files (Social Work) (Scotland) Regulations 1989 must also be considered. The provisions allow an individual a right of access to personal information held about him by a social work department. The minutes of the case conference may be held to form part of a Social Work record to which these provisions apply.

Regulation 10(4) makes an exception for information held by the social work authority (a) for the purposes of the prevention or detection of crime or (b) the apprehension or prosecution of offenders, where the disclosure would be likely to prejudice the purposes of either (a) or (b). However, these exceptions may not apply where the procurator fiscal has disclosed to the conference that no proceedings are to be taken in a particular case. As the Moorov doctrine operates in many of the types of cases concerning child abuse, procurators fiscal should ensure that if information is to be given to a case conference about a decision to take no proceedings, that the terms of the intimation cannot be construed as a declaration of an intention to relinquish the right to prosecute the accused in terms of Thom v HMA 1976 SLT 232, unless it is the procurator fiscal's intention to make such a declaration.

ANNEX 6

MEMORANDUM BY THE LORD JUSTICE GENERAL ON THE TREATMENT OF CHILD WITNESSES BY THE COURTS

1. The following memorandum of guidance has been prepared at the suggestion of the Scottish Law Commission: see Report on the Evidence of Children and Other Potentially Vulnerable Witnesses (Scot Law Com No 125). Its purpose is to provide assistance to judges in the exercise of their discretionary powers, where a child is to give evidence by conventional means in open court, to put the child at ease while giving evidence and to clear the court of persons not having a direct involvement in the proceedings.
2. The general objective is to ensure, so far as is reasonably practicable, that the experience of giving evidence by all children under the age of sixteen causes as little anxiety and distress to the child as possible in the circumstances.
3. The following are examples of the measures which may be taken, at the discretion of the presiding judges, with a view to achieving that objective -
 - (a) The removal of wigs and gowns by the judge, counsel and solicitors;
 - (b) The positioning of the child at a table in the well of the court along with the judge, counsel and solicitors, rather than requiring the child to give evidence from the witness box;
 - (c) Permitting a relative or other supporting person to sit alongside the child while he or she is giving evidence;
 - (d) The clearing from the court room of all persons not having a direct involvement in the proceedings.
4. In deciding whether or not to take these or similar measures, or any of them, the presiding judge should have regard to the following factors -
 - (a) The age and maturity of the child.

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

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

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

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

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

- (d) Whether the trial is summary or on indictment -

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

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

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

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

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

5. In all cases before a witness under sixteen years is led in evidence an opportunity should be given to those representing the Crown and the defence to address the judge as to what special arrangements, if any, are appropriate. Under solemn procedure such representations should be made outwith the presence of the jury and preferably before the jury is empanelled or at least before the commencement of the evidence.
6. If a relative or other supporting person is to sit alongside the child, that person should not be a witness in the case and he or she should be warned by the judge at the outset not to prompt or seek to influence the child in any way in the course of the evidence.
7. The clearing of the court while a child is giving evidence will normally be appropriate in all cases which involve an offence against, or conduct contrary to, decency or morality: see section 166 and section 362 of the Criminal Procedure (Scotland) Act 1975. In other cases this should only be done if the judge is satisfied that this is necessary in order to avoid undue anxiety or distress to the child. The statutory provisions that bona fide representatives of a newspaper or news agency should not be excluded should be applied in all cases.
8. When taking any of the measures described above the judge should have regard to the court's general duty to ensure that the accused receives a fair trial and is given a proper opportunity to present his defence.

GUIDELINES ISSUED BY THE LORD ADVOCATE TO CHIEF CONSTABLES ON THE PROVISIONS RELATING TO CHILDREN'S EVIDENCE IN SECTION 271 OF THE CRIMINAL PROCEDURE (SCOTLAND) ACT 1995

The following guidelines by the Lord Advocate update the guidance issued in 1991 in respect of children's evidence by live television link under Sections 56-60 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.

GENERAL

The Prisoners and Criminal Proceedings (Scotland) Act 1993 introduced further evidential options for children, namely evidence on commission and the use of screens. Section 271 of the Criminal Procedure (Scotland) Act 1995 consolidated the law in relation to the evidential options for children under the earlier legislation.

The purposes of the provision of Section 271 of the Criminal Procedure (Scotland) Act 1995 is to reduce the stress for child witnesses under the age of 16 years when they are giving evidence in the High Court of Justiciary or the Sheriff Court. The provisions allow either the prosecution or the defence to make an application to the court to authorise the giving of evidence by the child on commission, by means of a live television link or using a screen.

Section 271(1)-271(4) of the Act provide for the evidence of a child to be taken before a commissioner. The legislation does not specify the location of such proceedings but it is envisaged that they will generally take place outwith the confines of the court. Unless by leave of the commissioner, the accused will not be present in the room where the commission proceedings take place but he will be entitled to watch and hear the proceedings by such means as seem suitable to the commissioner. This may be achieved by a form of live link or the use of a screen. Under this procedure the child will be subject to examination and cross-examination by parties. The commission proceedings will be video taped and the tape will be received in evidence at the trial so that the child will not require to attend court.

Section 271(5) provides for use of the live television link facility. The link has now been available in some areas since October 1991 and, although there have been technical and practical difficulties in some cases, research has indicated that the facility enabled some children to testify without undue distress. The facility involves the child giving evidence at a trial from a remote witness room, his evidence being transmitted to the court via a live television link.

Section 271(6) of the Act provides that the Court may authorise the use of a screen to conceal the accused from the sight of the child while the child is present to give evidence. Where this procedure is employed the child gives evidence in court but a screen is placed so that he cannot see the accused.

CRITERIA FOR USE

Section 271(7) and 271(8) specify the factors which the court may consider when dealing with an application for the use of any of the above evidential options. The court must have regard to

the possible effect on the child if required to give evidence, no such application having been

granted;

- whether it is likely that the child would be better able to give evidence if such application were granted; and
- the views of the child.

The court may also take into account -

- the age and maturity of the child;
- the nature of the alleged offence;
- the nature of the evidence which the child is likely to be called on to give; and
- the relationship, if any, between the child and the accused.

AVAILABILITY OF EQUIPMENT

Evidence on Commission

The type of equipment required for evidence on commission is not specified in the Act. It is possible that appropriate facilities in police office, social work departments or hospitals could be adapted for such proceedings.

Live Television Link

The sheriff courts in Aberdeen, Airdrie, Edinburgh, Falkirk, Glasgow and Greenock and the High Court in Edinburgh are equipped with the live television link. The Act includes provision for the transfer of sheriff court cases within the same sheriffdom to a court which is equipped with the link, for example, a case in Stirling Sheriff Court could be transferred to Falkirk Sheriff Court if an application for the live link facility was granted.

Screens

The equipment necessary for the provision of screens is mobile and can be made available in the High Court and in every sheriff court.

IMPLICATIONS OF USE OF SECTION 271 - IDENTIFICATION

The use of any of the methods of giving evidence specified in Section 271 has implications in relation to identification evidence. Where a child gives evidence using any of these methods he may not be permitted to make a face to face identification of the accused in court or in the course of commission proceedings where the accused is not present in the room where the child gives evidence. It was established in the case of HMA -v- Brotherston 1995 SCCR 613 that while it is not incompetent for a child to give evidence from the witness box following the grant of an application (in that case for use of the live link), once the child has started to give evidence this way the whole of his evidence should be given by this means. In such circumstances it may be necessary to lead evidence of a prior identification by the child; indeed, the use of one of the statutory methods may be dependant on there being sufficient admissible evidence of a prior identification by the child.

Accordingly, in any case which, in the opinion of the investigating officer, may come within the description contained in these guidelines, it is essential that early consideration is given to the question of identification evidence.

PRIOR IDENTIFICATION BY THE CHILD

Section 271(1) of the Act provides that where an application under Section 271(1), 271(5) or 271(6) is granted and the child gives evidence that he recalls having identified, prior to the trial, a person alleged to have committed an offence, the evidence of a third party as to the identification of that person by the child prior to the trial shall be admissible as to such identification.

Evidence of a prior identification, in certain circumstances, may be admissible at common law or in terms of the statutory exceptions to the hearsay rule in Sections 259 and 260 of the Criminal Procedure (Scotland) Act 1995.

Such 'prior identification' may relate to events at an identification parade but it would also be competent to lead evidence of identification under less formal circumstances, for example, where the child has pointed out the accused to a third party, where he has identified the accused by referring to a photograph or where he knows the accused and can refer to him by name. In such circumstances it would be necessary to lead evidence to link the child's prior identification with an identification of the accused in court.

IDENTIFICATION PARADES

Attendance at an identification parade may be stressful for some child witnesses, particularly victim witnesses, and investigating officers should make enquiries in relation to alternative sources of identification evidence. In cases of doubt or difficulty the Procurator Fiscal should be consulted.

Where an identification parade is required, a one-way screen should be used, if possible. In all cases the child should be given an explanation of the procedure and the purpose of the parade. He should have an opportunity to see the parade room before the parade and, if a one-way screen is to be used there should be a demonstration of the equipment. Where a screen is used it is essential to have regard to the physical ability of the child and to ensure that he is able to see the accused's features and to view and correctly refer to the numbers or symbols to be used in the parade. During the parade itself the child should be accompanied by a parent or trusted adult who is not a witness in the case.

In the case of young children it may be necessary to modify the standard procedures to accommodate the needs of the child. For example, the use of numbers will be inappropriate for children with poor numeracy skills. Any variation from the standard procedure must be noted by the officer in charge of the parade and, clearly, any such variation must not compromise the rights of the suspect/accused.

REPORT TO PROCURATORS FISCAL

It is essential that Procurators Fiscal are in a position to identify at an early stage cases where it is appropriate to apply for use of one of the statutory options. Accordingly, in any case which, in the opinion of the reporting officer, may come within the description contained in these guidelines, it is essential the full information about the child witness is contained in the report to the Procurator Fiscal. In particular, information in relation to the criteria specified in

Section 271(7) and 271(8) should be included and the report should detail the available evidence in relation to the identification of the accused.

RESTRICTIONS ON PUBLICITY OF PROCEEDINGS INVOLVING CHILDREN

The restrictions on the media in publishing reports identifying children are as follows:-

CRIMINAL PROCEEDINGS

In terms of Section 47 of the 1995 Act, no report of any court proceedings shall reveal the name, address or school or include any particulars calculated to lead to the identification of any person under the age of 16 years concerned in the proceedings either as an accused, a victim or a witness and no picture of or including such a person shall be published, provided that:-

- (i) if the child is only a witness (and not also a victim) and all the accused are 16 years of age or older, the prohibition shall not apply unless the court so directs;
- (ii) the court may, at any stage, dispense with the prohibition to the extent that it is satisfied that it is in the public interest to do so; and
- (iii) the Secretary of State may, on completion of the proceedings, dispense with the prohibition.

In relation to (ii) above, in all cases where a child is convicted (either after trial or on the basis of a plea of guilty) and the prohibition would apply unless dispensed with by the court, Procurators Fiscal must, in accordance with an undertaking given by the Lord Advocate to Parliament, remind the judge of his discretion to allow publication if he believes it to be in the public interest. The Procurator Fiscal, when doing so, should state his own view on the matter, taking account any representations made to him by the media. The fact that the judge was so reminded and his decision must be noted on the case papers.

The intention of the above sections is to prevent children being exposed to publicity as a result of criminal proceedings. Where a child victim is dead and there are no other children in the family or any other children concerned in the proceedings, the question of publicity adversely affecting children does not arise and the prohibition on reporting does not apply. Where, however, there are other children in the family, then even if none is concerned in the proceedings, the prohibition will apply as any publicity may adversely affect them.

Procurators Fiscal should take care to ensure at every stage in criminal proceedings, including the petition stage in solemn proceedings, that no information which is subject to the above prohibition is disclosed to the media.

Specification of a child's age in the charge or witness list (paragraph 16.65) should assist in alerting the media to the possibility of a restriction on reporting.

CRIMINAL PROCEEDINGS IN ENGLAND AND WALES

In relation to children concerned in proceedings in England and Wales, there is a similar restriction on publicity to that in Section 47 (which applies to the reporting of Scottish proceedings anywhere in the UK) contained in Section 49 of the Criminal Justice and Public Order Act 1994 which applies to publication in Scotland. Again the court may dispense with the restrictions if satisfied that this is in the public interest (Section (4A) or inserted by the Crime (Sentences) Act 1997).

FATAL ACCIDENT INQUIRIES

In terms of Section 4(4) of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976, where a person under the age of 17 years is in any way involved in a Fatal Accident Inquiry (as for example a witness, dependent or person against whom an allegation has been made), the sheriff may, at his own instance or on an application made to him by any party to the inquiry, make an order providing that no report of the inquiry shall reveal the name, address or school or include any particulars calculated to lead to the identification of that person and that no picture of or including that person shall be published.

