

**SCOTTISH CIVIL JUSTICE COUNCIL
FAMILY LAW COMMITTEE**

PERSONAL EXAMINATION OF CHILD AND OTHER VULNERABLE WITNESSES IN CHILDREN'S HEARING PROOF AND APPEAL PROCEEDINGS

1. Introduction

- 1.1 This is an open paper by the Scottish Government and the Scottish Children's Reporter Administration ("SCRA").
- 1.2 At its meeting in December 2016, the Committee considered a paper by the Scottish Government and SCRA proposing a change to the rules which govern court proceedings under the Children's Hearings (Scotland) Act 2011. Specifically, the paper proposed the introduction of rules to prohibit the personal examination of a child or other vulnerable witness by a party where the subject matter of the proceedings relates to conduct by that party towards that witness, or to other conduct which concerns the welfare of that witness.
- 1.3 The Committee was supportive of the need for rules and sought further detail on what form those rules might take.
- 1.4 This paper sets out the views of the Scottish Government and SCRA on that point. It is based on consultation and discussion with other stakeholders including: Children 1st, the Commissioner for Children and Young People Scotland, Families Need Fathers and the Faculty of Advocates. Views from the Law Society of Scotland were also sought but were not provided by the deadline. The written submission from the Faculty is attached at Appendix 2. Other discussions took place face to face or over the phone.
- 1.5 All those who responded were supportive of the need for Rules and in broad agreement about what was required. The Faculty of Advocates and Families Need Fathers specifically referenced the importance of continuing to ensure fair process under Article 6 of the ECHR. Some suggestions for how this might be achieved are presented later on.

2. Discussion

Background

- 2.1 Within criminal proceedings there are clear statutory provisions which prevent accused persons personally examining (i) those witnesses against whom they are said to have committed certain classes of offence or (ii) other vulnerable witnesses in the proceedings. These provisions are set out within ss.288C to 288F of the Criminal Procedure (Scotland) Act 1995. The prohibition applies unless certain criteria set out in section 288F(3) apply.
- 2.2 There are presently no statutory provisions of a comparable nature designed to protect the position of witnesses giving evidence in applications to the Sheriff to determine whether grounds are established under Ss.93 and 94 of the Children's Hearings (Scotland) Act 2011 or in appeals to the Sheriff against children's hearing decisions under that Act ("2011 Act proceedings").

- 2.3 Proceedings under the 2011 Act are not criminal proceedings and do not involve an accused person. They are however proceedings which concern determination of the civil rights and obligations of the parties to those proceedings.¹ Such parties therefore have Article 6 rights under the European Convention on Human Rights to a fair hearing and any approach to the issue highlighted here must be consistent with those rights.
- 2.4 Proceedings under the 2011 Act routinely concern the conduct of a party to the proceedings towards children or other vulnerable witnesses. As things stand, it is competent for these parties to personally examine child or other vulnerable witnesses against whom they are said to have committed offences of a sexual or violent nature.
- 2.5 It is also possible for 2011 Act proceedings to not concern behaviour which might be termed “criminal” but relate, for example, to a lack of care by a relevant person and that a party to the proceedings will seek to personally examine a child or other vulnerable witness in circumstances which are likely to be highly distressing to the witness.
- 2.6 While it is noted that examination by self-represented party does not take place frequently, we agree with the Faculty of Advocates that “...the frequency with which it occurs may increase a little after the decision of *JS and CS v Children’s Reporter* [2016] CSIH 74, 2016 Fam LR 166”. This case is at <https://www.scotcourts.gov.uk/search-judgments/judgment?id=717e1fa7-8980-69d2-b500-ff0000d74aa7>

Powers to make rules

- 2.7 Section 185 of the 2011 Act amended section 32 of the Sheriff Courts (Scotland) Act 1971. Section 32 of the 1971 Act was repealed by the Courts Reform (Scotland) Act 2014. The specific wording about being ‘*prohibited from personally conducting the examination*’ was not carried across to section 104 of the 2014 Act, on powers to regulate procedure etc. in the sheriff court and the Sheriff Appeal Court. However, the intention in relation to section 104 was to draft it in such a way to ensure the Court of Session could make rules in relevant areas without any doubts relating to *vires*.

3. Proposals

- 3.1 Based on the consultation and discussion, it is proposed that there are three categories of individuals that need to be considered for protection:
- The child subject of the referral
 - Any other child witness
 - Any adult vulnerable witness as defined in section 11 of the Vulnerable Witnesses (Scotland) Act 2004
- 3.2 It is also considered sensible to work on broadly the same basis as the provisions in the Criminal Procedure (Scotland) Act 1995, which means that there are two types of protection that could be offered:

¹ While the proof proceedings before the sheriff are concerned only with whether there is sufficient evidence to justify a referral to a children’s hearing, if the sheriff decides that there IS sufficient evidence the hearing can make a range of decisions which may have a significant impact on that individual’s civil rights and obligations. For example, where a child is to reside and what level of contact parents or other family members have with the child.

- Mandatory prohibition of personal examination
- Discretionary prohibition of personal examination, subject to application by the Reporter or any other party or on motion of the Court. In this case, it is suggested that the court consider the fairness of proceedings, the interests of justice and the interests of the vulnerable witness (we recognise that these considerations overlap one another to some extent)

3.3 Broadly speaking it was felt that those situations where the child subject of the referral most clearly needed protection were in relation to grounds for referral under s 67 of the 2011 Act which cover sexual offences, schedule 1 offences, domestic abuse and forced marriage. On reflection, it was felt that lack of parental care cases could also raise issues where a child might be subject to traumatic examination by a relevant person. These have therefore also been identified as appropriate for mandatory prohibition. (A full list of the grounds is covered in appendix 1).

3.4 The same approach should be taken in relation in relation to other child witnesses. In addition, there should be a mandatory prohibition of personal examination in cases where the child was a witness to an offence committed by another child, where it was felt that hostile cross examination by a relevant person might take place.

3.5 For adult witnesses it was felt that vulnerable victims of offences committed by children, and victims of domestic abuse were in need of mandatory protection.

3.6 The table at Appendix 1 sets out the grounds for referral and the type of protection proposed for each category of victim/witness for ease of reference.

3.7 We would note that special measures would also continue to be available to child and adult vulnerable witnesses, meaning that discretionary or mandatory prohibition would therefore form the higher end of a continuum of protection. However, we also note that a number of the special measures (for instance use of a screen or a TV link) would not be appropriate or useful in circumstances where a relevant person was seeking to examine the witness.

3.8 In order to ensure that prohibition of personal examination is compliant with Article 6 of the ECHR, it is suggested that the court appoints a representative for any relevant person who otherwise insists on representing him or herself, in a very similar manner to that set out in s288D of the Criminal Procedure (Scotland) Act 1995.

4. Drafting

4.1 We consider that the terms of s288D, E and F could be adapted to provide for the regulation of personal examination of children and other vulnerable witnesses by a relevant person.

4.2 Specifically, s288D could be adapted to allow for the appointment of a solicitor by the court.

4.3 s288E could be adapted to provide for the prohibition of the personal conduct of a case involving cross-examination of a child or vulnerable adult by a relevant person. Rules could list the circumstances to which the prohibition applies in line with what is set out in Appendix 1.

4.4 Similarly, s288F could be adapted to provide for the circumstances where prohibition of personal conduct of a case involving examination of child and vulnerable witnesses would be at the discretion of the court.

4.5 We would suggest that the mandatory protection should apply to any self- represented party, while the discretionary protection would apply to a named individual.

5. Practicalities

5.1 We agree with the Faculty of Advocates that there would require to be a careful case management procedure so that the issue could be identified at an early stage thereby avoiding excessive delays and minimising any potential distress for the witness. SCRA generally seeks to promote a proactive judicial approach to case management in children’s hearings court proceedings in order to achieve fair, efficient and expeditious decision making.

6. Conclusion

6.1 Members of the Family Law Committee are invited to:

- Note the content of this paper.
- Agree to new rules of court being drafted. And in particular
 - i. apply a mandatory ban on self representation in certain defined circumstances
 - ii. allow a discretionary ban in other circumstances and give powers to all parties to make an application to that effect as well as allowing the court to consider such of their own motion
 - iii. allow the court to appoint a solicitor to represent a party where such a ban is enforced

APPENDIX 1

TABLE SHOWING GROUNDS OF REFERRAL, TYPE OF WITNESS AND PROPOSED LEVEL OF BAN

Note:

M = mandatory

D = discretionary

Ground under section 67 of the 2011 Act	Child subject of referral	Other child witness	Adult vulnerable witness
A – the child is likely to suffer unnecessarily or the health or development of the child is likely to be seriously impaired due to a lack of parental care	M	M	D
B – a Sch 1 offence has been committed in respect of the child	M	M	D
C – the child has or is likely to have a close connection with Sch 1 offender	M	M	D
D – the child is a member of likely to become a member of same household as victim of Sch 1 offence	M	M	D
E – the child is being or is likely to be exposed to persons whose conduct is such that it is likely the child will be abused or harmed , or there will be damage to the child’s health safety or development	D	D	D
F – the child is or is likely to have close connection with a person who has carried out domestic abuse	M	M	D/M (where victim)

G – the child has had or is likely to have close connection with a person who has committed an offence under parts 1 4 or 5 of the sexual offences Scotland act 2009	M	M	D/M (where victim)
H – the child is being provided with accommodation by local authority under s 25 and special measures are needed to support the child	D	D	D
I – a permanence order is in force and special measures are needed to support the child	D	D	D
J – child has committed an offence	D	M	D/M (where victim)
K – child has misused alcohol	D	D	D
L – child has misused a drug	D	D	D
M – child’s conduct has had or is likely to have a serious adverse effect on the health safety or development of the child or another person	D	D	D
N – beyond control of a relevant person	D	D	D
O – failure to attend school regularly without reasonable excuse	D	D	D
P & Q – Forced marriage or civil partnership	M	M	D

APPENDIX 2



FACULTY OF ADVOCATES

Response from the Faculty of Advocates**In respect of self represented relevant persons and
children's hearings court proceedings**

The Faculty of Advocates welcomes the opportunity to comment on the issue of self-represented relevant persons in Children's Hearings proofs. We have the following views in relation to this matter.

We consider that it is entirely right and proper that rules be introduced to regulate the personal examination of a child or other vulnerable witness by a party where the subject matter of the proceedings relates to conduct by that party towards the child, or indeed to other conduct which concerns the welfare of the child or vulnerable witness. The issue is of course that sufficient safeguards must be built in to ensure that the evidence can be adequately tested in the interests of justice.

We agree that the examination of children in the witness box by relevant persons is something which happens rarely. The frequency with which it occurs may increase a little after the decision of *JS and CS v Children's Reporter* [2016] CSIH 74, 2016 Fam

LR 166. We agree that it remains important to consider methods to avoid this happening, in line with child-centred practice.

The recent case of *JS and CS v Children's Reporter* [2016] CSIH 74, 2016 Fam LR 166 concerned an appeal against a sheriff's decision to exclude the evidence of three children in a grounds for referral proof. The Inner House held that where it was proposed to rely on hearsay evidence and that a witness was not to be called to give oral evidence, the fairness of reliance on a hearsay statement in the absence of the witness should be evaluated from three interacting perspectives, namely (i) whether there is good reason for the absence of the witness, (ii) whether the hearsay statement led in his place is likely to be the sole or decisive basis for the determination of the issue, and (iii) whether there are counterbalancing factors which compensate for the handicaps created by the admission of untested evidence. It is submitted that the last of these is particularly relevant to consider in the present, somewhat different, consideration of the cross examination of a child by a relevant person.

The issue to consider in this consultation process is whether there are counterbalancing factors which could compensate for the prohibition of the relevant person from cross examining the child or vulnerable witness. This situation is one which engages rights under both article 6 and article 8 of the European Convention on Human Rights. The issue was considered by the Court of Appeal in England in *In re K (Children)* [2015] EWCA Civ 543, [2015] 1 WLR 3801. The Court recognised that there were a number of case management options that would be sufficient in most

cases to protect Convention rights. These included directing that a particular witness give evidence on condition that the witness be questioned through a legal representative, the witness be questioned by the judge or his clerk, or a guardian be appointed to conduct proceedings on behalf of the children. Not all these options would be appropriate to the Scottish context. Examination by the sheriff may be considered inappropriate and examination by the clerk of court should be ruled out. A curator for the children will not satisfy the requirements of the Convention as he or she must have an independent view from that of the relevant person prohibited from crossing the child. The Court of Appeal did observe that there would be cases where the absence of a legal representative able to conduct cross examination would result in proceedings not being conducted in compliance with article 6 or 8. This, they stated, would occur where the oral evidence to be tested was complicated, as where there was complex medical or other expert evidence or complex or confused factual evidence, say, from a vulnerable witness. In those cases, they said, it should be possible to appoint a legal representative to conduct cross examination and to pay the representative from public funds.

We note that the SCRA Discussion Paper on this matter suggests that there should be a mandatory prohibition of personal examination in some circumstances and a discretionary prohibition in other circumstances, which would be the subject of an application by the Reporter or the Court. We agree that there should be such a distinction, and have some practical suggestions in that regard, discussed below.

COURT APPOINTED REPRESENTATIVE

In our view, the appointment of a court appointed representative for any relevant person who otherwise insists on representing him or herself, in a very similar manner to that set out in s288D of the Criminal Procedure (Scotland) Act 1995, would provide the necessary counterbalancing safeguards in the context of proceedings under the Children's Hearings (Scotland) Act 2011. The relevant person simply being warned that personal cross examination will not be permitted and then left to source their own representation if they chose to do so would not provide an adequate counterbalancing safeguard to the loss of the right to cross examine, as a lay person may not appreciate the disadvantage involved and may not have the means to engage a solicitor. Such an approach is unlikely in our view to be compliant with the relevant person's Article 6 right to a fair hearing, nor article 8 rights to respect for family life.

In our view, there are a number of provisos which would require to apply to the appointment by the court of a representative. There would require to be a careful case management procedure so that this issue could be identified at a relatively early stage to avoid excessive delays. We do not consider that would be possible for a solicitor to be appointed simply to come in and conduct the cross examination in question, in isolation. The solicitor would require to conduct the whole proof. The same considerations apply were counsel to be instructed. We understand that in criminal cases, the court appointed representative similarly requires to conduct the whole trial.

Where the reporter intends to call a child witness, and a relevant person is unrepresented, the prospect of a child witness will require to be made clear during the case management process, to allow steps to be taken by the court to appoint a solicitor. There are sometimes practical difficulties in identifying whether a child witness will be called, and sometimes an expert report is instructed in this regard before a decision is taken. There would therefore be an element of front-loading of preparation in these circumstances for the reporter, agents and any counsel involved. In addition, legal aid will require to be made available to the relevant person to ensure his or her representation. That would require to be regardless of the relevant person's resources, in order to ensure representation. A person may not be eligible for legal aid, but still not have the means to instruct representation in a referral proof that may be lengthy, complex and involve expert evidence.

We highlight the possibility of legal aid on this basis being open to abuse in that relevant persons who do not qualify for legal aid on financial grounds could bring themselves within the legal aid scheme in this manner, but we do not see this as a problem which should arise with any regularity, if at all. It is a minority of relevant persons who do not qualify for legal aid and the provision would carry the disadvantage (for the party) that the court, rather than the party, will select the representative.

Such a court appointment is a different role for solicitors practising in civil law, and regulation in a similar manner to that set out in s288D of the 1995 Act would be necessary. That involves provision for the solicitor to continue to act, where

necessary, regardless of the instructions of the relevant person, but in his best interests. The court should be able to allow the solicitor to withdraw from acting and to appoint a new representative. Law Society guidance to civil practitioners engaged in this way would be necessary.

COURT RULES

We agree that the terms of Rule 3.47(6) and (7) of the Child Care and Maintenance Rules 1997 are not sufficient to provide proper regulation of this matter. The matter requires to be covered in primary legislation. We consider that the terms of s288D, E and F could be adapted to provide for the regulation of personal examination of children and other vulnerable witnesses by a relevant person. S288D can be adapted to allow for the appointment of a solicitor by the court. S288E could be adapted to provide for the prohibition of the personal conduct of a case involving cross-examination of a child under the age of 18 by a relevant person. This provision could list as the circumstances to which it applies those which are set out in the SCRA Discussion Paper as the type of case where prohibition of personal examination should be mandatory. Similarly, S288F could be adapted to provide for the circumstances where prohibition of personal conduct of a case involving examination of child and vulnerable witnesses would be at the discretion of the court.

Provided substantive provisions are made in primary legislation, the issues may then be added to the points to be covered under Child Care and Maintenance Rule 3.46A.