



SCOTTISH
CHILDREN'S REPORTER
ADMINISTRATION

CONSULTATION ON THE USE OF INTERMEDIARIES FOR VULNERABLE WITNESSES IN SCOTLAND

15 JANUARY 2008

SCOTTISH CHILDREN'S REPORTER ADMINISTRATION COMMENTS



SCRA Background:

Established in 1996, the Scottish Children's Reporter Administration (SCRA) assumed responsibility for the Children's Reporter service across Scotland and operates as a Non-Departmental Public Body (NDPB), funded by the Scottish Government. While the Principal Reporter is independent in terms of his/her decision-making powers in relation to children referred, the organisation and Board of SCRA is responsible and accountable to Scottish Ministers.

In 2006-07, 56,199 children were referred to the Children's Reporter. This figure represents 6.1% of all the children in Scotland. 39,709 of these children were referred because they were considered to require care and protection, while 11,570 had allegedly committed an offence. 4,920 children were referred on both care and protection and offence grounds.

If the child and/or their relevant persons do not accept or do not understand the grounds for referral, the Children's Hearing may direct the Reporter to apply to the Sheriff court to establish the grounds for referral (section 68 of the Children (Scotland) Act 1995). In 2006/07 3,946 applications were made and in 87% of cases, the grounds were upheld by the Sheriff.

The attached information leaflet provides an overview of how the Children's Hearings System operates in Scotland.

An appendix is attached which explains further the relationship between the Children's Hearings System and the civil Children's Hearings court proceedings.

Detailed Consultation Response

1.

a) Do you feel that there currently are barriers to communicating effectively with child or adult vulnerable witness in the Scottish criminal justice system?

Yes

b) If yes, what do you consider to be the nature and cause of any such barriers?

Although much has already been done to provide help for children and other vulnerable witnesses through the provisions of the current legislation, the experience of giving evidence can still be traumatic and stressful for them. The use of special measures will take time to become embedded across all court proceedings, but it is likely that a measure founded in statute will have an impact on the experiences of witnesses. Statutory measures will also be more likely to promote consistency and fairness in application across Scotland, which can only be of benefit to vulnerable witnesses.

The principal purpose of the Vulnerable Witnesses (Scotland) Act 2004 is to promote the clear and accurate presentation of the evidence of child and adult vulnerable witnesses. The special measures for giving evidence already introduced by the Act seek to make legal proceedings more responsive to individual witness needs, promote witness participation and introduce greater certainty. However, more could be done, particularly in addressing the gap which can exist between good policy, the legislation and implementation on the ground.

There are continuing concerns about the quality and appropriateness of the questions put to child and vulnerable adult witnesses, particularly during court proceedings. Certain individuals, including children, may have particular communication needs when acting as witnesses and may require particular assistance in court to enable them to give their best evidence. The statutory provision of intermediaries is just one aspect of ensuring that these communication needs are properly considered and addressed.

Courts can be intimidating places and the experience is often unavoidably stressful and likely to promote anxiety. By giving witnesses the confidence and support they need as far as possible before, during and after court appearances, it is suggested that vital evidence is less likely to be lost due to communication difficulties.

c) How could any such barriers be addressed?

There should be:

- An assessment of the witness's abilities and needs
- An early consideration of the witness's views and wishes in relation to their communication requirements, which ensures that the appropriate supports are put in place and that they are actively involved in the process.

- More options for child and other vulnerable witnesses in how they give evidence, by the introduction of an intermediary as a special measure.
- Improvement in the management of trials, and other court proceedings involving vulnerable witnesses. This should include discussing and agreeing ground rules regarding the quality and appropriateness of the questions put to child and other vulnerable witnesses before the trial/proof commences. This should result in the court, and others involved, having a better awareness of the developmental and communication needs of the witness.
- It will be important to make a realistic estimate of the witness's ability to give evidence without the use of an intermediary but with other special measures available to the court.

It may well be that with additional support, many more witnesses will be able to give evidence and appear in court. An intermediary can assist greatly with this decision by providing information from their initial assessment of the witness and by their role in court during proceedings.

While it is acknowledged that defendants and other parties in civil proceedings have a fundamental right to a fair trial or proof, and this includes the ability to test and challenge the evidence against them, the process should protect the rights and needs of all concerned.

Children may be capable of expressing themselves adequately but may not use verbal communication as their main or only means of expressing themselves. They may communicate through a combination of speech, gestures, drawing or pointing to pictures or graphic symbols. This could also be true of many adults with a communication impairment, for whom speech may not be a primary or preferred means of communication.

Those involved in the court process (and before) should be aware of the range and extent of possible communication difficulties for children. Children should not have to display a 'disability' as such in order to qualify for an intermediary. They may just need help to understand the questions.

When communicating with children, it should be remembered that, depending on their age and stage of development, they may have a tendency to believe that adults are "all knowing" and are fully aware of everything happening to them. Effective communication will depend on the questioner's skills and understanding (through flexibility and sensitivity) of the child's particular needs.

Therefore, account should be taken of the level of a child's development, which may leave them more open to suggestion through established techniques of questioning than an adult might be.

Examination and cross-examination could be better managed if the court were better informed of the witness' level of development, something which an intermediary could assist with.

2.

a) Could better use be made of the court's powers within the current legal framework to help effective communication between a child or adult vulnerable witness and the court?

Yes

b) If yes, how?

Please see response to Question 3 below

3.

a) Could better use be made of training, guidance and awareness-raising in improving communication between the court and child or adult vulnerable witnesses?

Yes

b) If yes, how?

SCRA would suggest that mandatory training on existing measures for those likely to come into contact with vulnerable witnesses in the course of their work would be beneficial.

4. What would be the function and remit of an 'intermediary' if it were added as a statutory special measure under the Act?

There would be a need to clearly define the role of the intermediary and how it differs from those with other roles such as witness supporters, interpreters or appropriate adults - although some of the activity may be similar. This would be needed to avoid confusion about roles and responsibilities.

5. Should an intermediary be available for the accused?

SCRA does not feel it would be appropriate to comment on criminal trials, but we do believe that any child or parent who is party to Children's Hearings court proceedings should have an intermediary available as a special measure, irrespective of the ground for referral (whether offence or non-offence).

6. Should an intermediary be available in civil as well as criminal proceedings?

Yes

If an intermediary is included as a special measure, this should be available in Children's Hearings court proceedings (which are *all* civil proceedings, irrespective of the ground for referral), for witnesses and parties who give evidence. It may also be very useful in proceedings where issues such as contact and adoption are being considered.

7. How would the costs associated with the use of an intermediary be met?

SCRA believes that the costs could be met in the same way that other special measures are funded.

8.

a) What skills and background would an intermediary need to have?

SCRA notes that, in England and Wales, intermediaries come from a range of professional backgrounds, including speech and language therapy, occupational therapy, psychology, education and social work. There is also specific training provided for them and their personal expertise and conduct is open to legal challenge.

Some level of legal knowledge or experience would be beneficial, as would professional experience of working with children or vulnerable adults.

b) Would they have to be specifically trained and accredited?

Training would be essential for the intermediaries to do their jobs effectively and consistently and SCRA is also supportive of an accreditation scheme. This would provide greater acceptability and confidence throughout the court system in relation to the use of intermediaries.

9. Please indicate whether you agree, disagree or are unsure about the following statements:

a) The individual needs of the witness (child or adult) would need to be assessed in advance and taken into account in deciding whether to appoint an intermediary as a special measure.

AGREE

b) The individual needs of the witness (child or adult) would be the decisive factor in deciding whether or not to appoint an intermediary as a special measure.

AGREE

c) The use of an intermediary should be treated as a 'standard' special measure for child witnesses if introduced under the Act

DISAGREE

d) The use of an intermediary should be treated as a 'further' special measure for child witnesses if introduced under the Act

AGREE

e) Intermediaries should be available on application to the court for adult vulnerable witnesses

AGREE

10. What, if any, impact do you consider the use of an intermediary might have on examination and cross-examination of a witness?

An intermediary would play an active role in enabling the parties to communicate in a manner that facilitates the best possible understanding of

the evidence. There would need to be effective planning of the use of the intermediary at key stages in the progress of the case and of the actions that need to be taken to protect the quality of the evidence.

Assisting witnesses to recount an event accurately does not strike at a party's fundamental right to a fair hearing. Where a child is inhibited from describing what happened because court premises, procedures and language are all alien to their experience, it is in the interests of all parties to minimise that effect if it allows the evidence to be led; similarly if their age or developmental stage makes them especially liable to intimidation or distress. In a recent evaluation of the English system it was stated that: "It requires specialist knowledge to understand where the child is having a problem because it's not necessarily apparent that the child has misunderstood."¹

11. What, if any, impact do you consider the use of an intermediary might have in enabling the jury (or judge) to make an assessment of the witness's credibility and reliability?

The role may assist questioners to test the witness's evidence but intermediaries should not be expected to provide an opinion on whether the witness is truthful, credible or reliable. That assessment should continue to rest with the court.

12. What would be the advantages and disadvantages of adding the use of an intermediary as a statutory special measure under the Act?

There is a need to recognise the complexities involved in the communication process, particularly at court. One advantage would be that an intermediary would be able to produce a report for the court detailing the witness's communication needs, including provision of advice to the court about how communication may be improved. This would enhance the ability of witnesses to deliver their evidence clearly and coherently.

There would be an expectation that the appointment of an intermediary as a special measure is routinely considered as one of the options available where there are vulnerable witnesses. In addition, as previously stated, placing the provision on a statutory basis should ensure consistency in its application in any relevant proceedings across Scotland.

The availability of intermediaries as a statutory special measure would also send a strong message about the need to consider how best to assist a vulnerable witness communicate their evidence clearly and coherently.

It would fulfill the policy objectives of:

- Improving the quality of evidence given by vulnerable witnesses, in particular children; and
- Enabling and encouraging greater use of special measures for these witnesses in all types of court proceedings.

¹ www.communitycare.co.uk "Waiting for Justice" (24th May 2005) quoting Joyce Plotnikoff

13. What are the advantages and disadvantages of working within the current legal framework?

On balance, SCRA feels that intermediaries should be introduced as a statutory measure for the reasons outlined above.

14. In addition to your answers to the questions above please feel free to set out below any other views or comments you may have on the use of intermediaries to help witnesses give their evidence.

If lessons are to be drawn from the use of intermediaries in other jurisdictions, it should be remembered that the definition of a vulnerable witness may vary. For example, in England and Wales, witnesses who are eligible for special measures assistance solely on the grounds of fear or distress about testifying under Section 17 of the Youth Justice and Criminal Evidence Act 1999, are not eligible for an intermediary. It is only available in relation to young witnesses (under 17 years) and those who have an incapacity in the context of the legislation – this may include a physical or learning disability that affects their ability to communicate with others within the criminal justice system.

In the Vulnerable Witnesses (Scotland) Act 2004 the definition of vulnerability includes:-

- a person under the age of 16 years at the commencement of the proceedings etc
- any adult where there is a significant risk that the quality of the evidence may be diminished because they are suffering from a mental disorder, or fear or distress in connection with giving evidence at the trial or hearing.

Therefore, when determining vulnerability in terms of the 2004 Act, it has to be considered under either one of those headings. A physical disability or impairment, in itself, it would not allow an adult to be considered for this special measure in Scotland (unlike the English legislation). As a result, any conclusions drawn from the English system and use of intermediaries in this jurisdiction would have to be considered with this in mind.

Appendix 1

The interface between the Children's Hearings System and the Courts

The following summary provides brief information about how the Children's Hearings System operates, its interface with the Vulnerable Witnesses (Scotland) Act 2004, and any use of intermediaries.

Children may be referred to the Reporter from birth to aged 16 years (up to 18 years if already subject to a Supervision Requirement at age 16), and for any presenting concern. After investigation and assessment, the Reporter may refer some children to a Children's Hearing where:

- There is a need for compulsory measures of supervision and
- There is sufficient evidence of one or more ground(s) for referral, as set out in Section 52 (2) of the Children (Scotland) Act 1995.

The grounds for referral cover:

- Concerns for the child (e.g. the child has been the victim of a Schedule 1 offence, or is suffering from a lack of parental care), or
- Concerns about the child's behaviour (e.g. the child is beyond the control of a relevant person, or alleged to have committed an offence), or
- Both

Interface between the Children's Hearings System and the Courts

Where at the Children's Hearing (a tribunal of three lay Children's Panel Members, with no rules of evidence), the child and/or parent does not agree with the grounds for referral, or where the child does not understand them, the Hearing may direct the Reporter to make an application to the Sheriff for a finding as to whether these grounds are established.

The application to the Sheriff is lodged by the Reporter within 7 days, and will include any request to dispense with the child's obligation to attend at court (i.e. the child who is subject of the application). The Reporter may include information to assist the Sheriff to make a decision on this issue. The decision to dispense with the child's obligation to attend at court is made by the Sheriff and is governed by section 68(5) of the Children (Scotland) Act 1995, which sets out the test to be applied by the Sheriff.

NB-this is a distinct process from any application under the Vulnerable Witnesses (Scotland) Act 2004 - the child is not a "witness" on the basis of the Section 68 application being made.

The Section 68 application may result in the need to cite witnesses, in order that the Sheriff can hear evidence and make a decision on the grounds. Some cases may settle without evidence being led, so an application will not necessarily result in the need for oral evidence. However, in some cases evidence will be required, and may be contested in the normal way of adversarial proceedings.

There is a distinction in terms of the evidential rules to be applied, between two categories of Section 68 applications. While all Children's Hearings court proceedings are civil in nature, the cases where the ground for referral is based on an alleged offence **by** the child are subject to the rules of criminal evidence, and the grounds must be proved beyond reasonable doubt. All other cases are subject to the rules of civil evidence, where the standard of proof is the balance of probabilities.

So, Reporters need to apply two different sets of rules in preparing for proof and deciding on what evidence is required, depending on the type of grounds for referral. This has an impact on the Reporter's use of the Vulnerable Witnesses (Scotland) Act 2004.

In cases where the child is alleged to have committed an offence, hearsay evidence is only admissible in certain limited circumstances, and it is therefore more likely that a child or vulnerable witness will be cited, and the need for Special Measures addressed, as per the Vulnerable Witnesses (Scotland) Act 2004.

In all other cases, hearsay evidence is admissible, and SCRA's clear policy is to avoid citing child witnesses at all wherever possible, and to cite adult vulnerable witnesses with thought and appropriate application for Special Measures. The policy for child witnesses predates the Vulnerable Witnesses (Scotland) Act 2004, as case law had already removed the need to cite child witnesses in 2000 (TvT 2000 SCLR 1057).

A low number of Child Witness Notices in Reporter cases is to be expected and reflects implementation of SCRA's policy on practice in this area.

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