

Practice Direction 11

Role of the Reporter at a Children's Hearing or Pre-hearing Panel

Date Issued:	21 June 2013
Date Implemented:	24 June 2013
Date Last Revised:	12 February 2019

SUMMARY

General

- The reporter is to carry out his role at a children's hearing or pre-hearing panel in a way which supports the independence and impartiality of the hearing or pre-hearing panel.
- There are 4 elements to the reporter's role at a children's hearing or pre-hearing panel:
 - fulfilling statutory functions
 - supporting fair process
 - providing customer care
 - meeting health and safety obligations
- The hearing or pre-hearing panel is under no obligation to accept the views of the reporter in relation to fair process.

Before the Hearing or Pre-hearing Panel

- Contact with panel members is to be minimised and made transparent to relevant persons and the child (if of sufficient age and understanding). Contact is to take place only for:
 - administrative matters,
 - significant health and safety risk, or
 - specific exceptional circumstances relating to the chair's management of the hearing or pre-hearing panel.
- Those exceptional circumstances are:
 - there is a significant issue concerning the exercise of rights (including any issue likely to adversely affect the effective participation of someone with a right to be involved in the decision-making process)

AND

- the information is likely to affect the chair's management of the fair process of the hearing or pre-hearing panel if known to the chair **in advance** of the hearing starting, .
- Panel members are to be given a written note of who was notified, who was invited and who has attended.

In the Hearing or Pre-hearing Panel

- The reporter is to express a view on any procedural matter if requested to do so by a panel member, and is to express a view on his own initiative if he thinks there is a material procedural irregularity or one may develop. The reporter *may* express a view on his own initiative in relation to non-material irregularities; the more significant the irregularity the more likely it is to be appropriate for the reporter to express a view.
- If a panel member requests the views of the reporter on a procedural matter, the reporter is to indicate that the views of others at the hearing or pre-hearing panel should also be sought (if the panel member has not already done so).

After the Hearing or Pre-hearing Panel

- The reporter is to have no involvement in the writing of reasons.
- The reporter is to remain in the hearing room only if the chair has invited the relevant persons and child (if of sufficient age and understanding) to remain. The reporter may remain even if the child or relevant persons do not take up the offer.
- If the chair does not invite the reporter, relevant persons and child to remain, then the reporter may request the chair to do so.

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1. Introduction

- 1.1 This Practice Direction provides direction on the role of the reporter at a children's hearing or pre-hearing panel and how it is to be applied. In carrying out this role, the reporter must act in a way which maintains the independence and impartiality of the children's hearing or pre-hearing panel.
- 1.2 The Practice Direction takes into account the statutory duties of the reporter set out in the Children's Hearings (Scotland) Act 2011 and related secondary legislation. It also takes account of the European Convention for the Protection of Human Rights (particularly Articles 5, 6 and 8), the UN Convention on the Rights of the Child (particularly Articles 3, 9, 12, 16, 18, 19, 20, 25, 37 and 40) and the 'Beijing Rules' (particularly Rules 5–8 and 14–22).
- 1.3 Article 6 of the European Convention on Human Rights requires that when a child is referred to a children's hearing which determines his civil rights and obligations, the child and relevant persons receive a fair hearing before an independent and impartial tribunal. In *S v Miller* the Court of Session found that the children's hearing is an independent and impartial tribunal. The European Court of Human Rights recognises that there may be models of courts or tribunals that are different to the 'classic' court model but requires that any model has the key features of an adversarial approach in order to be able to provide a 'fair hearing'. Given the range of the Principal Reporter's statutory functions in relation to a child's case, the reporter is, in ECHR terms, an adversary of the child and relevant persons at the children's hearing or pre-hearing panel.
- 1.4 Where a court or tribunal differs from the classic adversarial model, the European Court of Human Rights may look at the whole model or system to determine whether there is compliance with Article 6. There is therefore some scope for flexibility as to the detailed operation of a court or tribunal model, provided the overall balance of roles and practice within the system meets ECHR requirements.
- 1.5 The most relevant statutory provisions in the Children's Hearings (Scotland) Act 2011 and the related Children's Hearings Rules of Procedure are:
 - 2011 Act Part 8 sections 79 - 82
 - Rules Part 12 rules 45 - 55
- 1.6 The general principles and procedure applying to a children's hearing or pre-hearing panel are summarised in Appendix 1.

2. The Role of the Reporter

There are four elements to the role of the reporter at a hearing or pre-hearing panel:

- fulfilling statutory functions
- supporting fair process
- providing customer care
- meeting health and safety obligations.

2.1 Fulfilling statutory functions

- 2.1.1 In terms of rule 13 the reporter is required to keep a record of proceedings at each children's hearing and pre-hearing panel. Practice Direction 18 on Completion of Forms provides more information on the Record of Proceedings. Section 78 gives the reporter an express right to attend a hearing or pre-hearing panel.
- 2.1.2 In terms of section 123 the reporter may apply to any children's hearing for a warrant to secure the attendance of the child at a children's hearing or court hearing. The reporter is wherever practicable to provide a written note of reasons for making the application to the hearing. A pro-forma for this purpose is set out at Appendix 2.
- 2.1.3 See the Practice Note on Warrants for fuller information about warrants, deciding whether to apply for one and relevant processes.
- 2.1.4 The reporter must not advocate for a particular decision or outcome in any other circumstances.

2.2 Supporting fair process

- 2.2.1 The Children's Hearings (Scotland) Act 2011 and the Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Rules 2013 set out the procedure to be applied at a children's hearing. Subject to these express requirements, rule 7 enables the chair to determine the procedure at the hearing.
- 2.2.2 The reporter has an interest in the children's hearing being a 'fair hearing' and is to support fair process within the hearing. Any action to support this fair process must be compatible with the independence and impartiality of the children's hearing.
- 2.2.3 There is fair process in the hearing if there is an absence of anything that could amount to a procedural irregularity. Effective participation by the child and relevant persons (and any other person with a right to be involved in the decision-making process about the child) is an element of fair process.
- 2.2.4 There are two aspects to supporting fair process. Firstly, where a panel member invites views from those present at the hearing on any aspect of procedure, the reporter is to respond. Secondly, where the reporter thinks that there is a material procedural irregularity, or that a material procedural irregularity may develop, the reporter is to express a view on his own initiative and give the reasons for that view. If there is, or may be, a non-material procedural irregularity the reporter *may* express a view on his own initiative; the more significant the irregularity, the more likely it is to be appropriate for the reporter to express a view.
- 2.2.5 Paragraph 5.8 provides examples of situations where the reporter is to express a view about fair process on his own initiative.

- 2.2.6 The reporter is not an adviser to the hearing and the hearing is under no obligation to accept the views of the reporter about fair process. Section 8 and rule 79 enable a hearing to seek advice from the National Convener. Children's Hearings Scotland has produced a briefing sheet for panel members on Practice Support and Advice to Children's Hearings.

2.3 Providing customer care

- 2.3.1 It is appropriate for the reporter to be alert to and address 'customer care' issues for children, relevant persons and others attending hearings, in so far as compatible with the rights and obligations of those attending and with the independence and impartiality of the children's hearing.
- 2.3.2 Customer care includes the reporter making himself known to those attending the hearing, seeking to ensure that the waiting arrangements suit everyone, responding to questions and supporting those attending to address any issues of conflict or effective participation.
- 2.3.3 In advance of the hearing starting, there are only limited circumstances where it will be appropriate for the reporter to inform the panel members of customer care type issues. Sections 3 and 4 provide more detail about contact between the reporter and panel members.
- 2.3.4 In the hearing, it will generally be for the person who wishes the hearing to consider an issue (for example, the person who wishes to table a report or the person who wants the hearing to know that they will find it difficult to participate if a particular person is also present) to raise it themselves in the hearing. However, the reporter may offer to do so in order to assist the person and in particular should offer where the person may find it difficult to raise the issue. If the person chooses not to be in the hearing at the start, the reporter should raise any issues relevant to this at the start of the hearing, unless another person does so.

2.4 Meeting health and safety obligations

- 2.4.1 The reporter has health and safety responsibilities in relation to all persons on SCRA premises or attending a children's hearing. Where any person on the premises for the purpose of attending a children's hearing presents a significant risk to others, the reporter must take action to manage that risk. In such circumstances the organisation's duty of care under Health and Safety legislation supersedes other considerations.
- 2.4.2 The risk should be controlled in the way which best minimises the impact on the hearing and the attendance and participation of anyone with a right to attend. For example arranging a police presence could

enable management of a health and safety risk presented by an individual while enabling the individual to attend the hearing.

3. Contact between the reporter and panel members

Contact between the reporter and the panel members outwith the presence of the child and relevant persons must be minimised. Any contact which does take place must not involve discussion of the substance of the case, must maintain the overall ECHR compatibility of the children's hearing system, must be as limited as possible and must be made as transparent as possible. Pre-hearing contact in particular can be justified in only limited circumstances and Section 4 sets out those circumstances in more detail.

4. Specific Situations Pre Hearing

- 4.1 The reporter may have contact with the panel members sitting on the hearing or pre-hearing panel in order to deal with purely administrative matters. Examples of administrative matters are: a panel member reporting the non-arrival of papers; providing panel members with a note of who has attended for the hearing; checking whether the hearing is ready to start the next child's case; giving papers which the reporter has determined are relevant or material to the consideration of the child's case. Where possible such matters should generally be dealt with by administrative or reception staff rather than the reporter.
- 4.2 Where the reporter is taking action to manage a health and safety risk, the reporter may be justified in providing information to panel members as part of exercising the duty of care under Health and Safety legislation.
- 4.3 Any other pre-hearing contact between the reporter and the children's hearing must be capable of justification in terms of the chair's management of the fair process of the hearing. At the hearing centre, the reporter's role in any pre-hearing contact with the panel members is restricted to passing relevant information to the panel members, and where applicable communicating the panel members' response to other parties. The reporter is not to engage in discussion with panel members about the substance of their response. The criteria for passing information to the panel members sitting on the hearing is that the information involves:
 - a significant issue concerning the exercise of rights (including any issue likely to adversely affect the effective participation of someone with a right to be involved in the decision-making process)

AND

- the information is likely to affect the chair's management of the fair process of the hearing **if known in advance** of the hearing starting.
- 4.4 The reporter must not communicate information with the intention of the information being withheld from any relevant person or other person entitled to

receive hearing papers. This will include the child where they are of sufficient age and understanding. For example, where one relevant person wants information passed to the hearing but not to the other relevant person, the reporter cannot facilitate this.

- 4.5 If the information meets the criteria in paragraph 4.3 for being provided to the panel members in advance of the hearing starting, the reporter must be open and transparent with all relevant persons and others entitled to receive hearing papers, including the child where of sufficient age and understanding. This means that the reporter will tell those persons that he is going to pass information to the hearing and explain what the information is. The only exception to this would be where doing so would create significant health and safety risks to any person on the premises.
- 4.6 Where it is apparent that there is conflict or tension between persons attending the hearing, the reporter may discuss the situation with the persons involved to see if the relevant persons, and child if of sufficient age and understanding, can agree on an approach to dealing with the situation. The most likely examples of this are where relevant persons are unwilling to be present within the hearing at the same time as each other, or one relevant person is unwilling to be present in the hearing at the same time as another. The reporter must always explain clearly to the relevant persons, and child if of sufficient age and understanding, that the relevant persons and child have a right to be present in the hearing at the start. These types of situations are unlikely to meet the criteria for bringing to the attention of the hearing in advance of the hearing starting. If there is a significant health and safety risk the reporter may be justified in providing information to the hearing as part of managing the risk.
- 4.7 It is for the chair to decide whether anyone who does not have a right to attend the hearing will be allowed to attend - section 78(2). This should generally be dealt with at the start of the hearing. The reporter or reception staff are to provide a note to the hearing, in advance of the hearing starting, of everyone who has attended for the purpose of being present at the hearing. Anyone who does not have a right to be present at the hearing and has not been invited by the reporter should generally be asked by the reporter to wait outside the hearing until the chair has come to a decision about their participation. The issue is unlikely to meet the criteria for the reporter to inform the hearing in advance of the hearing starting. If someone is waiting outside and no other person raises the issue in the hearing, the reporter is to inform the hearing of the situation. It is for the chairman to decide whether a person who does not have a right to attend is permitted to be present, irrespective of whether the reporter has invited the person.
- 4.8 It may be that the chair of the hearing, if he considers it appropriate, will confirm at the start of the hearing that the reporter has communicated information and summarise the content.
- 4.9 The reporter has duties under the Rules to give documents or information to the panel members and others entitled to receive them. These duties do not apply to documents or information which a person provides within the hearing. Documents or written information which a person brings with them when they attend a children's hearing are similarly to be regarded as not triggering the

reporter's duties under the Rules. This applies irrespective of who it is who has brought the report to the hearing. They are to be regarded as being brought for tabling at the hearing and not as being provided to the reporter. It will be for the person bringing the document or information to request within the hearing that the hearing considers the document or information. The reporter must make no assumptions about how the hearing will choose to deal with the report or information and is not to accept a copy or distribute the document to the panel members or other parties. **If a non-disclosure provision applies in the case or is being sought, the reporter is to alert the person bringing the report to this.**

- 4.10 The reporter may make copies of the report to give to the person bringing the report but there is no obligation or expectation to do so. **If a non-disclosure provision applies or is being sought in the case then the reporter is generally not to make copies in advance of the hearing considering the issue.**
- 4.11 There will be occasion where the reporter receives a document or information in advance of the hearing or pre-hearing panel which is to be given to panel members and others under the Rules, but there is insufficient time to send out the material. In these circumstances the reporter is to bring copies to the hearing premises for distribution in advance of the hearing starting to panel members and others entitled to receive the papers. It will be for the hearing to decide how to deal with the information, taking into account the need for fair hearing.
- 4.12 The reporter is not to share private transport with panel members, to or from the hearing, other than in exceptional circumstances where there is no alternative transport, the hearing would otherwise be unable to proceed and the child's case is urgent.

5. Specific Issues in the Hearing

- 5.1 The reporter has the statutory function under rule 13 of keeping a record of the proceedings at a hearing or pre-hearing panel. This is to be done in line with Practice Direction 18 on Completion of Forms.
- 5.2 A hearing may grant a warrant to secure the child's attendance only on the application of the reporter under section 123. Appendix 2 contains a pro-forma which is to be used wherever practicable to provide written information for consideration by the hearing and included within the hearing papers.
- 5.3 If the reporter has not applied for a warrant, a panel member or the hearing may ask the reporter to consider applying for one. The reporter is to consider the request and decide whether to apply.
- 5.4 Where any non-disclosure provision applies in the case, the reporter is to bring this to everyone's attention at the start of the hearing or pre-hearing panel.

- 5.5 If someone seeks to table a report the reporter is to identify any practical issues which may have a bearing on the hearing's response – for example the availability of photocopying facilities. Practice Direction 4 on Non-Disclosure provides more detail in relation to cases where a non-disclosure provision applies. It will be for the hearing to decide how to deal with the report.
- 5.6 If any person at the hearing or pre-hearing panel asks for information or advice about the Rehabilitation of Offenders Act 1974, the reporter is not to offer any information beyond what is included in the Leaflet, which is sent with notifications for a grounds hearing, nor offer advice.
- 5.7 If the hearing is considering amending the facts in the statement of grounds, it is for the hearing to decide what amendments to make. The only express restriction is that the hearing must be satisfied that any amendments do not call into question the acceptance of the ground (rule 59(6)). However the reporter is to be alert to issues of fairness and in particular that:
- the hearing does not consider amendment before knowing that the child and all relevant persons who are present accept the section 67 ground
 - the proposed amendments are acceptable to the child and relevant persons
 - panel members, child and relevant persons understand that any facts (or information in facts) removed cannot be taken into consideration by the hearing in its decision-making.
- 5.8 Paragraph 2.2.4 explains that the reporter is to express a view in relation to a material procedural irregularity, and may do so in relation to a non-material procedural irregularity (the more significant the irregularity, the more likely it is to be appropriate for the reporter to intervene). Material procedural irregularities include:
- **Explanation of the ground** - the reporter thinks the explanation provided by the chair is inaccurate or misleading
 - **Acceptance/non-acceptance of ground** - the reporter thinks the chair's or hearing's understanding of the response provided by the relevant person or child is inaccurate. In particular, if the reporter thinks the response of the relevant person or child indicates a non-acceptance or a lack of understanding of the ground, contrary to the apparent views of the chair or hearing, the reporter is to make his position known. It is not for the reporter to determine whether the grounds have been accepted or not.
 - **Amendment of facts in the statement of grounds** – the reporter thinks that the amendments to the facts being considered by the hearing would call into question the acceptance of the ground. It is however for the hearing to determine whether the acceptance is called into question. In addition the reporter is to be alert to issues of fairness as set out in paragraph 5.7.
 - **Options** - the reporter thinks any procedural or disposal options set out by a panel member is inaccurate or incomplete. The reporter may explain his own views on what options are available to the hearing.

- **Material issues** - the reporter thinks the hearing has failed to consider a relevant and material issue relating to the child's case, or appears to be considering information which is not relevant. For example: no consideration of contact although contact is identified in reports as a contentious issue; consideration of offences on the assumption they happened even though the behaviour has not been included in grounds and the child or relevant person is saying the child was not involved.
- **Effective Participation** – the reporter thinks the hearing is not sufficiently enabling the effective participation of someone entitled to participate in the decision-making or the reporter thinks the hearing is proceeding where it would be unfair to an individual to do so.
- **Views of others** - the reporter thinks that the hearing has erred in not seeking the views of someone attending the hearing on a material issue, including procedural issues.
- **Decisions** – the reporter thinks the decision of a panel member or the hearing is not clear or is incompetent. In addition, the reporter is to clarify a panel member's intention in the following situations:
 - where a panel member does not include any measure in an order, the reporter is to express a view that this is incompetent and that the order requires to include at least one measure;
 - where a panel member decides to continue a compulsory supervision order without giving a duration, the reporter is to check whether with the panel member their intention regarding the duration;
 - where a panel member decides to vary a compulsory supervision order, the reporter is to check whether with the panel member whether they intend to also continue the order (unless it is clear this is not the intention).
- **Reasons for decisions** - a panel member gives no reasons for their decision or a particular element of their decision, including each measure which the panel member wants to include in an order.

6. Specific Issues Post Hearing

- 6.1 The reporter has a statutory duty to complete the record of proceedings. The reporter is also to complete any form flowing from the decision of the hearing, for signature by the chair.
- 6.2 The reporter is to have no involvement whatsoever in the writing of reasons, the responsibility for which lies with the chair of the hearing.
- 6.3 The reporter must not remain with the panel members after the end of the hearing unless the chair has also given the relevant persons and child, if of sufficient understanding, the opportunity to stay. The reporter may stay only for the same period that the child and relevant persons are given the opportunity to stay for.

- 6.4 Provided the child and relevant persons are given the opportunity to stay, the reporter may remain even if the child and relevant persons decide not to take up the invitation.
- 6.5 Ideally at the end of the hearing the hearing chair will invite the child and relevant persons to remain in the hearing room while the reporter completes the required paperwork. If the chair does not do this the reporter may explain that he would like to remain in the hearing room to complete the paperwork if possible. The reporter may also explain that this is only possible if the child and family are invited to stay.
- 6.6 If the reporter does not stay with the panel members to complete the paperwork, there is no need for the child and relevant persons to be invited to stay. For example, at hearing centres where the panel members retire to separate room or, exceptionally, where the reporter chooses to complete the paperwork outwith the hearing room.
- 6.7 Where any form for signature by the chair is completed by the reporter outwith the presence of the panel members, the form is to be handed to the chair as soon as completed by the reporter. Where possible, this should be done by administrative or reception staff rather than the reporter.
- 6.8 At the end of the hearing session the reporter is to collect the signed written reasons and signed statutory forms from the chair. The reporter will check that all have been signed by the chair.

Appendix 1

General Principles applying to Decisions of a Hearing

When a children's hearing is coming to a decision about a matter relating to a child, the following principles apply.

1. Section 25 – Welfare Principle. A hearing (or pre-hearing panel) must regard the need to safeguard and promote the welfare of the child throughout the child's childhood as the paramount consideration. A decision inconsistent with this principle may be made if necessary to protect members of the public from serious harm **and** the hearing or pre-hearing panel has regard to the 'welfare principle' as a primary consideration (section 26).
2. Section 27 – Views of Child. A hearing must, so far as practicable and taking account of the age and maturity of the child:
 - give the child an opportunity to indicate whether the child wishes to express his/her views,
 - if the child wishes to express views, give the child an opportunity to express them and
 - have regard to any views expressed by the child.
3. Section 28 – Beneficial Order. A hearing may make an order or grant a warrant only if the hearing considers it would be better for the child if the order or warrant were in force than not.

General Procedure at a Hearing

1. The chair must take reasonable steps to ensure the child and relevant persons are able to understand the proceedings and participate in the proceedings. If the child wishes to express a view during the hearing, the chair must make reasonable arrangements to enable the child to express those views in the manner preferred by the child. Rule 6.
2. At the beginning of a hearing the chair must, in terms of rule 58(1):
 - introduce the panel members and explain the purpose of the hearing
 - ask whether the child, relevant persons and any safeguarder has received the hearing papers
 - confirm whether the child, relevant persons and any safeguarder has had the opportunity to review the hearing papers and whether the child and relevant persons have understood them
3. Section 121 requires the chair to ask the child whether the hearing papers accurately reflect any views expressed by the child. If the child confirms the papers do not accurately reflect his/her views, then in terms of rule 58 (2) the chair must try to clarify the child's views on the relevant matter.

4. Section 122 requires the chair to inform the child of the availability of children's advocacy services, unless, taking account of the age and maturity of the child, the chair considers it would not be appropriate to do so.
5. In terms of section 124, the chair must ask the child to declare his/her age, unless the chair considers the child would not be capable of understanding the question. The hearing may make a determination of the child's age.
6. Once a ground is accepted or established, the hearing is reviewing a compulsory supervision order, or the hearing is arranged under section 96(2) to consider a further ICSO during a proof application, rule 60 specifies that the chair:
 - must inform those present of the substance of any relevant report or other relevant document
 - must take all reasonable steps to obtain the views of the child, relevant persons and any safeguarder in relation to any report, document or matter being considered by the hearing and what, if any, measures would be in the best interests of the child
 - may invite others present to express views or provide information.
7. When the hearing is making a decision, each panel member must state his decision and reasons. If making, continuing or varying an order the panel member must give the decision and reasons in relation to any measure to be included in the order. The chair must confirm the decision of the hearing and state the reasons for that decision. The chair must inform the child, relevant persons and any safeguarder of the relevant rights of appeal.

General Procedure at a Pre-hearing Panel

1. The chair must take reasonable steps to ensure the child and relevant persons are able to understand the proceedings and participate in the proceedings. If the child wishes to express a view during the hearing, the chair must make reasonable arrangements to enable the child to express those views in the manner preferred by the child. Rule 6.
2. At the beginning of the pre-hearing panel the chair must explain the purpose of the pre-hearing panel. Rule 48(1).
3. If the pre-hearing panel has been arranged to consider whether to deem an individual to be a relevant person, this must be dealt with before any other matter referred to the pre-hearing panel. Section 81(2).
4. The chair must invite the child and relevant persons to give representations, orally or in writing, or any document or information. The chair may invite other persons to do so. If the pre-hearing panel is considering whether to deem an individual to be a relevant person, the chair must ask the individual to give representations, documents or information on that matter. Rules 48(4) and 49(1).

5. When the pre-hearing panel is making a determination, each panel member must state his determination and reasons. The chair must then confirm the determination of the pre-hearing panel and the reasons for that determination. Rules 48(7) and 49(3).
6. If the pre-hearing panel makes a determination in relation to whether to deem someone to be a relevant person, the chair must inform the child, relevant persons and the individual of their right to appeal. Rule 48(8).

Appendix 2



SCOTTISH
CHILDREN'S REPORTER
ADMINISTRATION

**APPLICATION TO A CHILDREN'S HEARING TO GRANT A WARRANT UNDER SECTION
123 OF THE CHILDREN'S HEARINGS (SCOTLAND) ACT 2011**

Name of Child: _____ **Child ID:** _____

Date Of Birth:

Date of Hearing:

Place of Hearing:

Type of Hearing: _____

To secure attendance at: CHILDREN'S HEARING/COURT HEARING

Secure Accommodation Authorisation Sought: YES/NO

Prohibition of Disclosure of Place of Safety Sought: YES/NO

Reasons for Application: (Summarise the reasons for applying to this hearing to grant a warrant)

1.

2.

3.

4.

5.

Date: _____ **Signed:** _____