



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 cross-examining 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.