

**SCOTTISH CIVIL JUSTICE COUNCIL  
FAMILY LAW COMMITTEE**

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

**Introduction**

1. This is an open paper by the Scottish Government and the Scottish Children's Reporter Administration ("SCRA").
2. It proposes a change to the rules which govern court proceedings under the Children's Hearings (Scotland) Act 2011. Specifically, the paper proposes 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.
3. The paper follows on from discussions between SCRA, Scottish Government and the SCJC Family Law Committee Secretariat ('the Secretariat') that have taken place over the last two years or so. It responds to specific questions raised by the Secretariat around (i) the frequency of personal examination of a child or vulnerable witness in children's hearings court proceedings, and (ii) whether existing rules of court could be utilised to prevent such examination.
4. The paper is submitted against the background of the current Evidence and Procedure Review, which has sought to improve the experience and evidence of child and vulnerable witnesses. While that review has focused on the criminal justice system, it should encourage us to consider the civil system in light of the Review's findings.

**Discussion**

*Background*

5. 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.
6. There are presently no statutory provisions of a comparable nature designed to protect the position of witnesses giving evidence in applications 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").
7. During the passage of the Children's Hearings (Scotland) Act 2011, SCRA approached the Scottish Government to raise these concerns and to propose that legislation be introduced to remedy what it considered to be a gap in the current rules of procedure governing children's hearings court proceedings. (The rules which principally govern how such proceedings are conducted are contained within Chapter 3 of the Act of Sederunt (Child Care and Maintenance Rules) 1997.)
8. As part of their consideration of the issue the Scottish Government considered whether the existing Rules provided sufficient protection. In particular they considered Rules 3.47(6) and (7) which allow the court to exclude a party while a child is giving evidence. The

Government's conclusion was that more specific provision was required in order to ensure that inappropriate questioning, cross examination or intimidation was avoided.

9. As a result the Government lodged an amendment to the Children's Hearings Bill, at stage 2. The intention of the amendment was to protect witnesses from additional trauma in circumstances where they might feel particularly vulnerable. The amendment was passed unanimously by the Scottish Parliament's Education Committee and now forms section 185(2)(a) of the 2011 Act. The amendment allowed the Court of Session to amend the relevant rules in the following way:

*"prescribing circumstances in which a party to proceedings under Part 10 or 15 of the Children's Hearings (Scotland) Act 2011 may be prohibited from personally conducting the examination of witnesses,"*

10. Section 185 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*.

11. 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.<sup>1</sup> Such parties therefore have Article 6 rights to a fair hearing and any approach to the issue highlighted here must be consistent with those rights.

12. 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.

13. It is also possible that 2011 Act proceedings do 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.

14. There have been ongoing discussions involving the Scottish Government, the SCJC Secretariat and SCRA concerning this issue.

15. Frequency

(i) SCRA investigation revealed that personal examination was something that happened rarely, but was not unknown. Children's Reporters have identified cases where personal examination took place and was significantly distressing to the child. In other cases, it was only narrowly avoided.

(ii) However, it was, and remains the case, that whatever the frequency the simple possibility of personal examination represents a challenge to child-centred practice. The possibility is

---

<sup>1</sup> 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.

likely to create a very real anxiety for many vulnerable witnesses whether or not personal examination ultimately takes place in their case. This anxiety would not arise for many vulnerable witnesses if there were a prohibition on personal examination from the outset.

#### 16. Use of existing powers

(i) It has been pointed out that the court, in hearing 2011 Act proceedings, has a wide range of powers available to it in determining how evidence is led. Specifically, it has been suggested that these powers may be used in such a way as to provide an alternative route to the kind of protection offered by 288C to F.

(ii) The powers which have been identified are those set out in Rule 3.47: Rule 3.47(6) and (7) state:

*“47 (6) Subject to paragraph (7), the sheriff may exclude any person, including the relevant person, while any child is giving evidence if the sheriff is satisfied that this is necessary in the interests of the child and that–*

*(a) he must do so in order to obtain the evidence of the child; or*

*(b) the presence of the person or persons in question is causing, or is likely to cause, significant distress to the child.*

*(7) Where the relevant person is not legally represented at the hearing and has been excluded under paragraph (6), the sheriff shall inform that relevant person of the substance of any evidence given by the child and shall give that relevant person an opportunity to respond by leading evidence or otherwise.”*

(iii) In our submission this provision cannot be used to provide safeguards comparable to those set out in 288C to F.

(a) Rule 3.47(6) applies to child witnesses only and does not afford any protection at all to adult vulnerable witnesses.

(b) Rule 3.47(6) is discretionary and therefore it is down to an individual sheriff to apply it. As a result – even if it was otherwise a competent means of preventing a child witness from being personally examined – some sheriffs may choose not to exclude, resulting in a child witness being personally examined by a relevant person.

(c) It is not clear **when** the sheriff would address the need to apply 3.47(6). It could be many months after the child becomes aware that they could be called as a witness, possibly even at or close to the point that the young person is about to give evidence, that a decision on the application of 3.47(6) is made. This is unsatisfactory as the lack of clarity will cause undue distress to the child who will not know (probably over a period of months) whether they are to be personally examined or not.

(d) Exclusion close to the proof would prejudice the ability of a relevant person to make arrangements to be properly represented, if at all. Allied to this is the likelihood of the court requiring to adjourn the proof to allow a newly excluded relevant person to obtain and fully instruct a legal representative. A clear rule would enable the issue to be identified in advance and for pro-active case management by the sheriff to provide an opportunity for the relevant person to make alternative arrangements.

(e) While the terms of Rule 3.47(7) do seem to countenance a situation where a child witness gives evidence while a relevant person is excluded AND is not represented, this does not mean that such an approach is compliant with a relevant person's Article 6 right to a fair hearing. The situation would be different if there were to be associated safeguards – for example a court appointed representative similar to one that would be appointed in a

criminal trial per s.288D of the Criminal Procedure (Scotland) Act 1995. There are no such safeguards.

(f) Rules 3.47(6) and (7) do not seem to have countenanced the situation where a relevant person calls a child as a witness. We cannot see a way in which they could possibly operate in practice in such a case. How would the child be called by someone who is not in court? Or does the relevant person call the child and then leave before the child comes in? Or after they have come in but before they give their evidence? And who would question the child? And if they can operate, how can it do so in a manner that is consistent with the relevant person's Art. 6 rights? Conversely, we consider that if there is an outright prohibition with associated safeguards – appointed representatives or ample time to obtain representation – an Art. 6 challenge will fail.

(g) It is unclear how the vulnerable witness provisions would be applied alongside the 3.47(6) prohibition. Clarity around how (or if) the child will be questioned clearly have implications for decisions on what special measures might be appropriate. It is easy to see how procedural confusion might arise in such a case, or how decisions might be made on special measures before it becomes apparent that personal examination is an issue. While special measures can be reviewed, there is still a level of uncertainty that is unhelpful.

#### *Other possible safeguards*

17. While not the main focus of discussions so far, it is worthwhile considering what protection for witnesses might be available through the Vulnerable Witnesses (Scotland) Act 2004. The only special measure available under the Act which would rule out personal examination would be the taking of evidence by commission in terms of section 19 of the Act.

18. In our submission, consideration of this special measure is (i) likely to take place much later in the process, and (ii) be subject to the discretion of the court. In both respects reference is made to some of the points raised in paragraph 12 which are relevant here too.

19. The use of such a measure in civil proceedings, the impact of examination by a party litigant on children, and the question of the difference between civil and criminal cases is discussed in the case of *GM v MB and AS* [2016] SC Dumb 38 (see paras. 56 to 61)<sup>2</sup>.

#### *Views of Other Parties*

20. Comment was invited from those with knowledge of the field which resulted in a response from Professor Kenneth Norrie. Professor Norrie was invited to comment on a paper from SCRA on the suitability of Rule 3.47 to deal with personal examination of witnesses. This paper set out concerns that SCRA had along the lines of paragraph 12 above.

21. Professor Norrie was clear “that Rule 3.47 was not designed to deal with the issue (of personal examination of witnesses)”. He further stated:

*“While it is possible to interpret the Rule to include a party representing themselves at a grounds determination, that to me is a stretched interpretation which creates all sorts of practical difficulties that (SCRA) have identified. I think, further, that in principle a stretched interpretation of one Rule should not be used in order to achieve desired effects other than*

---

<sup>2</sup> See [http://www.bailii.org/scot/cases/ScotSC/2016/\[2016\]SCDUMB38.html](http://www.bailii.org/scot/cases/ScotSC/2016/[2016]SCDUMB38.html)

*those it was designed for. At the very least there is a RISK of Art 6 challenge which is an unnecessary risk to run given the terms of section 185 (2) (a). That is a clear conferral of power to make rules to deal with the clearly specified, and self-contained, problem. The precedent of the protections in the criminal process shows how the risk of challenge can be dealt with. The solution to the problem adverted to in s.185(2)(a) ought, in my view, to lie in the exercise of the power granted by that section rather than the far less robust reliance on a Rule aimed at a quite different problem”.*

### Summary

22. This paper proposes an amendment to the Rules so that child and vulnerable witnesses in proceedings under the Children’s Hearings (Scotland) Act 2011 are protected from intimidation and from inappropriate questioning or cross examination by those who are alleged to have abused or otherwise harmed them, while at the same time ensuring that each party’s right to a fair hearing is maintained.

23. The scope of the protection proposed would require to be clarified given the range of matters that can form the subject matter of such proceedings. In broad terms, however, it is anticipated that the type of protection afforded witnesses in criminal proceedings would be an appropriate starting point.

24. The amendments would require to be to the rules in Chapter 3 of the Act of Sederunt (Child Care and Maintenance Rules) 1997.

25. It is possible that such changes would have very minor cost implications for the Scottish Legal Aid Board. Any costs for the Scottish Courts and Tribunal Service might be balanced out by savings in court time afforded by having the issue of examination agreed at the start of proceedings.

### Conclusion

26. Members of the Family Law Committee are invited to:

- Note this paper.
- Agree that the Rules be amended to prohibit (unless exceptional circumstances apply) personal examination of child and vulnerable witnesses in proceedings under parts 10 and 15 of the Children’s Hearings (Scotland) Act 2011.

27. Subject to the Committee’s agreement in principle, a further paper will be provided outlining possible detailed amendments for the Committee’s consideration.

## **APPENDIX 1 – CASE EXAMPLE**

The statement of grounds related to physical abuse by the mother and father of two children (aged 13 and 17). The specific proof application related to the younger of two children.

During the proof, both children were personally examined by at least one of their parents.

- The 17 year old young woman was led by the reporter and was personally cross-examined by both her father and mother concerning physical abuse of her and her younger brother over a period of years.
- The 13 year old boy was led by his father. He was questioned principally on a specific incident when he alleged he was assaulted by his father in a public place. The examination did cover the other abuse to an extent.

The reporter advises that it seemed plain to her (albeit that she has no detailed knowledge of the parents financial position or the availability of legal aid) that the decision to personally question the children was very much a deliberate and positive choice.

Notably the 13 year old had also been personally examined by the father in a related criminal trial when the father was acquitted.

Vulnerable witness measures were sought and granted for the 17 year old – she had a supporter with her in court. This did not prevent the young woman being significantly distressed by the experience, expressing shock to the Reporter that her father in particular was able to question her as he did.

The 13 year old was adamant in the run up to proof that he didn't want special measures but on the day he asked for a supporter and his request was granted.