



Establishing a statutory Appropriate Adult service in Scotland

RESPONDENT INFORMATION FORM

Please Note this form **must** be completed and returned with your response.

Are you responding as an individual or an organisation?

Individual

X Organisation

Full name or organisation's name

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We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

- X Yes
- No

CONSULTATION QUESTIONS

Delivery

- 1. We propose to use the definition of vulnerable person as set out at section 42 of the Criminal Justice (Scotland) Act 2016, but extended to cover victims and witnesses. Do you agree?**

No

The Faculty is concerned that the use of the section 42 definition - “owing to mental disorder” - is too restrictive and does not cover situations where the individual is otherwise challenged in terms of communication and comprehension, perhaps due to speech or hearing impairment, autism or brain injury, or other such condition. Whilst none of these conditions are “mental disorders”, the Faculty believes that the services of an appropriate adult would be essential in these circumstances.

There is a wider concern. Rather than requiring constables to satisfy themselves of the existence of a particular disorder, it is submitted that the focus should be on whether the individual is able to understand or communicate effectively, regardless of the cause of any inability to do so.

The Faculty first outlined its concern about this provision in its written evidence to the Justice Committee on the “*General principles of the Criminal Justice (Scotland) Bill*” (September 2013), when it wrote:

“The Faculty believes that the words “owing to mental disorder” where they appear in subsection (2)(b) should be deleted. It may be very difficult for a police officer, without medical training and without any assistance from a police casualty surgeon, to assess whether or not a person is suffering from a mental disorder. The Faculty believes that any person who appears unable to understand sufficiently what is happening or communicate effectively with the police should be provided with support.” (at paragraph 34)

The Faculty endorses the subsequent comments of Lord Bonyon in his Post-Corroborator Safeguards Review (April 2015):

“...consideration should be given to whether that phrase serves any useful purpose, and whether the real issue is the inability of the person to understand or communicate at the time rather than the reason for that.” (at paragraph 15.19)

The Scottish Government justifies its inclusion of the “mental disorder” requirement so that the definition “does not inadvertently include those who

have a temporary condition affecting their ability to communicate due to, for example, drugs or alcohol.” (page 3, paragraph 5).

The Faculty considers that this concern can be addressed by it being specified that the requirement to provide the services of an Appropriate Adult does not arise in circumstances where it appears to the police that an individual is unable to understand sufficiently what is happening or communicate effectively with the police because he or she is incapacitated by reason of alcohol or drugs. This is a drafting matter that should be capable of resolution.

2. We propose to use the definition of the type of support to be made available as set out at section 42 of the Criminal Justice (Scotland) Act 2016, Do you agree?

No (subject to the following comments)

The current definition in section 42 does not provide a sufficient level of detail to ensure a consistent and appropriate level of support.

Although the role of the appropriate adult is different to, and should not be conflated with, the role of the legal adviser, the Appropriate Adult should at all times carefully observe the process and intervene when necessary to provide appropriate support. For example, if the vulnerable person is feeling physical discomfort, the appropriate adult should say so. Similarly, it may be that the vulnerable person is tearful and in need of re-assurance.

It is also important that time is given for Appropriate Adults to advise vulnerable persons, in private, of their role in the process and also to enable the development of trust and rapport between them.

Unless the role of the appropriate adult is sufficiently set out in the regulations there is a danger of an inconsistency in approach in different parts of the country, particularly as individual local authorities are to have responsibility for operating the scheme.

3. We propose to place the duty on local authorities for ensuring that people are available to provide Appropriate Adult support, do you agree?

Yes (subject to the following comments)

The Faculty understands that local authorities have been responsible for the provision of the Appropriate Adult scheme to date. On the face of it, local authorities are therefore well placed to assume statutory responsibility. It is

also believed that a majority of local authorities is content to manage the scheme in the proposed manner.

It is made clear in the consultation paper that the proposal is informed by “discussions with delivery partners and third sector organisations”. It is assumed that local authorities will have emphasised the need for sufficient funding to enable proper implementation of the scheme.

The Faculty also trusts that the Scottish Government has carefully considered whether there are advantages in having a centralised system, namely: ensuring a uniformity of service and best practice country wide, while at the same time benefitting from the economies of scale resulting from delegation to one national body rather than 32 local authorities.

That said, it is readily apparent that individual local authorities will have a greater, and more immediate, appreciation of the difficulties they may encounter in managing the scheme and the relevant solutions to those problems.

- 4. We propose to keep details of the statutory duty at a high level but develop more detailed guidance to sit below this and to which those responsible for delivery must have regard, do you agree with this approach?**

Yes

The Faculty considers it important that there is an over-arching structure for the development of guidance and, crucially, oversight of how local authorities are implementing the scheme. Such a body would ensure uniformity of service and develop best practice in the field.

Otherwise it is difficult to see how the system can be monitored properly and modified accordingly.

Training

- 5. We propose to place a duty on local authorities to deliver training to Appropriate Adults. Do you agree with this?**

No (subject to the following comments)

In terms of ensuring the needs (and rights) of the vulnerable, it is essential that a consistent service is provided throughout Scotland.

Appropriate Adults in rural areas should be able to perform their role - whether facilitating communication and understanding, observing, re-assuring or intervening – no less well than their Metropolitan counter-parts. Unless they have a sound and full grasp of their duty at the police station and in the course of any interview, quite simply, they will be unable to provide the best service.

From a more important perspective, regardless of location, vulnerable individuals have the same needs and rights, and are entitled to expect that these are accommodated and protected, whether they are sitting in a police station in Lochmaddy or Glasgow.

Although the Faculty would defer to organisations with more expertise in this field, in order to ensure best practice in terms of delivery to the end-user, it is submitted that there is a strong case for centralised training.

The Faculty would also recommend the creation of an accessible centralised training website or portal. This would help address any unusual or difficult situations that might face an inexperienced Appropriate Adult; for example, in the middle of the night at a police station when no one else is readily available to discuss whatever problem has arisen.

Quality Assessment

6. We propose to place a duty on the Care Inspectorate to carry out a quality assessment role in relation to the provision of Appropriate Adult services, do you agree?

No (subject to the following comments)

The Faculty doubts whether the Care Inspectorate has the requisite expertise in the field of criminal justice to properly assess the provision of the scheme by local authorities.

The proposed process of drawing together key-themes, following a self-evaluation process, risks a failure to identify key problems. Without a detailed knowledge of the criminal justice system - particularly the mechanics of police procedure, interview, the admissibility of evidence and the mechanics of a trial – this evaluation could be something of a meaningless exercise.

Ideally, an independent body consisting of mental health professionals, local authority representatives, lawyers and others would be better suited to undertaking this function.

7. How might we best engage with service users to understand their experience?

The Faculty anticipates that most “service users” would be reluctant to participate in any review. However, a simple questionnaire could be provided at the end of the trial process. It should be understood that, akin to many such voluntary surveys, replies might only be provided by those with a grievance; so that the results might be somewhat skewed.

So far as accused persons are concerned, their solicitors might be able to provide some comment, albeit only in general terms due to client confidentiality.

Oversight

8. We propose to place a duty on the Mental Welfare Commission to have oversight of how Appropriate Adults services are provided across Scotland, do you agree?

No (subject to the following comments)

The Faculty queries the need for the Mental Welfare Commission to oversee the provision of the services while, at the same time, the Care Commission oversees quality assessment; and asks the Scottish Government to consider whether the two roles could be carried out by the same body, preferably one equipped with the required expertise (as referred to in answer 6).

9. Do you agree with the proposed functions of oversight role?

Yes

Consideration should be given to the establishment of a Code of Conduct.

10. Please use this space to provide any additional comments you may have.

The role of the Appropriate Adult cannot be under-estimated. It is anticipated that they will play an increasingly important part in the criminal justice process, not only in their critical role supporting vulnerable accused, but also in dealing with the growing number of vulnerable complainers and other witnesses whose evidence is likely to be pre-recorded or taken on commission.

It should go without saying that evolution or refinement of the scheme should not be left to a “trial and error” basis. Strenuous efforts should be made to ensure that the statutory scheme is the best it can be, from the outset.

The Faculty is wholly supportive of any modification to the system of investigation of crime that makes the process better for victims and witnesses and provides the necessary support to those who are not able to understand the process and communicate effectively with the police.

However, the Faculty suggests that, before the provision of an Appropriate Adult is made for vulnerable complainers and witnesses, a full assessment is undertaken and a report is prepared for consideration on how the system is working in practice at the present time.

The Faculty cautions against the introduction of a deficient system with regard to vulnerable complainers and witnesses that may cause profound problems in investigation and prosecution of crime and which could, in some instances, damage the prospects of successful prosecution.

The status of an accused person is very different to that of a complainer or witness. Where problems have arisen in the case of an accused - for example, where the action or inaction of an Appropriate Adult has affected the admissibility of the accused’s interview - these have been capable of identification and challenge by the accused’s lawyer. As there will be no lawyer present for vulnerable witness interviews, there will be no scope for intervention. A valuable check is therefore absent from the process.

It is not clear to the Faculty whether there is some sort of “model” for the engagement of the Appropriate Adult with vulnerable complainers or witnesses, or whether it is envisaged that safeguards be put in place to protect the integrity of the evidence ingathered by the police that will prevent challenges to the admissibility of the resulting evidence. These matters should be explored before the scheme is rolled out for vulnerable complainers and other witnesses.

For all of the foregoing reasons, the Faculty considers that a staged process of change is the best way in which to proceed, as it has done with regard to the parallel Victims and Vulnerable Witnesses Bill.