

Justice for Children written evidence to the Scottish Government and Scottish Court Service regarding the Evidence and Procedure Review

October 2015

This evidence is in response to the draft Scottish Court Service recommendations paper and supplements the oral evidence that Children 1st and other organisations have submitted to the Scottish Court Service and our attendance at various workshops and discussions relating to the Evidence and Procedure Review. It is a joint submission from Justice for Children,¹ a child witness reform alliance chaired by Children 1st. The alliance was established in 2001 due to strong lay and professional concern that the interests of children should be compatible with and enhanced by, the Scottish Justice system. The aim of Justice for Children is to work with professionals and academics to ensure that children are able to give their best evidence in court. We seek to create solutions that preserve the essential judicial rights of accused persons, or of defenders or pursuers, while at the same time safeguarding and promoting the interests and welfare of any children involved.

Background to our evidence

Many of Justice for Children's members support children and young people throughout court processes and appearances. Our experience is that current arrangements for child witnesses are often unnecessarily complex and can be traumatic and damaging to children and young people. They are concerned that children's rights are often lost in these processes and that their voices are not heard and their best interests are not upheld.

Although we are encouraged by the recent positive changes which awarded children and young people and other vulnerable witnesses greater rights to special measures when giving evidence through the Victims and Witnesses (Scotland) Act 2014, we remain convinced of the need for serious reform of the arrangements for children and young people who have experienced or witnessed crime and who must interact with the criminal justice system.

We believe that in Scotland children and young people, many of whom have witnessed or been victims of serious crime or sexual abuse, are asked to engage with a criminal justice system that is designed for, and by, adults, which does not have adequate protections for them largely resulting in a negative impact on their wellbeing. This is out of step with recent positive policy changes such as GIRFEC, that place children's rights at the centre and with the ambitions of 'Equally Safe', which recognises the key role of the criminal justice system in keeping women and girls safe from violence and abuse and in supporting their recovery. Change is also necessary in order for Scotland to meet the EU Directive 2012² on establishing minimum standards on the rights, support and protection of victims of crime.

Justice for Children encourage the Scottish Government and stakeholders to consider how they can best address our key concerns relating to child witnesses (outlined in detail in appendix A), as part of a wider review of the child protection system in Scotland. Specifically, we believe that the following issues must be addressed:

1. The process of disclosing abuse is driven by systems rather than being child-centred
2. There are often long waits and lengthy delays

¹ Justice for Children has a wide and varied membership. The organisations who have agreed to sign up to this evidence include: Children 1st, NSPCC Scotland, Victim Support Scotland and Morag Driscoll (individual)

² DIRECTIVE 2012/29/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2002/220/JHA

3. There is a lack of communication with the child or young person and their family.
4. There is little access to therapeutic support and trauma recovery
5. Questioners are not adequately trained and questions posed are not easily understandable or developed with children in mind.

We are therefore pleased that the draft Evidence and Procedure Review paper confirms that there is widespread support for the idea that more can be done.

Recommendations from Justice for Children

Justice for Children believes that Scotland is in urgent need of whole-system change in order to fully address the deficits in the existing criminal justice system, which is wholly unsuitable for vulnerable children and young people. We acknowledge, as has the Evidence and Procedure Review, that court practitioners and legal professionals have had to adapt and respond to a number of legislative and policy changes to provisions for victims and witnesses over the past 10 years (including the Vulnerable Witnesses (Scotland) Act 2004 and the Victims and Witnesses (Scotland) Act 2014 and the changes to Legal Aid). We have no desire to overburden a system that is already weary from change, however, we are clear that the existing situation for children and young people engaging in the criminal justice system is a violation of their rights and must be urgently addressed. We would therefore support a phased approach for change—identified as an option in the draft paper—that takes into account the current concerns about immediate reform, provided: (1) this approach addresses some of the most immediate problems as a matter of urgency; (2) the delays to reform do not negatively impact on the rights of child victims and witnesses; (3) the end result is significant change that takes into account the concerns we have raised.

We believe that Scotland can learn many lessons from the child-centred and child-focused “Barnehus model” used with child victims and witnesses of crime in Norway as well as from other models that are working successfully in other countries. We agree with the draft paper that rather than transporting an existing system that is in place in another country into Scotland it is more helpful to identify key elements that could make up a Scottish model that fits the Scottish context.

In terms of the recommendations outlined by the Scottish Court Service in the draft paper, we are pleased that the principal recommendation identifies a need for “a systematic approach to the evidence of children or vulnerable witnesses in which it should be presumed that the evidence in chief of such a witness will be captured and presented at trial in recorded form; and that the subsequent cross-examination of that witness will also, on application, be recorded in advance of trial”. We are also pleased that the paper acknowledges a number of child-focused solutions, including the need for early identification of a witness’s particular needs and access to support (point 17.2); the possibility of greater use of multi-agency centres to provide wrap around service (point 17.3); and that interviewing of children should use effective techniques such as the NICHD protocol (point 17.4). However, while these recommendations are a positive step, we believe that in order to deliver on our ambitious aims for children they must go further.

We therefore make the following recommendations:

1. The Scottish Government and political parties and the Scottish Court Service must make a clear commitment to addressing injustices for child victims and witnesses as a matter of priority.
2. Although we recognise that wholesale change of the system will take time, there are some immediate solutions that can be taken to improve the situation for child victims and witnesses. We are pleased that the Scottish Court Service recommendation paper states that serious consideration will need to be given to whether there will be a role for intermediaries (point 17.7). This is something that Justice for Children has called for over

ten years. We recommend that intermediaries are introduced as an interim step (in advance of further, more systemic changes) using the powers under section 21 of the Victims and Witnesses (2014) Act to prescribe further special measures. Intermediaries are highly-trained individuals in child communication who relay questions to children from advocates and lawyers during cross-examination to ensure that children can understand what they are being asked. Intermediaries are currently used in differing models in England and Wales and other jurisdictions such as South Africa. Scotland is notably behind many other areas of the world due to the lack of intermediaries in the current criminal justice system.

3. Full consideration of how child-centred and child-focused models can be adapted for implementation in Scotland, such as elements of the 'Barnehus model' used with child victims and witnesses in Norway, with the aim of seeing real change to access to justice and improvements in the experiences of child victims and witnesses in Scotland.

We believe that a Scottish model should incorporate the following elements:

- A custom built, child-friendly centre making the experience less traumatic for children, and more focused on their needs.
- A process for initially speaking out about abuse and a professional response that is child-centred and at the child's own pace.
- Highly trained interviewers, familiar with child communication and protection best practice, who take into account children's rights and their individual needs and make efforts to ensure that evidence is collected at the start and used later, without the need for the child to repeat their experiences.
- A child attends just one forensic interview hearing which is observed and guided by a judge and legal representatives for the defence, prosecution and victim.
- The interview consists of a structured approach according to established protocols. The interviewer is the only person who questions the child witness and all other people are in another room watching via video link.
- The hearing happens as soon as possible following the child's complaint.
- Steps are taken to consider how an inquisitorial approach could be used with children and young people. At the very least cross-examination should be kept to a minimum, is pre-recorded, with any questions reviewed for suitability beforehand.
- Reduction of waiting times and delays for children and families.
- Access to family support and advocacy workers to keep children and young people and their families informed throughout the process.
- Access to therapeutic and medical support as required that includes intensive trauma recovery support. Medical examinations and support services should be located in one place and should take into account the overall wellbeing of the child or young person. Holistic aftercare support should be provided following a child's interaction with the justice system.
- Family and child to have a support worker or advocacy worker who will keep them informed throughout the process.
- Accessibility for people in a variety of locations across Scotland, including those in remote and rural areas.

We favour an approach where the child is only questioned once by a highly-trained interviewer in child communication and the child's needs and rights are placed at the centre of the system. This will ensure the child will not have to retell their evidence to different people and they will not have to wait for years for completion of their part in the case because of trial delays. We also favour an approach whereby children and young people and their families are fully supported in

terms of family support and trauma recovery services, but we are clear that these options are not mutually exclusive—the key aspect of the approach outlined above is that all of the elements work together to improve the experiences of children and young people.

We also advise the Scottish Government and the Scottish Court Service to explore how change to the Scottish justice system can ensure access to justice for other vulnerable victims and witnesses as defined in the Victims and Witnesses (Scotland) Act 2014 (victims of trafficking, domestic abuse, stalking and sexual crime and those considered vulnerable due to a mental disorder, fear or distress or significant harm associated with giving evidence), as well as children and young people who are accused of a crime.

Justice for Children is aware that some of the changes that we are calling for will be challenging in the Scottish context as some of the existing approaches are well entrenched into the existing criminal justice system. However we are confident that, as part of a comprehensive review of our child protection system, which examines how children talk about abuse and how we can ensure children's best interests are at the centre, these changes will improve the lives of some of the most vulnerable children and young people in our society. In the short-term we consider there to be a number of steps that can be taken more swiftly in order to improve the situation for child victims and witnesses, including the introduction of intermediaries.

We look forward to discussing these issues in more detail with the Scottish Court Service and the Scottish Government. In the first instance please contact Sarah Vernon, Policy Officer at Children 1st at sarah.vernon@children1st.org.uk.

Appendix A: Specific concerns with respect to the existing system for child victims and witnesses

1. The process of disclosing abuse is driven by systems rather than being child-centred

Justice for Children know from experience that many children and young people are fearful of disclosing abuse and do not come forward for the protection they need and deserve. Others tentatively explore what might happen if they do begin to speak about abuse and police rarely obtain a complete disclosure in the timescale that they currently need to help the Crown pursue a case. Scotland needs an effective early disclosure system for children that adopts a rights-based, child centred approach to supporting children and young people who have been sexually abused and exploited. Children should be able to talk about abuse at their own pace and in a way that is not bureaucratic or process-driven. They should be supported to do so by people who are highly trained and who are able to ensure that evidence is as complete and accurate as possible so that they do not have to repeat the experience.

2. There are often long waits and lengthy delays

It can be as long as two years until a case is over, often with delays in proceedings. This can cause considerable anxiety to children and their families—one child whose case was delayed 18 months told us that she had nightmares every single night. Some children also have difficulty recalling their initial statement when they arrive to give evidence, due to the length of time between their initial statement and the court date.

In some cases, children and young people are required to wait several hours before giving evidence on the day or are kept waiting and asked to return on another day. This can lead to high levels of anxiety, missed time at school and can increase the chance of the child seeing the accused during a trip to the canteen or the toilet if they are giving evidence in the court building.

3. There is a lack of communication with the child or young person and their family

Long waits are often made worse by the lack of communication with the family about the progress of their case. Children have told us they often do not receive adequate information regarding the case including what to expect in court and how to prepare for being cross-examined. In one case the child was worried that the accused would come and attack her in court by jumping over the screen. One father of a child who was sexually abused told us: “After she gave her statement to the police, for two months there was no contact. We had no idea – is this going to court? I had to harass people for one and a half years for any information.... We felt shunted from one person to another.”

4. There is little access to therapeutic support and trauma recovery

Children who have been abused have a right to high-quality recovery services, but we know that therapeutic support following the disclosure of a crime is not always available or accessible. Trauma recovery support has significant benefits to children who are witnesses in terms of improving their overall confidence and wellbeing, building self-esteem, exploring feelings through play and art and through the support provided by a key project worker, all without discussing the issues of the specific case. In our experience children who receive therapeutic support throughout the process are better equipped to give evidence confidently. All child witnesses should be given the option to receive trauma recovery work as part of the support they and their family receive during their interaction with the criminal justice system, but this is currently a significant gap that should be urgently addressed.

5. *Questioners are not adequately trained and questions posed are not easily understandable or developed with children in mind.*

Our experience is that children often do not fully understand the questions being posed to them in court—but they report feeling too intimidated to ask for clarification and do not know how to identify that they need a break. This has been demonstrated by recent research on the adversarial nature of the cross examination process. Members of Justice for Children are aware that inappropriate and confusing questioning has resulted in a number of children breaking down, resulting in the case being discontinued.

In 2013 a five-year old child who had suffered sexual abuse gave evidence via TV link over two days, without a supporter or other special measures, leading appeal judges to comment on how the child appeared incapable of giving appropriate evidence. The film showed the child's attention had wandered and they became restless. This would not have happened in many other jurisdictions including England and Wales, which has trained intermediaries to help communication with child witnesses and is trialling the "Pigot" model for child witnesses.

We are concerned that people with little, or no, training on child protection and communication are asking questions and examining child witnesses. In particular Scotland is lacking behind the progress that is being made in other countries.