



Law Society
of Scotland

Consultation Response

Scottish Government

Establishing a statutory Appropriate Adult service in
Scotland

26 June 2018



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Criminal Law Committee welcomes the opportunity to consider and respond to the Scottish Government consultation: Establishing a statutory Appropriate Adult service in Scotland. The committee has the following comments to put forward for consideration.

General

Appropriate Adults are employed to facilitate communication with vulnerable adults during police station procedures. The consultation refers to vulnerable suspects, accused victims and witnesses (aged 16 or over) but for the purposes of our response, we focus principally on vulnerable suspects and the accused. We recognise that there may well be rare circumstances where a vulnerable adult may start as a victim or witness, then move onto becoming a suspect or accused when suspicion as to their role focuses. Since the main aspect of the role of the Appropriate Adult is facilitation of communication, the issues which arise are, for these purposes, substantially similar irrespective of the status of the vulnerable adult. Victims and witnesses will not usually require access to a solicitor though added to these categories could be the voluntary attendee who is not really a witness or a suspect.

It may be useful therefore to set out the context in which our members, principally acting as criminal solicitors, become involved and interact with Appropriate Adults. These police procedures within the criminal justice system where an Appropriate Adult may be involved will include the initial interaction with the police during the processing of suspects/accused and any interviewing that may thereafter take place.

Our members will be involved in providing advice at police stations whether on the telephone and/or in person. Our members will be involved in providing police station advice to their own clients who may be vulnerable. More often those suspects/accused that are vulnerable will not have a solicitor. Advice will be provided most often by those involved in the duty scheme such as the solicitors employed by the Scottish Legal Aid Board (SLAB) working on the Solicitor Contact Line (SCL) or solicitors also employed by SLAB working for the Public Defence Solicitor Office (PDSO) under the police station duty scheme or by solicitors employed under the police station duty scheme. Some suspects/accused may be involved in a combination

of these different solicitors. That could mean telephone advice from SCL followed by advice in person by solicitors from the PDSO or solicitors on police station duty scheme.

Solicitors in Scotland have been involved in providing police station advice since the *Cadder*¹ decision in 2011 which provided suspects with the right to legal advice when detained at the police station. It is important to recall that prior to 2011, solicitors were not routinely provided access to their clients when they were detained at the police station.

This is relevant background, since the Appropriate Adult scheme was developed at a time when solicitors had little or no access to their clients when in custody. What this has meant is that Appropriate Adults attended at police stations where they were not familiar with nor understood the role of solicitors or were trained post *Cadder* to understand how their role should work alongside or compliment that of a solicitor. We address more fully when considering the fundamental requirement to develop training for Appropriate Adults. Solicitors have a professional role towards their clients with regulatory and disciplinary sanctions should they fail to perform to the requisite standard². In considering how best to place the existing non-statutory Appropriate Adult services on a statutory footing, there is a need to examine critically what role the Appropriate Adult undertakes in relation to the accused and what the role actually comprises.

Our experience is that the role is interpreted differently depending not only on the locality but also on who the Appropriate Adult is. There is an inevitable overlap with the role of a solicitor. There are concerns too that the Appropriate Adult advises the person 'to assist the police.' That would not be the correct legal approach when they are a suspect. It is essential therefore to understand the police powers as well as what rights the suspect or accused actually has. It is easier to set out what is not the role of an Appropriate Adult. It is not their function to:

- advise the person being interviewed whether or not to answer any question,
- object to any questions being asked, except for the purpose of facilitating communication between the police and the interviewee,
- tell the police any line of questioning is unfair (except where it is about terminology) or
- offer support after the interview or help arrange ongoing referrals.

Where legal advice is required, this must be obtained from a solicitor.

That is no doubt due in part to the way that the service has evolved with changes to practice such as the *Cadder* decision and now with the Criminal Justice (Scotland) Act 2016 (2016 Act) coming into force. The 2016 Act may well have anticipated and extended the need and demand for the services of Appropriate Adults (as the rights of vulnerable suspects are improved by the 2016 Act).

¹ [2010] UKSC 43

² *Sharp v Council of the Law Society* 1984 S.C. 129

We are aware that numbers were increasing previously where there were 5,442 facilitated interviews in 2014-15, compared to 5,183 in 2013-14.³⁴ Before any service can be placed on a statutory footing, as the 2016 Act provides, for this service to be the success it requires in supporting our most vulnerable adults in the police station, we would suggest that their role be clearly set out and agreed.

Attempts were made at centralisation under the Scottish Appropriate Adult Network (SAAN) but that website is now understood to have been closed down.⁵ Previously SAAN was described as ‘a collaborative group that has been established to support the development and maintenance of the Appropriate Adult Services in Scotland.’ Their remit was specified as being to:

- develop and update national guidance in best practice recruitment training and resource of services
- work with Scottish Government, Scottish Police Service (now Police Scotland), Social Work Scotland, Crown Office and Procurator Fiscal Service and other identified stakeholders to develop policy guidance and legislation
- provide a network through which Appropriate Adult services can be supported and provide a consistent level of service delivery across Scotland

Whatever organisation is tasked to take on the scheme, part of its remit must be to promote best national and consistent practice so the role of the Appropriate Adult in one part of Scotland is the same as in another. That is essential for fairness and access to justice.

This variation in practice extends too, as we understand, to any use of Appropriate Adults in court. We note that the consultation does refer only to the use of Appropriate Adults in the police station. We are aware of their use in certain areas of Scotland in custody court, having been asked to attend to facilitate communication in court. Appropriate Adults may of course be cited as witnesses in court – and this is again another aspect of training which we flag below which needs to be covered.

We do not know if Appropriate Adults receive training to undertake any extension of their role into court. There may well be, as we acknowledge there may be a need for a vulnerable adult appearing in court to have support to facilitate communication. That role may well be covered by their professional legal representative if appearing represented. If unrepresented, there may be a need for a person such as intermediary or supporter to appear. That role if required should not be delegated to the Appropriate Adult scheme by default. If there is a need for someone at that time, this role should be named and its remit set out clearly. If it is decided that the Appropriate Adult scheme should cover court, training has to be included as part of the role.

Training is not one way process. In highlighting the need for clarification of the role of the Appropriate Adult, if the scheme is placed on a statutory footing, it is essential too that all other criminal justice

³ <http://www.journalonline.co.uk/Magazine/60-11/1020958.aspx>

⁴ Scottish Appropriate Adult Network (SAAN) Annual Report 2014-15

⁵ <https://www.sundaypost.com/fp/fury-vulnerable-witnesses-id-info-leaked-online/>

organisations are similarly aware by way of training as to the role and remit. This would include the police and criminal lawyers and if the role is to extend to court, the judiciary, whom it is understood may call for an Appropriate Adult where there are communication issues. There is perhaps a failing to understand or lack of awareness that Appropriate Adults are not currently, as we understand, trained for court work. Indeed it seems from the consultation that the extension of their role is not being foreseen. We mention this only to ensure that these issues are fully considered when placing the scheme on a statutory footing.

Our members are familiar with being in a police station in their professional role. No one should lose sight that it is a very unfriendly and challenging environment. For those in society who are the most vulnerable, it is much more frightening. The purpose in being there is in the interests of justice and in being a suspect in the investigation of a crime or offence. As an accused, the police are entitled to interview and allow them to provide their version of events if they so elect or to remain silent. They must be able to understand the processes involved. That requires support. The nature of that support is not 'one size fits all'. It will depend on the circumstances of the incident and the nature of the vulnerability which as we discuss below can and will vary considerably. The concept of support is one with which we agree. The purpose of the support would include:

- facilitate effective communication
- promote understanding and
- provide reassurance.

Communication involves bilateral engagement. The person providing that support as an Appropriate Adult must understand their role, understand how the law applies to that role and their relationship and interaction with the solicitor who may attend and be present at interview.

What it means for the suspect will include the understanding of language, the format, process and procedure adopted at the police station and at interview if relevant. That includes the Appropriate Adult in their role pre, during and post interview. Quite simply can the suspect or accused understand simple commands advice or instructions?

The absence of a statutory framework has hindered, in our view, the effective operation of the service to date and also as to public awareness of the role and need. The consultation is to be welcomed as a much needed conclusion to the significant reforms of the criminal justice system since 2011 and the safeguarding of human rights of the vulnerable adult in the police station.

Before responding to the questions, we do consider that the consultation does lack a robust evidence base to support a number of the proposals. From our members' practical experience, we have indicated areas where we consider that the system does require a fundamental review.

We would respond to your questions as follows:

Question 1. We would propose to use the definition of vulnerable person as set out at section 42 of the 2016 Act but extended to cover victims and witnesses. Do you agree?

We refer to our answer above with regard to the reference to victims and witnesses.

There does need to be a definition of 'vulnerable'. There is merit in consistency of definitions for simplification purposes. The definition of 'vulnerable' was considered fully at the time that the 2016 Act was debated in the Scottish Parliament. It received relevant input from the relevant specialist organisations which we note were included within the various consultations and workshops that were held prior to the consultation's launch. We would defer to their expertise in what the definition of vulnerable adult should be.

We understand that the definition of 'mental disorder' within the Mental Health (Care and Treatment) (Scotland) Act 2003 is under review at present. There is also a wider debate as to if this definition is compatible with the UN Convention on the Rights of Persons with Disabilities for specific rights or duties to be framed around a diagnostic label rather than the need for support. The recent debate on the right to advocacy in the Social Security Bill highlights the issues that arise. A right which the Government originally sought to confine to people with a mental disability was ultimately extended to all disable people.

What is essential is that those who are vulnerable are recognised and supported in the criminal justice system. We have highlighted the need for effective communication and that includes the police recognising that need at the outset. That involves training, but also effective transmission, subject to any data requirements under GDPR, as to the vulnerability of the suspect or accused to solicitors - be it SCL, PDSO or private solicitors involved as duty.

We have highlighted above that the one size fits all approach does not work. Consistency and transparency of practices will be key across the country.

The 2016 Act definition is not yet tested so looking at the implementation and monitoring of the 2016 Act is crucial.

Question 2. We propose to use the definition of the type of support to be made available as set out in section 42 of the 2016 Act. Do you agree?

We refer to our answer above.

Certainly, section 42 of the 2016 Act does outline in broad terms what the role involves in the way of support. However, we do feel that there is a need to specify the role of the Appropriate Adult in more detail taking the following observations into account:

- the type of support that is provided by the Appropriate Adult needs, in our view, to focus on what the outcome is to be, as this is an active and not passive role. That is to ensure that the vulnerable adult is treated fairly.
- there needs to be an emphasis on their independence from the role of the police and the solicitor. Appropriate Adults are not here for the police. They are here for the vulnerable adult and to facilitate effective communication.
- there is a need to ensure that the procedural requirements are being complied with e.g. the letter of rights is provided and understood, if the vulnerable adult requires medical assistance that this is provided or any reasonable adjustment is made on account of their condition, such as being confined in a cell or being provided with access to their medication.

We would say the role of Appropriate Adult includes observation, advice, support and assistance and inform and intervention if required. It does not mean legal advice.

We would consider that there is also a holistic role that goes beyond what is outlined in section 42 of the 2016 Act which is to offer reassurance. That is fundamental to the role and underpins its effective performance.

The regulations should set out clearly what the role of support means as highlighted above. Support can be subject to misinterpretation, meaning different things to different people, being not only those involved in the criminal justice system but also for the vulnerable adult. We understand that specialist organisations have become aware of their role in promoting and signposting their vulnerable groups to assistance e.g. making them aware of the role of a solicitor in advance as part of welfare advice.

Clarification of these matters will benefit the criminal justice system by promoting public confidence in the system, which will become more effective in supporting the vulnerable person due to everyone involved understanding their respective roles, whilst also improving the efficiency of process.

It is also essential, where measures to support the vulnerable person are being taken, that these are explained to that person. Failure to do so means that more harm can be done than good. It can harm a person's self-esteem. It can cause where there is inadequate training, an under-assessment of veracity and credibility.

Question 3. We propose to place the duty on local authorities for ensuring that people are available to provide Appropriate Adults support. Do you agree?

We refer to our answer above in relation to previous attempts at centralising the practice.

We have no view on the allocation of the service to the local authorities. There is experience and practice in the local authority delivery that can be relied on to provide the basis of the service in the future.

What is required is adequate funding of service provision and possible ring-fencing to ensure that the service is resourced to be delivered effectively rather than the service funding diverted to be allocated according to the individual local authorities' own priorities.

What is essential is the provision of an effective, accessible and consistent service. We note that akin to the access to legal advice at police stations, there is the need to provide a service 24/7 and 365 days a year. There needs to be a standard of service to ensure that a vulnerable person can access the services required to support them Scotland wide. It should not be dependent on post code. The vulnerable adult has the same needs whether in Aberdeen or Dumfries.

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

Yes. There seems merit in this approach but who will be responsible for developing the guidance, keeping it up to date and publishing it? Will the guidance be enforceable?

We can understand why a flexible approach might be taken, as depending on the timescales that are being envisaged in the consultation, to also take into account and to factor in changes being made or brought forward in the anticipated Vulnerable Witnesses Bill. These will have implications for the vulnerable adult as a witness or victim since there is likely to be a presumption against such witnesses ever appearing in court. Their evidence will be taken in a different and pre-recorded form. What the Appropriate Adult role is in that situation needs further consideration.

We are aware of the publication of guidance through SAAN however we could only locate this through the Police Scotland Standard Operating Guidelines⁶. Is this the correct place for such guidance to sit? That guidance does not include solicitors as part of the SAAN membership. There is a role for solicitor within such guidance as to when they interact and are involved with Appropriate Adults. Paragraph 2.7 of this guidance, updated in January 2018 to take account of the changes made by the 2016 Act refers to:

'Appropriate Adult Services are expected to follow the Scottish Appropriate Adult Network (SAAN) National Guidance and Standards (our underlining) which covers all aspects of the Appropriate Adult Service and is considered best practice regarding the management, organisation and service delivery of Appropriate Adults.'

These cannot be accessed.

However guidance is developed, it must be accessible to all who require to refer to it. It is important not to follow what may have existed previously but to consider carefully who is involved in developing such guidance and to whom it applies or needs to refer.

As far as what the guidance should include, we would consider that it generally (but this is not definitive) needs to cover:

- its purpose
- to whom it applies and their roles
- its authority- the legislation under which it is derived
- the role of the Appropriate Adult
- the definition of vulnerable
- police station procedures responsibilities of the Appropriate Adult with regard to confidentiality/personal data/ use of IT

⁶ <http://www.scotland.police.uk/assets/pdf/151934/184779/appropriate-adults-sop>

Training

Question 5. We propose to place a duty on local authorities to deliver training to Appropriate Adults. Do you agree?

Yes. Before the consultation discusses training, we note that the consultation does not mention the proposed manner of recruitment and appointment. There needs to be a proper consistent means of appointing suitably qualified persons to be Appropriate Adults.

For consistency, recruitment may well be local through the local authorities if this is the preferred route but there needs to be a single job description and the recruitment and appointment process needs to be transparent and open.

Concerns have been expressed in the past about bias, where those appointed may have previously been police officers undertaking different roles from that now being undertaken in the Appropriate Adult role. The interests of justice test needs to be undertaken to avoid any perception of bias. A robust appointment process should sort out any lingering issues that may arise here.

Why the appointment process is relevant is because training is an ongoing matter, from induction to refresher. As we assume that there will be continuity when the new arrangements come into place, consideration will need to be given to those currently in role being given training, as well as those being newly appointed, as well as how and when such refresher training should be provided. Training needs to be mandatory. Though training is mandatory at present, it is delivered in a piecemeal fashion with no centralised programme of training. It does not mention, or refer to, any background, or promote any understanding of the solicitor's role.

Training is currently being undertaken by organisations who are promoting their own version of Appropriate Adult training. There does not appear to be any evaluation, feedback processes or appraisal. It is our view that these are all required. There is no publication of reports about training. This all needs to change for the purposes of transparency.

There needs to be an overarching training framework which must set out the details of what is required from an Appropriate Adult by way of training when they are appointed and on a recurring annual basis. How many hours of training are they required to undertake?

We would anticipate that this would include development of a competence-based approach tied with the criteria for appointment. In addition, all organisations who are involved in the police station process should be involved in developing the training, using methodologies which could include online learning to ensure consistency and quality of materials and delivery of training.

There is evidence available of how to approach training which needs to include how to interact with police officers, where the police may not demonstrate understanding of how to ask questions.

There is mention of developing a training oversight group, which is essential in understanding how best to service the vulnerable adults' varying needs. The context for the training needs to be set out clearly. The training must include details of the required interactions with a number of the criminal justice organisations. It must also set out the legislative context which is vital. This does include an ethical accountability. There is also the issue of a complaints process. Where do complaints go if the Appropriate Adult breaches their duties?

A model which might be considered would be similar to that put in place for justices of the peace. Their role is different, since it a voluntary scheme, but covers national as well as local delivery but to a set framework of competencies, training committees as well as mentoring and appraisal procedures. The Judicial Institute for Scotland is responsible for training of justices of the peace and would provide the relevant information.

We also note that there is provision in England and Wales for accredited training⁷. This would provide another route for developing meaningful effective training.

Whoever is responsible, training is essential for the successful development of the Appropriate Adult scheme. It will need adequately resourced and funded.

Quality Assessment

Question 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?

Firstly, to pass on responsibility for quality assessment of the Appropriate Adult services to the Care Inspectorate seems to add a layer of complexity to the system. We appreciate that this would be high level. There are several reasons:

- the Care Inspectorate is delivering quite a different service in a civil and not criminal context.
- they would, we surmise, have little understanding of the respective roles of the criminal justice organisations or of the procedural, legislative or evidential context of the police station processes.
- the criminal trial⁸ starts at the police station where an understanding of the importance of the police processes is essential. Challenges to admissions made at police station interviews/procedures can be anticipated.
- it is not clear how any self-evaluation framework would be used by the local Appropriate Adult services.

⁷ <http://www.appropriateadult.org.uk/index.php/qualifications>

⁸ *Salduz v Turkey* 36391/02 [2008] ECHR 1542

Secondly, how do you set quality standards? What is effective? What is being measured? How do you show that the role has been satisfactorily undertaken? We would suggest that the focus would be that a service has been delivered rather than the effectiveness of what was facilitated by way of communication. That is in our view too narrow.

We would suggest that a quality assessment role should be undertaken by an independent standalone organisation where its members would be representatives from the medical sector (third sector organisations currently servicing vulnerable adult needs) and from the legal sector, in order to be able to understand the specialist context in which support is being provided.

Quality is not just about the provision of a service but also about the delivery of the actual support, in what is a highly challenging pressured environment where the issues are about the vulnerable person's human rights, including Article 6 of the European Convention on Human Rights – their right to a fair trial.

We note the reference to Community Justice in Scotland. There are some Quality Indicators which cause us some issues such as:

People must be held to account for their offences, in a way that recognises the impact on victims of crime and is mindful of risks to the public, while being proportionate and effective in preventing and reducing further offending (Quality Indicator 5.1, 5.2, 5.3)⁹

Though we recognise that the reference was to a community justice model which could be utilised, it does refer to the position post-conviction. What is happening in the police station is the balance between the rights of the state to investigate crime and the rights of the individual (such as the right to remain silent and to understand what the caution means). It is a rather different process. We do not see any legal input to the Community Justice model.

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

To whom does the 'we' refer? Does it mean the Scottish Government in developing the service, or the ongoing process of quality assessment and improvement in relation to learning disability?

We can understand the challenge. Those involved in the criminal justice system may, we suspect, be reluctant to engage or indeed, have the capacity to engage meaningfully in feedback. That is where the role of the third sector will be important and best placed to provide specialist advice. There would need to be similar engagement with all groups representing mental illnesses and personality disorders. We understand that the Mental Welfare Commission for Scotland for instance has previously engaged with

⁹ <http://hub.careinspectorate.com/media/437466/a-guide-to-self-evaluation-for-community-justice-in-scotland.pdf>

people with lived experience on a range of issues including the use by police of place of safety legislative powers and would be happy to explore whether they might be able to assist.

We would again highlight that our members will be in a position to monitor and observe the interactions and role of the Appropriate Adult when they attend at the police station. However, on grounds of client confidentiality, they would be unlikely to be able to contribute specifically other than provide generic feedback.

Oversight

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

This again seems to be overly complicated. What is in effect being proposed here are two existing bodies being used for quality assurance and oversight respectively. We recognise that the Mental Welfare Commission has experience and a background in the criminal justice system as it provides information and advice on mental health and treatment. However, we do refer to our suggestion of a standalone organisation responsible for both quality assurance and oversight. It would also seem to be the place for all information about the Appropriate Adult scheme to be located for reference.

This work may be undertaken informally at present by the Scottish Appropriate Adult Network but this should not continue in its current informal role with no legal status.

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

Yes. There is a need to engage with a number of organisations and not just those who currently provide Appropriate Adult Services. It needs a robust framework which is not present at the moment.

General Comments

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

We have highlighted that we feel that there does need to be a fundamental overhaul of the Appropriate Adult system in order that the service delivers what it is required to deliver. That, in our view, is to achieve a fair justice system that ensures the effectiveness of the Appropriate Adults who are responsible for

securing the welfare and rights and enabling the effective communication of vulnerable persons involved in the criminal justice system as suspects or arrested persons.

There is no mention of funding. It is hard to ascertain how many times the services of an Appropriate Adult have been required in the past. As we have highlighted, the number of occasions when the Appropriate Adults are required will have increased and is expected to increase with the implementation of the 2016 Act. The service will need to be adequately funded.

There is a role for public awareness as well as service provision. For this reason, whatever policy decision is taken about the role of oversight/ assurance/ development of training/ national standards for recruitment, we would highlight that the activities have to include:

- raising awareness
- developing guidance
- supporting volunteering
- providing training
- conducting research and providing feedback
- monitoring evaluation and reporting
- informing policy

We trust that this is helpful for your purposes. We are happy to answer any further questions.



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