JUSTICE COMMITTEE

CHILDREN (SCOTLAND) BILL

SUBMISSION FROM THE SUMMARY SHERIFFS' ASSOCIATION

This submission is made on behalf of the Summary Sheriffs' Association, in response to a request from the Scottish Parliament's Justice Committee for views on the Children (Scotland) Bill. If required further clarification in relation to the points below can be obtained through the Summary Sheriffs' Association.

The Committee suggested certain areas or questions which might be included in any submission. We have found it easier to respond by going through the proposed sections of the Bill, and commenting or making observations where appropriate. We have not commented on matters which we consider to be within the realm of policy-makers. Our submission is principally from the standpoint of the decision-maker who finds himself or herself dealing with family legislation and family litigation.

Section 1,2 and 3: Child's Views

We make no comment on the removal of the presumption in relation to a child aged 12 or over, which is a matter of policy, but make the following observations on the practical implications thereof. The result of the removal of the presumption will result in the views of more children requiring to be taken in some mode or other. We would point out that in practice, and in accordance with the new Sheriff Court Rules introduced in June 2019, the views of children under the age of 12 are already regularly obtained.

- We consider that it should still be left to the courts to decide how the child should be given an opportunity to express his or her views, assuming that the child has indicated that wish. At present this is done in a variety of ways, and we make the following comment on the various methods and the issues arising therefrom:

(i)Child welfare reporters are often instructed to speak to children in the context of preparing reports for the court, either expressly to obtain their views or, where younger children are involved, to gain an understanding of the child's position. If such reports are to be routinely instructed, issues of resources arise. Sometimes neither party can afford to fund such a report.

(ii) A child can complete Form F9, both the Form and its content have been recently substantially amended to be more "child-friendly". Dispensing with service of Form F9 should remain a matter for the summary sheriff or sheriff's discretion.

(iii) It is open to a sheriff to interview a child personally. It seems that most judges will consider this to be a useful option in a minority of cases, and it should remain an option. It may be unrealistic to employ this method routinely.

(iv) Certain areas have service providers (for example a contact centre such as Avenue in Aberdeen) which offer a service whereby professional counsellors will talk

to the child over a number of sessions and provide reports for the court. Currently this may be funded by the Scottish Legal Aid Board or the parties privately. Those of us able to obtain the benefits of such a service find it very valuable indeed. However, there is by no means universal provision of such services in Scotland, and extension of the provision (with the necessary funding) might require to be considered, in light of the envisaged increase in the taking of children's views.

(v) A teacher or other adult involved in the child's education may be requested to speak to the child and record their views. Such a practice is informal and depends on the willingness of teachers to undertake such a task. It is our experience that teachers may not feel entirely comfortable doing so, as it may compromise their neutrality in relation to the parents, and they may feel they do not have the necessary training.

- Issues of confidentiality are likely to arise even more frequently and are very difficult to resolve.

Sections 4,5 and 6: Vulnerable Witnesses

- We welcome the prohibition on parties conducting their own case but observe that to implement the prohibition will require considerable resources, both to identify solicitors willing to be court–appointed and to remunerate them appropriately.

- Provision for vulnerable witnesses requires to be better resourced, particularly in terms of the standard of technology used, for example, in remote video links.

Section 7: Vulnerable Parties

- We consider there may be practical difficulties in conducting Child Welfare Hearings with measures in place for persons perceived to be "vulnerable parties". Both parties may make allegations and counter allegations of domestic abuse in their written pleadings. At Child Welfare Hearings, the court cannot and is not expected to make decisions as to the truth or otherwise of the allegations. The aim of Child Welfare hearings is for the judge and the parties, with or without their solicitors, to discuss the ways of resolving disputes over children, in a relatively informal way. We would be concerned that the use of special measures, such as screens or video links, might undermine the effectiveness of Child Welfare Hearings in resolving matters without proof, with implications for court time and programming.

Section 8: Establishment of Register of Child Welfare Reporters

- While we appreciate that one of the policy aims of the Bill is to attract non-lawyers to the role of child welfare reporter we note that courts already have the power to refer matters to social workers and obtain reports from them, in terms of the Rules of Court, and this can be illuminating where there has been social work involvement with a family and an understanding of the history is necessary. Furthermore, while we consider that courts dealing with difficult family situations would welcome the chance to refer cases to a child psychologist, where there are psychological issues, (such as alienation), the

remit would be different, and perhaps more therapeutic, from the usual instructions to a child welfare reporter.

- However, in our experience and with respect, there are good reasons for any preference for appointing solicitors as child welfare reporters. Most solicitors understand what is required by way of dispassionate and forensic reporting. They understand the relevant law and how to apply it to the facts. An up-to-date report by a specialist family solicitor, known to local Bar and Bench as objective and independent, is often a means of resolving apparently intractable disputes, which would otherwise proceed to a costly and possibly damaging proof. Local authority reports from a Social Work department are not helpful in a standard case.

- We recognise that there are issues over the funding of child welfare reporters and their investigations and often lengthy reports, and where there is no legal aid certificate this can result in inequality or an avenue for settling a dispute being closed off. However, we would be concerned that the remuneration offered should be sufficient to attract applicants, especially solicitors, to be on any Register. It seems to us that there is a danger that skilled reporters will be discouraged from registering because of insufficient remuneration, but conversely, that less skilled reporters would be attracted by the possibility of registration and a fixed remuneration.

- The extent of the required investigations and remit of the report differ from case to case, so remuneration would require to reflect this. The present system of capped fees seems to work well, and we do not see merit in a fixed fee system.

- It is conceivable that a person on a register might meet eligibility and training criteria, but not be skilled or suitable for other reasons. Is it envisaged that a court or judge should have some way of feeding back any concerns as to the quality of reports?

Section 9: Contact Centres

- Our view is that such centres are an invaluable resource, both in terms of facilitating difficult contact situations, and for providing feedback and reports on such contact. Contact centres are extensively used, in our experience, and our perception is that they seem to achieve positive outcomes on the whole. If the centres are to be regulated and registered, (which in itself will require resources to be made available) then such centres deserve adequate and long term funding in order to progress their work.

- It is important that the independent centres continue to operate and should not be disadvantaged by regulation.

- The wording of the proposed new section 11 (14) (by virtue of section 9(2) of the Bill) seems unclear. It states that where the court makes a contact order to take place at a contact centre " *….the court may only require that contact to take place at a contact centre operated by a regulated contact service provider."* If the intention is that the court may order to take place only at a

regulated contact centre, (and not any other contact centres) then the word "only" may be in the wrong place. At the very least, if we are wrong in our interpretation, then the wording is confusing.

Sections 12 Factors to be considered before making an order

- We would observe that courts already take the factors set out in Section 12 into account, if relevant. We appreciate that this may be a matter of policy, but we can foresee a difficulty for judges where certain factors are specifically included in legislation, but others, which may be equally important, are not. There may be a perception that there is intended to be a ranking of the different factors. It would be our position that judges are capable of identifying the factors relevant to a child's best interests whether referred to in legislation or not.

Section 13: curators ad litem

- We agree with the provisions for the appointment of *curators ad litem*, although in our view a six month period for re-assessing the appointment is somewhat unrealistic. If an action is ongoing, that should be sufficient reason for continuation of the appointment.

- Remuneration of *curators ad litem* has not been resolved satisfactorily, and should be on a statutory footing.

Section 14: Local authority reporters

- We agree with the imposition of this requirement. We refer back to our comments regarding section 8 in respect of the limited circumstances in which a report from the local authority may be of use to the court. A prerequisite of the court being able to avail itself of this resource for investigation is that there must be sufficient numbers of local authority reporters to undertake the task without undue delay. Often it is a social worker allocated to the child, or with existing knowledge of the child, who is assigned the task of providing the report to the court and this allows for the report to be prepared with the benefit of the worker's direct knowledge of the child. For this to continue, the local authority would require to ensure that most social workers within children and families teams are trained, qualified and registered as child welfare reporters. There would need to be adequate funding for this.

Section 15: Explanation of decisions

- The requirement to explain decisions to the child being a matter of policy, we do not comment directly on that. There would be, however, practical considerations and difficulties in carrying out the requirement, some of which may also impact on the best interests of the child.

- Arranging for a child welfare reporter to explain the decision would require additional funding to be in place for such an exercise.

- If the aim is to have an independent person explain the decision to the child then we observe that explanation by the child welfare reporter is not likely to occur before the decision has been explained to the child by at least one of the parties to the action. Parents are likely to explain it to the child when they see the child after the hearing. Decisions are usually due to be implemented shortly after they are made. For the explanation to be given to the child by a child welfare reporter before another party explained it and before it is implemented, the child welfare reporter would need to arrange to visit the child on the same day of the decision, immediately after the decision was taken. This would require considerable coordination between courts, reporters, parties and schools. This is not feasible.

- An explanation to the child by the court itself would require the child to be brought to the court building if the court was to provide the explanation face to face and in private. Again, to do so immediately after the decision was made would necessitate the child attending the building with the parents at the time of the hearing and usually at a time when a number of other similar hearings are scheduled to take place the same day. This is not a particularly desirable environment and circumstance for most children and generally would not be considered in their best interests. An explanation by the court would also require considerable adjustment in terms of court programming and staffing requirements and would involve significant additional resources.

- During the course of actions seeking section 11 orders, often interim decisions are made and then varied on a number of occasions. This is usually happens when contact is increased in duration over a period of time to allow the child time to adjust, and to assess what arrangement works best for the child. This involves a number of interim decisions. The requirement that interim decisions are explained would raise the possibility of repeated approaches to the child. It may well be that the repeated nature of the process of explaining would in itself be detrimental the child. This might be particularly so if it involved repeated visits to the court by the child or repeated interruption to their day to day routine by having a child welfare reporter visit them.

- It would be difficult to monitor whether written explanations sent to the child were in fact received by them, and not intercepted by adults, and does not allow for a check to be made as to whether the child understands the written explanation.

- It is acknowledged that this part of the response does not provide a solution to the issues raised in it. It is difficult to envisage how decisions can be explained to the child throughout a process without considerable practical barriers as well as potential negative impacts on the welfare of the child.

Section 16: Failure to obey order

- It is not clear what this provision would achieve. The requirement to establish a reason for failure to obey an order would seem to mirror the test which must be met before a finding of contempt of court can be made. In *AB and CD v AT, No 43 27 March 2015 [2015] CSIH 25, at paragraph 29*, Lord Carloway said:

"In Muirhead v Douglas it was made clear that whether a failure to obey a court order amounts to a contempt of court depends on all the relevant circumstances. The failure is not automatically a contempt. As Lord Cameron said (p18), 'the position and duties of the parties alleged to be in contempt are necessarily material considerations.' There must be a deliberate lack of respect for or defiance of the authority of the court."

- The courts have recognised that problems with the operation of contact and other orders can often be resolved without the need to go to the extent of considering a finding of contempt of court. That being said, the party complaining that an order is not operating needs to have some kind of mechanism of bringing the matter before the court. They might do so by lodging a motion or minute asking that the other party be ordained to appear and explain their failure to obtemper the order without necessarily asking for a finding of contempt. See Glasgow practice note 2012, para 50 (repeated in the Edinburgh practice note) and rule 33.44 of the Ordinary Cause rules. The appointment of a child welfare reporter is an option already open to the court in the circumstances described in subsection (3)

- However the court must be able to deal quickly with an alleged contempt where that is required. An alleged contempt which is denied requires a factual determination by the court. This is not achieved by the appointment of a child welfare reporter and it would be of benefit to the child to have regulations which allow for a speedy and simple determination of facts and then and an appropriate penalty to be imposed and the failure to be remedied.

Section 17: Appeal against relevant person decision

- The Principal Reporter and Children's Hearing are distinct entities with separate roles. It might be argued that the restriction of the right of appeal by the Principal Reporter to only those decisions which do not confirm a determination of the children's hearing aligns the Reporter's interest with that of the Children's Hearing and undermines the Reporter's independence.

Section 21: Delay in proceedings

- There is already recognition by the court of the need to progress expeditiously in proceedings under the legislation referred to and that this is to avoid prejudice to the child's welfare. To that end, case management is provided for in rules of court. We are not persuaded of the necessity or benefit of this being set out as a factor in the primary legislation. Some delay is unavoidable and indeed necessary, for example to allow for sufficient preparation of the case to be presented to the court and for any investigation needed, including by a child welfare reporter. If this provision is to be retained, it may be beneficial to specify *undue* delay.

Summary Sheriffs' Association
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