JUSTICE COMMITTEE

CHILDREN (SCOTLAND) BILL

SUBMISSION FROM THE SENATORS OF THE COLLEGE OF JUSTICE

Introduction

1. This is a response from the Senators of the College of Justice to the call for evidence on the Children (Scotland) Bill as introduced in the Scottish Parliament on 2 September 2019.

2. In respect of most of the provisions contained within the Bill, our position remains the same as in our response to the Children (Scotland) Act 1995 consultation, which was completed in November 2018. Our consultation response is therefore referred to throughout this document to re-iterate our views on certain provisions.

3. Whilst we do not provide comment on the specific questions which are raised in the call for evidence, we do have the following comments to make on some of the provisions contained within the Bill.

Summary

4. Our primary concerns with the Bill are in terms of practicalities and workability and include:

- Proposed Section 8 - Establishment of register of Child Welfare Reporters;
- Proposed Section 13 – Curators ad litem;
- Proposed Section 15 – Explanation of decisions to the child; and
- Proposed Section 20 – Extension to sheriff of enforcement powers under Family Law Act 1986.
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5. Our thoughts on each of these proposed provisions are set out below.

Section 8 – Establishment of a register of Child Welfare Reporters

6. The establishment of a register is welcomed. Child welfare reporters are a valuable resource. The Court of Session and the Sheriffs Principal currently hold a list of existing child welfare reporters. However, the lack of formal training, qualifications or regulation of child welfare reporters to date has been a cause for concern.

7. The Bill seeks to introduce a completely new set of arrangements to manage and train child welfare reporters. The Scottish Ministers would be given the power to make provision, by regulation, in relation to a variety of matters, including the requirements which a person must meet to be included in the register, training requirements, the process for inclusion and removal from the register, the process for appointment, the handling of complaints and the remuneration of child welfare reporters. The Bill places a duty on the court only to appoint as a child welfare reporter a person who is included on this register. In our view, the practicalities and consequences of all of this require to be considered carefully.

8. Our response to question 4 of the 1995 Act consultation was that responsibility for maintaining the register of child welfare reporters should rest with the courts. We are concerned by the proposal to remove the register from the court's responsibility and control. The court would be wholly reliant on the regulations produced by the Scottish Ministers in respect of child welfare reporters. The practical difficulties with the Scottish Ministers, as opposed to the court, maintaining the register include the steps which the court would have to take to a appoint a child welfare reporter from the list, and how the court will ensure that the list is up to date. Without knowledge of the detail which the regulations would contain, our view is that it seems more appropriate for the court to maintain the list of child welfare reporters.

9. So far as remuneration of child welfare reporters is concerned, we note that it is intended that the Scottish Ministers bear this under the proposed new scheme. We can understand how a fixed fee or hourly rate regime for such reporters may be desirable. However, the current regime for remuneration works well. The rules provide that the court allocates responsibility, in the first instance, for payment of the fee, with the ultimate responsibility as between the parties being held over if necessary until later in the proceedings. This system ensures that regardless of whether the litigant is legally aided or is paying privately, the court is not deterred from instructing a report due to concern about the remuneration for the child welfare reporter.

10. In our response to the 1995 Act consultation, we said that training of child welfare reporters needed to be provided as part of any new framework regulating the role. We therefore welcome the new training provisions contained in this section.

Section 13 – Curators ad litem

11. Similar issues arise in the context of curators ad litem.

12. The proposed section 13 would provide that, where the court is considering making a section 11(1) order in relation to a child, then it can only appoint a curator ad litem if: the court is satisfied that it is necessary to protect the child's interests; the curator is registered; and reasons are given by the court for the appointment. The court must review the appointment every 6 months and give reasons should it continue the appointment (but not, if it decides not to continue it).

13. The related proposed new section 101B of the Children (Scotland) Act 1995 would make provision for the register and provides power for the Scottish Ministers to regulate the qualifications and appointment process for curators, complaints against them, their remuneration and the administration of the register.

14. It provides power for the Scottish Ministers to prescribe the process on how a person on the register is to be selected as the curator in a given case. It is not clear how this power might be exercised by the Scottish Ministers. We are conscious that this power may enter into court rule territory, an area which is within the exclusive remit of the Lord President. The responsibility for choosing which registered curator should be appointed in a given case should rest with the courts.

15. Our 1995 Act consultation response (question 4) preferred the option of modifying existing arrangements so that the Lord President and Sheriffs Principal could remove a curator, if they failed to meet necessary standards. The existing arrangements worked well. From a practical perspective, our preference would be for the register to be maintained by the court. Our position is consistent with the recognition, in the proposed section 11D, that it would remain for the court to give reasons for any individual appointment in a case and to reassess that appointment every 6 months.

Section 15 – Explanation of decision to child

16. The proposed section 15 would insert a new section 11E into the Children (Scotland) Act 1995. It would provide that, where the court is making, varying or discharging a section 11(1) order (on a final or interim basis) under the 1995 Act, it "*must ensure"* that the decision is explained to the child in a way that the child can understand. There would be some exceptions to this obligation in the proposed new section 11E(3), where the child is incapable of understanding an explanation or where it would not be in their interests to give an explanation (or the child cannot be found).

17. The explanation is to be given in one of two ways: either the court is to provide it or a child welfare reporter would provide it, although Scottish Ministers would be given a power to modify these two ways, i.e. to remove someone or add someone who can provide an explanation. As currently framed, the mandatory nature of the proposed obligation seems to place a novel and unnecessary burden on the court. There is typically no ongoing involvement of a child welfare reporter at the stage of final decision making by the court.

18. There should be no expectation on the judiciary to engage with children in this manner. This proposed obligation would be of particular concern in sheriff court cases, given the volume of section 11 orders which are made on a daily basis. The practical challenges, were the court to be responsible for explaining the decision to the child in each of these cases, would be difficult to overcome. It would simply be unworkable for the judiciary to perform this function. It is clear that this is not a function which it would be appropriate for court staff to perform. Aside from the operational difficulties that this would cause, court staff are neither trained nor qualified for this function. It is not within their job description.

19. Our response to the 1995 Act consultation (question 3) was that the primary responsibility to explain the decision to the child should remain with the parents. If that was inappropriate in a given case, then a child support worker or child welfare reporter could step in. We are extremely concerned by the proposal to place this obligation on the court.

Section 20 – Extension to sheriff of enforcement powers under Family Law Act 1986

20. The proposal in section 20 of the Bill as currently drafted is somewhat different to that offered in the 1995 Act consultation. Question 12 of the consultation document asked whether the definition of "appropriate court" in the 1986 Act should be extended to include the sheriff. We disapproved of the suggestion made in the consultation

document, taking the view that the central register in the Court of Session performed well. Changing the definition might give rise to jurisdictional issues. We were unaware of any problems with the existing system, in which expertise is centralised. Allowing enforcement in the sheriff court was likely to lead to more delay and confusion.

21. The fundamental reason for disapproval of this section of the Bill is that the Court of Session has an all Scotland jurisdiction. It is well versed in dealing with cases of complexity, including cross border issues. By extending this power to the sheriff court, whose jurisdiction is restricted to the particular sheriffdom, and which has less exposure to these types of cases, our concern is that the delay in such cases may increase.

22. In July 2018, after a number of meetings between the senior judiciary of Scotland and of England & Wales, a Judicial Protocol was entered into to allow family judges in those two jurisdictions to share information in family cases. The Protocol has been successful. For Scotland, a central contact point was created in the Court of Session. All communications are channelled through it. The Court of Session is responsible for keeping a record of all communications, which are sent by one of two appointed liaison judges in this court on behalf of any sheriff or judge making a request. The Court of Session's involvement in family cases which involve more than one jurisdiction should be maintained. This power should not be extended to the sheriff court.

Other

23. In relation to other proposed sections of the Bill, we question the necessity to include the following provisions:

- Section 11 – Factors to be considered before making a section 11 order under the 1995 Act;
- Section 16 – Failure to obey an order; and
- Section 21 – Delay in proceedings likely to prejudice a child's welfare.

Section 11 - Factors to be considered before making a section 11 order under the 1995 Act

24. Section 11 would add a number of additional factors which the court must take into account when considering the child's welfare and whether or not to make an order. Our 1995 Act consultation response disapproved of a statutory checklist (questions 34 and 41) as it is not part of the Scottish approach whereby a holistic view is taken, having regard to all relevant factors, recognising that the number and nature of the factors will vary in each case. This proposed section adds little value to the Bill.

Section 16 – Failure to obey an order

25**.** Section 16 would insert a new section 11F into the Children (Scotland) Act 1995 to provide that, where the court is considering whether to find a person in contempt for failing to obey an order (whether final or interim) under section 11 or to vary or discharge such an order on the basis that a person has not obeyed it, the court must seek to establish the reasons why the person has failed to obey it. The court is

provided with the power to appoint a child welfare reporter to investigate and report to the court on the person's failure or alleged failure to obey it.

26. This provision is unnecessary. The nature of contempt of court proceedings already ensures that the court must take into account the reasons for any failure to obey an order. There is a risk that its introduction would encourage parties to disobey a court order in order to draw attention to what they perceive to be its injustice, and so indirectly seek to bring about its variation or discharge.

Section 21 – Delay in proceedings likely to prejudice a child's welfare.

27. The courts are already well aware of the need to proceed expeditiously in child welfare cases. This provision is therefore unnecessary.

Publication

28. We are content for this response to be published.

Senators of the College of Justice
15 November 2019