JUSTICE COMMITTEE

CHILDREN (SCOTLAND) BILL

SUBMISSION FROM THE SHERIFFS PRINCIPAL

[1] We offer these observations on the following provisions of the Bill.

[2] We offer these comments in the context of our recognition and appreciation of the policy objectives of the bill, in particular that the paramount consideration should be the welfare of the child and therefore the child's best interests.

Regard to be had to the child's views
Section 1-3

[3] Section 6 of the Children (Scotland) Act 1995 requires the decision maker to: "have regard so far as practicable to the views (if he wishes to express them) of the child concerned taking account of the child's age and maturity…" We do not anticipate that the proposed new formulation will have a significant impact on the steps taken by the court to seek the views of the child.

[4] A new form F9 has been introduced for cases raised on or after 24 June 2019. This has been designed to be accessible to children. This further supports the court in fulfilling the statutory obligation. It is not apparent to the Sheriffs Principal that the changes proposed will assist the court in gathering the views of the child or assist the child in expressing their views; nor that any additional methods are proposed which are not possible at the present time.

[5] It will be appreciated that often the question is not what is expressed by the child but whether that view has been unduly influenced by one parent.

[6] The amendment to section 11 of the Children Scotland Act 1995 is clearly designed to require the court to have specific regard to domestic abuse. This is already a factor which the court will have regard to, where evidence is available, and while we see no particular difficulty with the proposed terms of new section 11ZA we anticipate this is likely to result in parties seeking to bring more "expert" evidence to address the impact of abuse on the child. We should also express concern that it may result in an increased number of appeals which will delay the resolution of individual cases as parties seek to test the impact of the statutory amendments, bearing in mind, as is well recognised, delay adversely impacts on the children involved.

Vulnerable witness: prohibition of personal conduct of cases
Section 4

[7] We have some concerns about how the competing objectives of having the parties present in court at child welfare hearings in order that they can be spoken to directly by the court and the introduction of these provisions for deemed vulnerable witnesses in proceedings where the court may make an order under section 11(1) of the Children (Scotland) Act 1995 are to be reconciled. Particular issues may arise at early child

welfare hearings when the court is considering contact arrangements (especially at an early stage in proceedings) and this may impact significantly and adversely on court programming.

[8] An important purpose of child welfare hearings is to bring the parents before the sheriff to discuss the care arrangements for the child or children and for the court to explain the court's powers and functions to protect and to have regard to the child's welfare in the event that the parents cannot agree these arrangements themselves. The child welfare hearing is an important forum for such discussions with both parents participating usually with solicitors, but sometimes unrepresented. The purpose of child welfare hearings where the aim is to resolve issues relating to children in an effective open manner under judicial control may potentially be inhibited by the vulnerable witness proposals of section 4.

[9] Special measures are commonplace in all sheriff courts, but the necessary facilities are not universal, such that in every case it would be straightforward for the arrangements to be made at a time (and with the desirable despatch) which suits the court, the parties and, in particular, the child. There is every likelihood that hearings will have to be fixed for a date later than desirable or that would otherwise be the case, simply because as a matter of practicality the special measures cannot be provided when first sought.

[10] We approve the unequivocal right of a prohibited party to legal representation. We are however concerned at the proposals (11B(4) and 11B(5)(b)) that a prohibited person will include a party who " is being prosecuted for committing a relevant offence" This appears to run contrary to the presumption of innocence and the requirement for due legal process.

[11] In appeals under section 154 of the Children's Hearings (Scotland) Act 2011, which require to be disposed of in three days (including weekends and public holidays), the practical arrangements for special measures will be particularly acute.

Child welfare reporters and curators ad litem
Section 8 and section 15

[12] Child welfare reporters and curators ad litem perform a very important role and their input is highly regarded by the judiciary. Child welfare reporters in particular play a key role in assisting courts to reach decisions and in bringing the views of the child to the attention of the court. Their input can be especially valuable where there may be a suggestion of a parent seeking to influence the views of a child in respect of the other parent.

[13] We are particularly concerned that the registration requirements and introduction of procedures for the removal of individuals from a list risk prejudicing the independence of the judiciary to appoint a person suitable to the role. In most cases the appointment follows a cab rank rule from the list of suitable persons, maintained in the court under the supervision of the Sheriff Principal, but there can be cases where the sheriff very properly wishes to appoint a particular reporter or curator ad litem who has skills and experience which are suitable to the individual circumstances of these

cases. That is in the interests of the child and it would be unfortunate if that judicial discretion was lost by a formal rule about who next be appointed to a case.

[14] The desirability for formal training for child welfare reporters has been identified for some time. This would augment the selection criteria for child welfare reporters beyond their being identified as being experienced practitioners in the field and who have the respect of the local judiciary. We welcome this proposal.

[15] We are however concerned that the cost implication of the proposed regime for child welfare reporters may not have been fully recognised. It would be desirable that much more detail for these arrangements be fleshed out prior to their introduction. We are particularly concerned at the proposal that Scottish Ministers will set the fee rates. This may result in restriction in the fees being paid which may have the direct consequence that reports lack the robustness and analysis necessary to assist the court determine what orders to make (if any) and to have the views of the child transmitted and interpreted by skilled and experienced reporters. Moreover, it may result in experienced child welfare reporters no longer being prepared to accept appointments. Experience of the contracting out arrangements for safeguarding reports has not been positive - with concerns being widely expressed that the limited remuneration has seen a reduction in the quality of reports and inputs.

[16] Form 44 introduced by The Act of Sederunt (Rules of the Court of Session and Ordinary Cause Rules 1993Amendment) (Child Welfare Reporters) 2015 has specified the enquiries to be undertaken and resulted in more focused reports which better inform the court. These enhanced, more directed arrangements for reports are, we believe, operating well.

[17] Many of these observations also apply to the appointment of curators ad litem. We believe current arrangements work in a satisfactory manner.

[18] We consider it is fundamental that sheriffs have confidence in the ability and experience of the reporters; that sheriffs appoint the most suitable individuals given that reporters are officers of court. We therefore support the recommendation of the Bar Reporters Working Group that Sheriffs Principal continue to manage and maintain the lists of Child Welfare Reporters which should be maintained on a court by court basis.

Contact centres
Section 9

[19] Contact centres are valuable in supporting contact or supporting a return to contact. We would be concerned if the effect of the proposed regulation regime was to remove facilities currently available to support contact. We are not aware of issues arising from a lack of standards at such centres and while recognising the assurance offered by a registration regime, absent evidence of problems (where any difficulties are likely to be raised by a party to the court proceedings), we would suggest that care should be taken to evaluate the risks of a reduction in the availability of such facilities resulting from increased regulatory costs.

[20] Currently, contact centres are often part of the charitable sector funded largely by grants and fundraising and often staffed by volunteers. National and local bodies do receive government funding. However 10 years ago when the Gill Review reported it was noted "*Child contact centres have a valuable role; but we are not convinced that they are sufficient in number or adequately resourced. They are a vitally important and safe but scarce resources which the court can use to promote or reinstate contact between children and absent parents.*" (Chapter 5 paragraph 118). The review concluded at paragraph 121 that provision and funding of mediation services and family contact centres should be treated as a priority by the Scottish Government and kept under review by the Scottish Parliament. At that stage the review was concerned as to whether these organisations could meet the demands upon them with their existing level of funding and increased demands were anticipated with the rising incidence of family breakup and additional pressures on families in the current financial climate. Demand continues to exceed supply and parents often have to wait some considerable time before obtaining a contact time or arrangement.

Explanation of decision to the child
Section 17

[21] We do not support this proposed amendment to introduce section 11E to the Children (Scotland) Act 1995. In the case of *Patrick* v *Patrick* (pseudonyms) [2017] SC GLA 46 a letter was written by the sheriff to the children. That case had very specific facts; in particular, a clinical psychologist who specialises in working with children had given evidence and arrangements were made for him to pass the letter to this child. That case demonstrates that in very specific circumstances it may be appropriate for the court to explain a decision to a child and this may be done within the existing statutory framework. In *MN v ON* 2019 SAC (Civ) 35 the Sheriff Appeal Court urged caution in the manner in which a judicial decision on contact arrangements should be conveyed to a child.

[22] Providing an explanation to the child should in all but the most exceptional case be the responsibility of the child's parents. Given the high volume of such decisions being made and because the proposed section anticipates such an explanation being made for both final and interim orders (if the court considers it should be explained to the child in a way the child can understand), we are concerned that specifying how the court may fulfil the obligation will result in the default that court does provide the explanation even if that is not appropriate or necessary in the vast majority of cases. This is likely to place an excessive burden on the courts. Court staff should not be required to perform this function. They are not qualified to do so. It would not be deliverable within existing resources.

Duty to investigate a failure to obey order
Section 18

[23] We are concerned that this provision may result in an increase in non-compliance with court orders. It may be perceived as giving the delinquent party an added opportunity to explain or seek to justify their reasons for non-compliance. In our view, it risks undermining the authority of the court's order. We are unaware of any empirical evidence which suggests that the manner in which sheriffs deal with such circumstances is deficient such that a change in the law is required.

Sheriffs Principal
18 November 2019