

JUSTICE COMMITTEE

CHILDREN (SCOTLAND) BILL

SUBMISSION FROM DR RICHARD W WHITECROSS, EDINBURGH NAPIER UNIVERSITY

The Children (Scotland) Bill provides an opportunity to strengthen children's rights in Scotland. I understand that submissions from other colleagues and organisations will discuss those rights and the approach set out in the Bill, notably on the "voice of the child". I focus on particular aspects of the Bill and my concern that it does not fully address the serious issue of domestic abuse, the barriers to presenting information and evidence of domestic abuse before an order for contact or residence is made and for the extension of the vulnerable witness measures available in criminal cases to a mother during Child Welfare Hearings in the civil courts.

1. Child's best interests

There is an underlying aim of the Bill to promote the best interests of the child. However, one area that should be emphasised, perhaps with an amendment to the current Bill: confidentiality of information. This would ensure that the Bill will meet the requirements set out in UNCRC Article 18 (the child's right to privacy).

2. Child welfare reporters and curators ad litem

I support the Bill's proposal to regulate child welfare reporters and curators ad litem. However, there is a need to consider how this will be done in practice in a manner that supports children. There is, at present, a lack of information on the necessary infrastructure that will need to be put in to place.

3. Factors to be considered by the court when making contact and residence orders

Contact with both parents when it is in the child's best interests is accepted as important. As set out in the Bill there is a focus on the voice of the child. Based on my research and the work of Tisdall and others on the voice of the child it is important that the views of the child are heard and taken in to consideration when making a contact or residence order. However, my research examining cases of domestic abuse suggest that there is a strong need for courts to ensure that children who experience or have experienced domestic abuse are provided with an opportunity to express their own views before an order is made granting contact or residence.

At present, Scottish courts work on an assumption that contact with both parents is in the best interests of a child. Indeed, the Policy Memorandum states that "the Scottish Government believes that both parents should be involved in their child's life as long as this is in the child's best interests"¹. However, research highlights the dangers of this assumption when there has been domestic abuse.² In my own recent interviews

¹ Policy Memorandum Children (Scotland) Bill 2019 para 144.

² See special issue of *Journal of Social Welfare and Family Law*, vo. 40, 2018.

with mothers who have experienced domestic abuse and attended Child Welfare Hearings, it is suggested that there are barriers to presenting information on domestic abuse and its impact on the child, its siblings and its mother.

The reframing of Section 11 (7A) – (7E) is confusing. Particular care needs to be taken to link the reference to “abuse” and to “domestic abuse” to the new definition in the Domestic Abuse (Scotland) Act 2018. In *R v R*,³ Sheriff Holligan noted that “domestic abuse” added nothing to the definition of “abuse” therefore this is a good opportunity to address this comment and to explicitly link the definition set out in the 2018 Act.

It is noted that the Bill removes sections (7A) – (7C). The original section, introduced by the Scottish Executive in September 2005 was drafted in collaboration with Scottish Women’s Aid. I understand that the intention behind this new section was that Section 11(7A)-(7E) should be read together and in sequence in order to best inform decisions made in relation to children who had experienced domestic abuse and contact arrangements.

4. Vulnerable witnesses

I welcome the provisions on vulnerable witnesses and fully support the proposals. However, again based on my own research in Child Welfare Hearings, I believe that the provisions must more explicitly apply to the civil court in cases of domestic abuse, or alleged domestic abuse. Ideally, it should seek to reflect the protection afforded to victims of domestic abuse in criminal cases under the Victims and Witnesses (Scotland) Act 2014. The Bill provides an opportunity to make linkages across various strands of legislation to provide women who have experienced domestic abuse with the same protections in contact and residence order cases in the civil courts.

Dr Richard W Whitecross
On behalf of the Child and Family Law and Policy Unit
Edinburgh Napier University
18 November 2019

³ *R v R* 2010 Fam. L.R. 123