JUSTICE COMMITTEE

CHILDREN (SCOTLAND) BILL

SUBMISSION FROM CLAN CHILDLAW

About Clan Childlaw

Clan Childlaw is a unique legal outreach service for children and young people. Our dedicated child-centred legal service gives practical effect to Article 12 of the United Nations Convention on the Rights of the Child (UNCRC), enabling children to participate in decision-making processes that affect them and allowing their voices to be heard. We deliver free, confidential legal advice and representation to children and young people up to the age of 18, or 21 if they have been Looked After. We use what we learn from our legal work to identify how the law could work better for children and young people and how their rights could be better realised in Scots Law and contribute to policy development. We provide free information, guidance and training about children's rights and the law affecting children and young people.

We believe that:

- every child and young person should have the opportunity to express their views freely in all matters affecting them and that their views should be listened to and taken account of;
- every child and young person should have the opportunity to be heard and represented in any judicial and administrative proceedings affecting them. Children and young people who need legal advice and legal representation should be able to have their own lawyer;
- children and young people and those who work with them should know their rights and should be able to access information and guidance about their rights and how to exercise them.

Our evidence is based on our organisation's 11 years of experience of representing children in private and public legal proceedings and the experience of our team members in working on public policy in the field of family justice. Our Policy and Advocacy Consultant served until recently as Chair of Together (Scottish Alliance for Children's Rights) and as a member of the Scottish Civil Justice Council's Family Law Committee (FLC) where she coordinated work on reforming the 'F9' form. Our Principal Solicitor now serves on the FLC and is a child welfare reporter ("CWR") and *curator ad litem* in relation to contact and residence disputes in the Sheriff Court and a *curator ad litem* and reporting officer in relation to adoption and permanence proceedings. Our team have experience as child welfare reporters and Safeguarders. Clan Childlaw is a partner with Stirling University's Centre for Child Wellbeing and Protection and Edinburgh University's Centre for Research on Families and Relationships in the Scottish Government-funded research project *Children's Participation in Family Actions – Probing Compliance with Children's Human Rights*.

Overall, Clan Childlaw welcomes the principles of the Children (Scotland) Bill. In our view, however, the Bill could go much further to support children's participation rights and child-centred practices in legal processes affecting children and young people.

Q1. Voice of the child: Do you agree with the approach taken in the Bill to remove the presumption that a child aged 12 or over is of sufficient age and maturity to form a view?

We are **very supportive of the removal of the presumption** that a child aged 12 or over is of sufficient age and maturity to form a view. Removal of the presumption would reflect our international obligations. UNCRC General Comment No 12 (2009) on the Right of the Child to be Heard, sets out the scope of legislation, policy and practice required to achieve full implementation of Article 12 and states at paragraph 21: "[t]*he Committee emphasises that article 12 imposes no age limit on the right of the child to express his or her views, and discourages States parties from introducing age limits either in law or in practice which would restrict the child's right to be heard in all matters affecting her or him*. *.. …Research shows that the child is able to form views from the youngest age, even when she or he may be unable to express them verbally....* [I]*t is not necessary that the child has comprehensive knowledge of all aspects of the matter affecting her or him, but that she or he has sufficient understanding to be capable of appropriately forming her or his own views on the matter."*

The removal of this presumption should **allow younger children to provide their views more easily**, and will help make children, parents and professionals aware that this is an option open to them. The presumption can operate as an obstruction to the views of children under 12 being properly heard.

We are concerned that retaining in section 11 of the Children (Scotland) Act 1995 ('the 1995 Act') the **presumption that a child of 12 or more is of sufficient age and maturity to form a view in relation to legal representation** (proposed section 11ZB, inserted by section 1(4) of the Bill) sends a confusing message and could have the effect of obstructing under 12s from seeking legal help in cases where they need it and where they might in fact have the capacity to instruct a solicitor. A presumption that a child aged 12 or over has capacity to instruct a solicitor in civil matters operates by virtue of section 2(4A) of the Age of Legal Capacity (Scotland) Act 1991: a child under 16 has legal capacity to instruct a solicitor in connection with any civil matter where they have a general understanding of what it means to do so, and a child aged 12 or over is presumed to be of sufficient age and maturity to have that general understanding.

As lawyers for children and young people, we have experience of representing children's views below the age of 12 in contact and residence cases. We do this either by assisting the young person to complete the 'What I Think' (F9) Form or by providing a letter with their views to the court and parties. In our experience we have found children as young as 10 to have capacity to understand the process of providing their views to court and instructing us to do so. When we are first contacted by a child, or contacted by an adult with regard to a child, we meet with the child to assess whether they understand what is happening. Each child is treated by us as an individual and their capacity and maturity to provide their views are carefully assessed and considered before any action is taken. For a solicitor making this assessment it is a question of professional judgement based on experience, and may take meeting with the child a few times and a second opinion from a colleague before deciding they have demonstrated capacity.

We work on many of these cases on a pro bono basis, because if we were to seek legal aid for the child or young person we would have to take into account the financial circumstances of anyone who owes them a duty of aliment; seeking that financial information is often not appropriate, for example where there is conflict between a child and a parent, and the only way we can give independent and confidential advice is by providing pro bono help rather than seeking legal aid.
Do you agree that it should be left to the court to decide the most suitable way of obtaining a child's views? How do you think children should be given the opportunity to express their views? Are there other measures that you think should be in the Bill to ensure that the voice of the child is heard?

We are pleased that the intention of the Bill is to ensure **children are able to give their views in a manner suitable to them**. Children's input in the process must allow them to feel involved, respected and empowered. It is important that children are not only appropriately involved in proceedings concerning them but that they understand decisions ultimately made about them and their reasoning. Practice varies widely amongst Sheriffs across the country and clear, accessible legislation is required, giving children a direct right to have their voice heard in the process.

The new form for seeking children's views in family actions developed by the Scottish Civil Justice Council's FLC and the accompanying changes designed to bring a culture change of seeking the views of younger children brought in by the Act of Sederunt (Rules of the Court of Session 1994 and Ordinary Cause Rules 1993 Amendment) (Views of the Child) 2019 should change practice. Where the pursuer in a case is of the view the child too young to fill out the form, they must seek permission from the court to *not* send it to the child and state why it is inappropriate. There are clear limits, however, to using a form and the Bill, if implemented properly, should support regular use of other means of seeking views. It is important children have a range of options. Wherever possible, children must have the opportunity be heard directly in proceedings (para 35, General Comment No 12).

We are concerned that the Bill as drafted may not have the desired effect of significantly changing practice. There is scope for further incorporation in the Bill of UNCRC General Comment No 12. In the context of the Scottish Government's commitment to incorporating the UNCRC into Scots law, it is particularly pressing that all legislation passed by the Scottish Parliament is fully compliant with the UNCRC in both letter and spirit. We would urge reference to the UNCRC on the face of the Bill.

In our view the Bill should be strengthened in the following ways:

By introducing a presumption that a child has capacity to form their own view in line with UNCRC General Comment No 12 which states: "*States parties cannot begin with the assumption that a child is incapable of expressing her or his own views. On the contrary, States parties should presume that a child has the capacity to form her or his own views and recognise that she or he has the right to express them; it is not up to the child to first prove her or his capacity"* (para 20). The emphasis must be on **supporting a child to express their view, irrespective of age, and ensuring any support needs are met** to facilitate this. The Bill provides that courts/adoption agencies/ Children's Hearings/pre-Hearing panels, if satisfied the child is not capable of forming a view (or the location of the child is unknown), are not required to give the

child the opportunity to express their views or have regard to those views. How capability to form a view is assessed will be critical. Currently in many cases the only information available to a Sheriff making a decision as to whether or not a child can form a view is from the parties who are already in conflict over many matters to do with the child and it is not clear how this will change.

By building in a system of redress so a failure to give a child an opportunity to express their views or have regard to a child's views can be challenged. The child's right to be heard in family actions must be enforceable. Redress is an important aspect of incorporating the UNCRC and meeting the requirements of Article 12 UNCRC in a meaningful way. Paragraph 46 of UNCRC General Comment No 12 states: *"[l]egislation is needed to provide children with complaint procedures and remedies when their right to be heard and for their views to be given due weight is disregarded and violated*".

By accompanying the Bill with a package of measures to ensure all children can be supported to give views in practice in a manner suitable to them, consistently across Scotland and throughout the legal process. Adequate resources are required for the process of determining how the views are best taken, for ascertaining the child's views in the manner determined, for supporting the child in advance, during and after the proceedings, and for training for all professionals involved, including training the judiciary in child-centred communication. We note it is not anticipated the Bill will give rise to any significant additional costs to deliver judicial training (paragraph 87, Financial Memorandum). Working in a child-centred way to properly represent a child or young person's views, before, during and after the decision-making process, means taking the time to meet the individual needs of the child. (It is worth noting that as solicitors the time we take to work in a child-friendly manner is not covered by legal aid - we cover this pro bono – as set out in our response to the recent Scottish Government Consultation on Legal Aid Reform in Scotland here).

By providing in the Bill for an independent *child support worker* (CSW) role to support children's participation rights. We see CSWs as an effective solution to providing consistent support during a legal process and also after. It is also a mechanism for children to participate and be included in the process when this is their desire. We would support the expansion of this role across Scotland, based on the experience gained in recent years in West Lothian through the Court Contact Rights Officer role. With appropriate training and qualifications, the CSW can support children of all ages, in an age appropriate manner, to give their views, communicate those views to the Sheriff on the child's behalf, and explain the decision to the child. **It is vital the system of support for children in legal processes is joined up, straightforward and accessible to children and young people.**

Q2. Child's best interests: To what extent does the Bill meet one of its key policy aims of ensuring that the best interests of the child are at the centre of contact and residence cases and Children's Hearings?

Overall, we think more fundamental and ambitious reform of court processes involving children is required to put the best interests of the child at the centre of contact and residence actions. Though the Bill introduces improvements, it retains the current system, which frequently operates in a way that does not put the best interests of the

child first. We favour embedding in Scots law fundamental principles such as meaningful participation of the child, which would enable the child truly to be placed at the centre of any process.

Q3. Child welfare reporters and curators ad litem

We agree child welfare reporters and *curators ad litem* should be regulated. A new set of arrangements should be put in place that would manage standards, structure, training and assessment of child welfare reporters to ensure consistency, in particular on how CWRs engage with and obtain children's views, and transmit those accurately and fully to the court. Training for child welfare reporters should include the use of domestic abuse risk assessments.
We welcome the proposal in the policy memorandum of the Bill that child welfare reporters will be funded by the Scottish Government in place of Legal Aid or private funding. In our experience, clients who encounter obstacles in gaining legal aid struggle to afford a child welfare reporter, which can put them at a comparative disadvantage. We welcome this change of funding as a positive measure of promoting more equal access to justice and parity of arms in a legal case.

Q4. Factors to be considered by the court when making contact and residence orders

In respect of the requirement on the court to consider the child's important relationships with other people we refer to our response to question 9 on siblings.

We note that the Scottish courts have been resistant to the use of checklists in contact/residence cases. In White v White 2001 S.C. 689, Lord McCluskey described the court's task in considering contact between a father and his daughter as follows: *"It must always be a matter of weighing all the material bearing upon welfare and the interests of the child. It would be impossible to list all the other matters that might be relevant, because life constantly throws up unprecedented circumstances; and the law has to be flexible enough to cope with the unforeseen."*
In our view to have any checklist risks the court missing an essential factor, and risks deflection from the paramountcy of the child's best interests. We would prefer reference to UNCRC General Comment 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration to be made in judicial training, to assist judges and sheriffs in making decisions under section 11.

Q5. Other requirements on the court: Do you agree that the court should ensure that certain decisions are explained to the child? Do you have any views on the provision in the Bill which would require the court to consider the risk to the child's welfare of any delay in the proceedings?

It is important that children are not only appropriately involved in proceedings concerning them but that they understand decisions ultimately made about them and the reasons behind the decisions. **We favour communication by the decision-maker in appropriate language and welcome the proposed obligation to ensure that the decision is explained in a way that the child can understand**. Currently, the vast majority of court opinions are written in language that is inaccessible to a child, and for that matter to many parties to actions. We would commend the benefits

to more approaches like in the case in the English High Court of *Re A (Letter to a Young Person) [2017]* EWFC 48 and the decision by Sheriff Anwar at Glasgow Sheriff Court in *Patrick v Patrick* [2017] FamLR 128. It would be very useful to have an overview of Sheriffs' approaches across Scotland, as practice varies. Section 15(4) of the Bill gives the court the option explaining to the child itself of arranging for a CWR to give the explanation. In our view the decision should be communicated orally or in writing by the court rather than the child welfare reporter. There is the possibility of hostility on the part of the child to the CWR. Furthermore, unlike the position of safeguarders in the children's hearings system, CWRs are not present at court when cases are heard and decisions are made.

Children we have worked with have shared their views that they need support *after* the decision has been made to address their questions and implement the decision. We support our young clients by working with them after the case concludes, when required. We would welcome further actions in this area. We would like to see stronger emphasis on the role of child support workers, as we know that children and young people value the support they receive and the opportunity to create a trusting, long-term relationship, and they are in a good position to explain the decision to the child.

We agree with section 21 of the Bill by which courts must consider the risk to the child's welfare of any delay in the proceedings. The duty as proposed would reduce the risk of undue delay, and thus secure the procedural requirements of article 8 ECHR, as set out by Lord Reed in B v G [2012] UKSC 21.

Q6. Vulnerable witnesses

We support the proposed ban on personal cross examination of domestic abuse victims in court cases concerning contact and residence. In terms of special measures, we would make the general point that where courts are permitted to order the use of special measures, there should be in practice an effort to seek the child's views on what special measures should be ordered. This should be done in a child friendly manner. In our experience of representing children who are party to Children's Hearing cases where a Vulnerable Witness Application has been lodged by another party, we have provided the child with the information necessary for them to decide which special measure should be used. We assess their capacity to make this decision in the way described in question 1.

Q7. Contact centres

We support regulation of child contact centres. Regulation of the service and training of staff would allow for a consistent approach, adhering to certain standards. We think that there is scope for different tiers of centre, from those facilitating simple handover to those providing guidance and assessment.

Q8. Enforcement of orders

We support the Bill's approach to addressing failure to comply with section 11 orders. It is vital that the court as part of its investigation seeks and has regard to the child's views, which may have changed since the order was made. We work on many cases in which a child disagrees with a contact or residence order or no longer wishes to comply with an order, yet there is no opportunity for the child to give these views after the order has been made or themselves seek variance of the order. The policy

memorandum states that the Scottish Government expects the court to need to obtain the child's views as part of the investigation in to non-compliance. In our view the need to have regard to the child's views should be included on the face of the Bill.

Mediation, in which the child is treated as an equal, is often the most effective means of ensuring compliance with a contact order.

Q9. Contact with siblings

We are delighted to see the proposal to place a duty on local authorities to promote contact between a child and any siblings or other people with whom the child has a sibling-like relationship. In 2014 we proposed an amendment to this effect to the Children and Young People (Scotland) Bill, which was lodged by Jayne Baxter MSP but not carried. Our 2015 Guide on Promoting Sibling Contact for Looked After Children was updated in February 2018 for the formal launch of "Stand Up for Siblings (SUFS)", of which we are founding members: the 2018 paper Prioritising Sibling Relationships for Looked After Children by Fiona Jones and Dr. Christine Jones sets out the current situation and legal changes we think are required. SUFS is a coalition of organisations and individuals working to drive changes to law, policy and practice to protect children's sibling relationships and has submitted joint evidence to the Justice Committee on the sibling-related aspects of the Bill.

As the Child Rights and Welfare Impact Assessment sets out, sibling contact is underpinned by a number of UNCRC articles (1, 3, 8, 12, 16 and 20). In its 2016 Concluding Observations on the UK, the UN Committee on the Rights of the Child expressed its concern about "*Children placed at a distance from their biological families which prevents them from keeping in contact, and siblings being separated from each other without proper reason*" (paragraph 51). Siblings are of course recognised as relations whose right to family life is protected by Article 8 ECHR.

It is well established that a child's welfare is supported when they are helped to maintain relationships with siblings. Although under current law, much can be done to help and ensure siblings stay in contact when there is family disruption or children are looked after, **the lived experience of many children in Scotland is that they lose touch with siblings against their will**. In the 11 years we have been representing children and young people, the majority of whom have care experience, this has been an issue for many clients. This indicates that current primary and secondary legislation and accompanying guidance is insufficient. The changes set out in Bill and the Family Justice Modernisation Strategy have the potential to significantly improve law and practice, if implemented properly, and if built upon with further provisions in the Bill on participations rights in courts, Children's Hearings and permanence proceedings.

The **duty introduced by Section 10 on local authorities to promote, on a regular basis, personal relations and direct contact between a looked after child and their siblings**, where practicable and appropriate, is far stronger than the current duty under the Looked After Children (Scotland) Regulations 2009 to assess a child's contact arrangements with family members where they are considering placing a child away from home (Reg 4). The proposed duty in the Bill replicates the existing duty on local authorities in s17 of the 1995 Act to promote personal relations and direct contact with parents. Local authorities will have to place greater priority on children's sibling

relationships than they currently do. Where local authorities failed to fulfil this duty, they could be legally challenged. Local authorities would need to be able to demonstrate the reasons for any decision made against contact on grounds of it being inappropriate or impracticable. Practicability should be interpreted narrowly and not usually justify a decision against contact on resource grounds for example.

We welcome the **express addition of siblings to persons whose views must be ascertained**, where reasonably practicable, by a local authority before making any decision with respect to a child they are looking after, or proposing to look after (amending s17(3) of the 1995 Act).

We welcome the **clarification in section 11** of the Bill meaning that a person, including a person under age 16, can seek and be granted a contact order without automatically being given parental responsibilities and rights. While a person can already seek an order for sibling contact from a court under section 11(2)(d) of the 1995 Act (and we have done so on several occasions for clients), there has been some confusion, and inconsistency in obtaining legal aid for such actions, in the past.

We welcome the **principle introduced in section 12 that when making contact and residence orders the courts must consider the effect of an order on the child's important relationships with other people**. This should lead to greater vigilance in private family law disputes in relation to the potential impact of proceedings on sibling relationships. The child's views in respect of their sibling relationships should be among those sought by the court and had regard to pursuant to the proposed Section 11ZB (as indeed should already happen under s11 as currently worded).

We regret, however, the imbalance in the Bill in respect of the participation rights of siblings in relation to decisions about the child. Whereas Section 10 of the Bill clarifies that siblings' views are amongst those which should be ascertained by a local authority when making decisions with respect to a child they are looking after, or proposing to look after, the Bill does not propose courts seek or have regard to siblings' views, or intimate to persons identified by the child as their siblings, in Section 11 actions. The Bill does not propose any changes to the Children's Hearings (Scotland) Act 2011 or the Adoption and Children (Scotland) Act 2007 to ensure children's sibling relationships are prioritised. In our view the **Children's Hearings (Scotland) Act 2011 should be amended** to place a duty on the children's hearing to consider sibling contact at each hearing, whether representations are made on behalf of the sibling or not, and to give siblings the right to be notified of Hearings which may make decisions on matters which will impact the sibling relationship (thus interfering in their Article 8 rights), the right to be provided with papers to be considered by the Hearing (subject to rules as to non-disclosure), the right to attend Hearings, the right to make representations, a right of appeal or review, and the right to request a review Children's Hearing. The Supreme Court's judgment in two live cases relating to sibling rights in the Children's Hearing System, including one brought by our client, will be important in shaping changes in this regard.[1]

[1] UKSC 2019/0134 In the matter of XY (AP) (Appellant) (Scotland); UKSC 2019/0063 ABC (AP) (Appellant) v Principal Reporter and another (Respondents) (Scotland). Clan Childlaw Ltd is instructed by 'ABC'.

Similarly, we support amending the **Adoption and Children (Scotland) Act 2007** to introduce explicit rights for siblings to be notified of permanence proceedings, to make representations, to make application for contact with their sibling, and to appeal against any decision, and to place a duty on the court to consider sibling contact. It is essential that siblings should receive intimation in adoption and permanence cases. This is particularly so because in such cases when an order is made, the legal status of the child subject to the order changes, and the opportunity for a sibling or other person to seek contact at a later stage is lost.

We welcome Part 10 of the Family Justice Modernisation Strategy which proposes **amendments to the Looked After Children (Scotland) Regulations 2009 to introduce a duty on local authorities to place siblings under the age of 18 together** when they are looked after away from home when it is in their best interests. While current provisions in the 2009 Regulations require local authorities to take the need for sibling co-placement into account, there are no enforceable duties and attention to sibling co-placement is not always given, so this would be a very important strengthening of the law.

Q10. Births registered outwith the UK

We support the Bill's approach.

Q11. Children's Hearings

Our concerns expressed in question 1 as to how a Sheriff will determine a child is not capable of forming a view apply also to Children's Hearings. Overall, we would remark that, although we acknowledge that the Children's Hearing System does have some difficulties of its own, in general it operates far more successfully than the courts at putting the child in the centre and in ensuring that the child's voice is heard.

We strongly support the Reporter having the right to appeal against a Sheriff's decision in relation to deemed Relevant Person Status. The Policy Memorandum (page 35) refers to the recent case of *CF v MF and JF AND Locality Reporter SLT 945*. Clan Childlaw Ltd were instructed by the Appellant CF in this case. When the case was appealed to the Inner House of the Court of Session the Appellant was 14 years old. Prior to instructing a solicitor in July 2016, the Child (Appellant) had requested at Pre-Hearing Panels in February 2014 and October 2015 that her grandparents' Relevant Person status be removed. Both panels removed their status however her grandparents appealed the decision to the Sheriff Court and their Appeals were upheld by a Sheriff. Following the first appeal in February 2014, the Children's Reporter appealed the Sheriff's decision to uphold the Appeal to the Sheriff Principal. This appeal was refused on the grounds that the Reporter had no such right of appeal (see s. 164 (3) of the Children's Hearing Scotland Act 2011). The child instructed us in July 2016 to represent her position at a pre-hearing panel where she requested removal of Relevant Person Status. Again, the Children's Hearing removed the grandparents Relevant Person Status and they appealed it to the Sheriff Court. The Sheriff upheld their appeal. The child then appealed to the Inner House of the Court of Session. It was unfortunate for the child that she had to take such steps herself to appeal this

decision. The proposal that the Children's Reporter will have a right of appeal is therefore welcome.

Q12. Practical, financial or other impacts of the Bill

The Bill must be matched by implementation in practice and the resources required to achieve its aims. Measures to support roll out of the new provisions in the Sheriff courts will be critical to ensure lasting change. Properly funded legal aid will be required to support children in giving their views in contact and residence cases. Where duties are created they must be met. We support young people who are not benefitting from duties created in the Children and Young People (Scotland) Act 2014, because local authorities are not implementing the provisions on continuing care consistently and in the way intended. We note with concern in this regard that no cost implications are anticipated for the new duties on local authorities to promote sibling contact and seek siblings' views under Section 10 of the Bill.

Q13. Family Justice Modernisation Strategy / issues not covered by the Bill

Areas in the Strategy we would particularly like to see further measures in include:
- Child-friendly guidance on attending court, alternatives to court and giving views in family actions
- Child support workers (see our comments above)
- Modernisation of the Children's Hearing System
- Training on trauma-informed legal support and decision-making
- Alternative Dispute Resolution in family cases.

Clan Childlaw
19 November 2019