JUSTICE COMMITTEE

CHILDREN (SCOTLAND) BILL

SUBMISSION FROM PROFESSOR ELAINE E. SUTHERLAND[1]

General

The policy objectives of the Children (Scotland) Bill and the accompanying *Family Justice Modernisation Strategy*[2] are to "ensure the views of the child are heard in contact and residence cases; further protect victims of domestic abuse and their children; ensure the best interests of the child are at the centre of any contact and residence case and children's hearing; and further compliance with the United Nations Convention on the Rights of the Child (UNCRC) in family court cases."[3] These objectives are welcomed, as is the opportunity to comment on the Bill. It is my view that, while some of the provisions in the Bill would achieve its goals, others require clarification or amendment, while yet others should be dropped.

In its original form, the 1995 was a clear, well-structured statute that sought to embody the law governing children in the family setting and child protection. Developments since the 1995 Act was passed have resulted in the scattering of the law across a number of statutes.[4] As a result, the law is less accessible. Aspects of this Bill add to the complexity of the legislative framework. This problem could be addressed by codification of child and family law. The desirability of codification is, however, a debate for another day. This response focusses on specific aspects of the Bill amending the 1995 Act and other statutes and uses the headings provided by the Justice Committee in its invitation to comment. *General Comments* from the United Nations Committee on the Rights of the Child (UN Committee) are employed in assessing the extent to which the Bill achieves its fourth goal.[5] My attempt to comply with the request to keep responses to "a maximum of 4-6 sides of A4" means that it was only possible for me to comment briefly on some issues.

Voice of the child

Scots law has long embraced the principle that the child concerned has a right to have his or her views taken into account in the decision-making process. In this, the letter of the law largely accords with the UNCRC which requires, in one of its general principles, that the child must be given a meaningful opportunity to participate in the decision-making process in all matters affecting the child.[6] Similarly, it is implicit in

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[1] LL.B (Hons); LL.M., Professor of Child and Family Law, Stirling Law School, University of Stirling and Distinguished Professor of Law Emerita, Lewis and Clark Law School, Portland, Oregon. I have been teaching law for some 40 years, have written widely on the subject and regularly present papers at domestic and international conferences.

[2] (Edinburgh: Scottish Government, 2019), para. 1.7.

[3] *Explanatory Notes: Children (Scotland) Bill*, para.5.

[4] In addition to the 1995 Act, the Adoption and Children (Scotland) Act 2007, the Children's Hearings Act 2011 and the Children and Young People (Scotland) Act 2014.

[5] It is regrettable that the Justice Committee has adopted the abbreviation "UNCRC" for the Convention since, in UN and international law circles, that is the abbreviation for the Committee, with "CRC" being the abbreviation for the Convention. As a courtesy, I have adopted the Justice Committee's preferred usage.

[6] The four general principles underpinning the UNCRC are found in Articles 2 (non-discrimination), 3(1) (primacy of the child's best interests), 6 (the child's right to life, survival and development) and 12 (the child's participation rights). See, United Nations Committee on the Rights of the Child*, General*

Article 6 of the ECHR, that the child's voice should be heard when decisions are taken that will affect his or her life. As the *Family Justice Modernisation Strategy* recognises, how the law is implemented in practice is (and may remain) in need of further attention.[7] The main statutory provisions here are the Children (Scotland) Act 1995, ss. 6, 11, and 16, the Adoption and Children (Scotland) Act 2007, ss.14 and 84, and the Children's Hearings Act 2011, s.27. Each would be amended by the Bill.

Section 6 of the 1995 Act deals with the obligation on those exercising parental responsibilities to take account of the child's views and there are a number of proposed amendments:

- *Deletion*: The Bill removes the reference to "if [the child] wishes to express" views from the original. This is a retrograde step and these words should be reinstated. As the UN Committee has emphasises, "Expressing views is a choice for the child, not an obligation."[8]
- *Addition*: As proposed in the Bill, s.6(1A) would require the child to be given the opportunity to express views "in a manner suitable to the child". This amendment is welcomed. The UN Committee has made clear that it is the responsibility of the adult world to facilitate this expressions of views by the chid.[9]
- *Addition*: As proposed in the Bill, under s.6(1B), the person under the obligation to listen to the child would be freed from the obligation where "(a) the child is not capable of forming a view, or (b) the location of the child is not known". The issue of capacity to form a view is discussed under the proposed new s.11ZB, below and these comments apply equally here. Turning to (b), the child's location being unknown will usually be a temporary situation and it should be made clear that there is an affirmative obligation to seek to find the child; that the obligation to take account of the child's views is simply suspended while the child is missing; and that it revives as soon as the child is found.

Section 11 of the 1995 Act, proposed s.11ZB

Section 11(7) of the 1995 Act embodies the fundamental principles – the child lawyer's mantra – of Scots child law: the paramountcy of the child's welfare; taking account of any views the child wishes to express; and an injunction against making any non-beneficial order. The Bill spreads these over two new sections, s.11ZA, dealing with the first and third principles, and s.11ZB, addressing the child's views.

- It would have been better to keep the fundamental principles together in order to make clear that they are of equal value. Granted, when the court is deciding whether or not to make the relevant order, it "must" still have regard to each of the principles. However, by placing the obligation to take account of the child's views in the second new section, there is a sense that they are being relegated to a lesser, "B-list", status.

Specific aspects of s.11ZB:

- *Substance unchanged:* The court would still be required to have regard to the child's views "taking into account the child's age and maturity" and, while the phrasing has been altered and rendered gender-neutral, the sense remains the same. This aspect of the provisions is consistent with Art. 12 of the UNCRC and, by introducing gender neutrality is an improvement on the original.

Comment No. 5, *General Measures of implementation of the Convention on the Rights of the Child* (2003), CRC/GC/2003/5, para.12.

[7] *Family Justice Modernisation Strategy* (2019), Part 2 and Annex D (on-going research).

[8] United Nations Committee on the Rights of the Child*, General Comment No. 12: The Right of the Child to be Heard* (2009), CRC/C/GC/12, para.16.

[9] United Nations Committee on the Rights of the Child*, General Comment No. 14 on the rights of the child to have his or her best interests taken as a primary consideration* (2013), CRC/C/GC/14, paras 85-91.

- *Deletion*: Again, the reference to "if [the child] wishes to express [his or her] view" has been removed from the original and should be reinstated for the same reason as stated in respect of s.6.
- *Addition*: Again, the addition of the reference to the child being given the opportunity to express views "in a manner suitable to the child", as proposed in the Bill, is welcomed for the same reason as stated in respect of s.6.
- *Addition*: As proposed in the Bill under s.11ZB(2), the court would not be required to take account of the child's views if "(a) the child is not capable of forming a view, or (b) the location of the child is not known". Turning first to (a), it will be for the court to determine this issue on the basis of evidence and, in this, it is to be hoped it will bear in mind the view of the UN Committee that, "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."[10] The danger with this provision is that it could be (mis)used as a way to disempower children, rather than as an opportunity to be creative in facilitating the expressions of views. Turning to (b), again, it is for the court to determine on the basis of evidence and it would be open to the court to continue the case while the child was located. The fear that this provision might be misused by a person wishing to avoid the child's views being heard is allayed somewhat by the following test articulated by a Scottish court when dealing with these words in other legislation: "all reasonable steps must be taken, and if even only one reasonable step is omitted, one cannot say that a person cannot be found."[11]

s.14 of the Adoption and Children (Scotland) Act 2007 and s.27 of the Children's Hearings Act 2011

These provisions, dealing with listening to the child's views, are subject to similar amendments and the above comments apply to them.

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?

Broadly, yes. It is my view that the current presumption should be understood as facilitating the expression of views by young people of 12 and older, while not in any way disempowering younger children. However, it may have been misunderstood, in some quarters, by those who are not familiar with the following injunction from the UN Committee: "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 recognize that she or he has the right to express them; it is not up to the child to first prove her or his capacity."[12]

Do you agree that it should be left to the court to decide the most suitable way of obtaining a child's views?

As presently structured, it is the court that makes the decision about how to obtain the child's views and the Bill provides no further guidance. It is suggested that this issue should be revisited and thought should be given, either to providing a non-exhaustive list of options in the Bill, or to addressing the matter by means of a Practice Note, as is done in England and Wales. In considering how to proceed, it may be helpful to bear in mind that Article 12(2) of the UNCRC, dealing with judicial and administrative

[10] *General Comment No. 12*, para.21 (citations omitted). It continued, "Consequently, full implementation of article 12 requires recognition of, and respect for, non-verbal forms of communication including play, body language, facial expressions, and drawing and painting, through which very young children demonstrate understanding, choices and preferences."

[11] *S v M* 1999 S.L.T. 571, at p.575D.

[12] *General Comment No 12*, para.20.

proceedings, refers to the child having an opportunity to be heard "either directly, or through a representative or other appropriate body." Clearly, it is anticipated that a range of methods may be employed and the UN Committee has offered further guidance in *General Comment No. 12*. It takes the views that, once the child has decided to be heard, "he or she will have to decide how to be heard,"[13] suggesting that the choice of method lies with the child. However, it continues, "wherever possible, the child must be given the opportunity to be directly heard in any proceedings," indicating an acceptance that this might not always be possible. Later, discussing the transmission of the child's views through a representative, the UN Committee notes that "it is of utmost importance that the child's views are transmitted correctly to the decision maker by the representative."[14]

Best interests

That the welfare of the child concerned should be the paramount consideration in decisions affecting the child is another of the fundamental principles of child law in Scotland. In this, Scots law exceeds the requirement of Article 3(1) of the UNCRC that the child's best interests should be "a primary consideration".[15] The Bill repeals s.11(7)(a) of the Children (Scotland) Act 1995, dealing with the paramountcy of the child's welfare, and reformulates it in a new s.11ZA. It has to be observed that the way this is approached in the Bill, by creating a new section, then amending it twice in later sections, is not as accessible as it might have been.[16] Two aspects of s.11ZA require comment: s.11ZA(2A) (impact of delay on welfare) and s.11ZA(3) and (4) (the welfare factors).

s.11ZA(2A) (impact of delay on welfare)

For the first time, a statutory obligation would be placed on the court to have regard to "any risk of prejudice to the child's welfare that delay in proceedings would pose". Any lawyer worth his or her salt knows that delay can have an adverse impact of child welfare and the courts have articulated their concern over the problem of delay many times.[17] That suggests that this provision is unnecessary. It is also worth remembering that cases involving children are infinitely varied and sometimes highly-contentious and/or complex. It is important to take the time to reach the best decision and, in so far as this provision might create a climate of undue haste, it poses a danger to child welfare. Since the court is only required to "have regard" to the impact of delay, it is unlikely that this would be the result, but it might be better to delete this amendment.

s.11ZA(3) and (4) (the welfare factors)

As someone who has long advocated for greater statutory clarity on what is meant by "the welfare of the child", I give a qualified welcome to this provision. It is familiar territory that the 1995 Act, quite deliberately, did not provide a "welfare checklist" for fear that it would be necessarily incomplete, might divert attention from other factors which ought to be considered and might result in judges taking a mechanical approach

[13] *Ibid*, para.35.
[14] *Ibid*, para. 36. That UN Committee continued, "The method chosen should be determined by the child (or by the appropriate authority as necessary) according to her or his particular situation." That refers to choosing the method for ensuring accuracy.
[15] The terms "welfare" and "best interests" are synonymous.
[16] One explanation for this approach is that those drafting the Bill were seeking to separate out what they, quite reasonably, may have anticipated would be contentious issues.
[17] See, for example, *B v G* [2012] UKSC 21.

to decision-making.[18] The Family Law (Scotland) Act 2006 departed from that approach by amending the 1995 Act to require the court, when considering making an order in relation to parental responsibilities and parental rights, to consider the prospect of parental cooperation (s.11(7D)) and, in assessing welfare, to have particular regard to the need to protect the child from exposure to domestic abuse (s.11(7A)-(7C)). Thus, the present law embodies a partial welfare checklist, highlighting two relevant factors, but making no mention of other considerations that might be of equal or greater relevance in a given case. As I have said before, "having a partial checklist is worse than having none at all." [19]

That is not to suggest that a welfare checklist should seek to be comprehensive. Given the infinite variety of family situations, any attempt to cover every eventuality would be doomed to failure and it would carry the danger of undue rigidity. Again, the UN Committee offers sound guidance when it recommends a "non-exhaustive and non-hierarchical list of elements"[20] to be used in assessing the child's best interests. Its list includes the following: the child's identity (including sex, sexual orientation, national origin, religion and beliefs, cultural identity, personality); any issues that make the specific child particularly vulnerable, the child's right to health and the child's right to education. In addition to recognising the child's distinct right to have his or her views taken into account, the UN Committee listed the child's views as an element relevant to best interests. The list in s.11ZA(3) is much narrower.

- The Justice Committee might like to consider whether the list of factors in s.11ZA(3) should be expanded in the light of the UN Committee list and might also look at some of the checklists found other jurisdictions, including those in the United States where checklists are used widely in state statutes.[21] If it opts for a longer list, I would urge the Committee to include the following as the final factor: "and any other relevant factor."
- *Some alteration to the existing wording:* s.11ZA(3). While the new sub-section substantially replicates s.11(7B), there are the following changes:

(b) the effect that [… "such" … has been deleted …] abuse, or the risk of abuse, might have on the child …

(d) the effect that [previously … "any" …] abuse, or the risk of [previously … "any" …] abuse, might have on the carrying out of responsibilities in connection with the welfare of the child by a person who has (or, by virtue of an order under section 11(1), would have) those responsibilities."

The Justice Committee might like to consider why the wording was altered and whether the changes are likely to have any impact on the protection of victims of domestic abuse and their children.

- *Addition*: 11ZA(3)(e), requiring the court to have regard to "the effect that the order the court is deciding whether or not to make might have on –
  (i) the involvement of the child's parents in bringing the child up, and
  (ii) the child's important relationships with other people."

  Turning first to (i), it is wholly consistent with Article 18 the UNCRC that the involvement of both parents in the child's life should be mentioned, provided that the overarching effects of Article 3(1) (primacy of the child's best interests) is borne in mind. It is essential that Scots law continues to avoid any presumption of "shared parenting", something that proved

[18] Scottish Law Commission, *Report on Family Law* (Scot. Law Com. No. 135, 1992), paras 5.20-5.23.
[19] Elaine E. Sutherland, "Family Law: Still scope for reform", *Journal of the Law Society of Scotland online,* 17 July 2017: http://www.journalonline.co.uk/Magazine/62-7/1023495.aspx#.XbZ22G52uM8
[20] *General Comment No. 14*, para. 50.
[21] Linda Elrod, *Child Custody Practice and Procedure*, 2017 edn (Eagan, MN: Thomson Reuters, 2017), § 4:3.

to be such a disaster in Australia.[22] Such provisions expose children (and women) to domestic abuse, can be widely misunderstood and risk commodifying children. Nor should the folly of the "friendly parent" provision, found in some US states, be embraced.[23] Sub-section (ii) would benefit from further definition. Will a relationship be judged to be "important" from the perspective of the child or that of the adult claiming it? Must a relationship be established in order to be important or would potential relationships be included? Again, there is a risk of children being commodified here.

Related provisions

These two provisions are somewhat related to s.11ZA and to each other:

- *Addition*: The proposal in the Bill for s.11F is something of a mixed bag. Failure to obey a s.11 order presents a complex issue and may involve anything from an occasional, minimal deviation from the letter of the order to persistent violation. There may be a reasonable explanation for a violation, like the child being ill or the child's strong aversion to complying with the order, or the person failing to comply may be showing a stubborn disregard for an unwelcome decision from the court. Thus, placing the court under an obligation to enquire further (s.11F(2)), appointing a child welfare officer to report, if necessary (s.11F(3)), is welcomed (although one hopes the court would have explored the issue anyway). What is troubling is the ambiguity in s.11F(1)(b) empowering the court to vary or discharge an order on the basis that it has not been obeyed. If this means a court may, for example, review an order for contact because it was unworkable, then it is unobjectionable – but the court has the power to do that now so the provision is unnecessary. More worrying is the implicit threat that residence might be altered as a penalty for non-compliance with a contact order. The original residence and contact orders will have been made on the basis of the child's welfare. Is child welfare to be cast aside in order to punish a contemnor? Such an approach would be contrary to the 1995 Act and the UNCRC. In this, it is worth remembering that the court has other powers, including imprisonment, for dealing with contempt.[24] Very wisely, the courts have used the power to incarcerate sparingly, not least because imprisoning the person with whom the child lives would undermine the residence order.
- *No change:* s.11(7D), dealing with parental cooperation, has been retained. This provision has never been wholly satisfactory. First, it is reasonable to assume that judges assess whether an order under consideration would actually work without being required to do so by statute. Secondly, s.11(7D) does not tell them how to address the problem of un-cooperative parents. Thought might be given to repealing this provision.

Other requirements on the court

Do you agree that the court should ensure that certain decisions are explained to the child?

Yes. This reflects the most basic level of common sense – and common courtesy. We all like to think that, when we are asked for our views, our contribution will be taken seriously and may make a difference. In this, children are no different to adults, hence the guidance from the UN Committee that, "Since the child enjoys the right that her or his views are given due weight, the decision maker has to inform the child of the outcome of the process and explain how her or his views were considered."[25]

[22] Bryan Smyth, Richard Chisholm, Bryan Rodgers and Vu Son, "Legislating for Shared-Time Parenting after Parental Separation: Insights from Australia?" (2014) 77 *Law and Contemporary Problems* 109.
[23] J. Herbie DiFonzo, "From the Rule of One to Joint Parenting: Custody Presumptions in Law and Policy" (2014) 52 *Family Courts Review* 213, 224-226.
[24] *S v M* 2011 S.L.T. 918; *F v H* 2014 G.W.D. 26-515; *SM v CM* 2017 S.L.T. 197.
[25] *General Comment No. 12*, para. 45.

Contact with siblings

Do you agree that local authorities should be required to promote contact between a child and any siblings or other people with whom the child has a sibling-like relationship?

Yes, provided that contact only takes place where both parties want it.

Other matters in the Bill

Constraints of space do not permit me to give detailed responses in respect of the following matters, but I am broadly supportive of the provisions in the Bill dealing with them: recognition of parental responsibilities and rights obtained outwith the UK; clarification of the order-making power; regulation of child welfare reporters and curators ad litem; regulation of contact centres; further provision designed to protect vulnerable witnesses; and the provisions on children's hearings.

Professor Elaine E. Sutherland
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