JUSTICE COMMITTEE

CHILDREN (SCOTLAND) BILL

SUBMISSION FROM DR GILLIAN BLACK, SCHOOL OF LAW, UNIVERSITY OF EDINBURGH

Introduction

Steps to improve the lives of children and their families in Scots law are very welcome. The Children (Scotland) Bill contains some important proposed statutory reforms. In this brief note, I wish to highlight five key aspects of the proposals.

As a preliminary point, I also wish to observe that the statutory reforms themselves will not be enough: it is absolutely critical that the Parliament (and Government) makes adequate funding available to support these changes. Any of the changes which envisage new regulatory regimes will only operate successfully if there is appropriate money available to implement the scheme and provide training and support. The success of the Bill will therefore be intimately tied to the financial resources made available to implement it.

Clauses 1-3: Voice of the child

The proposals here remove the age 12 presumption. This is a very welcome development, to ensure there is no unnecessary hurdle to children under 12 sharing views. However, it is essential that practitioners and judges do not interpret this change as *raising* the age presumption. In part, this should be avoided by the proposals to split the process into two parts: giving the child the opportunity to express a view; and having regard to those views.

Nevertheless, these changes will take place in the existing culture in Scots law and practice, so any resistance which currently exists will need to be challenged and overcome (and there is anecdotal evidence that many practitioners treat age 12 as a "bright line" when seeking the views of the child). Thus, any further encouragement to change current practice would be very welcome, to try to encourage a more inclusive approach to seeking views from children. A more strongly worded duty in the Bill might help, to emphasise that *all* children should be given the opportunity to express a view, and that any question of age and maturity should only be of consideration at the second stage.

Clause 15: Explanation of decisions to the child

Clause 15 of the Bill imposes a duty on the court to explain a decision under s11 of the 1995 Act to the child. I strongly support this measure. At the moment, there is no such duty, and practice is variable. I suspect the majority of judges do not provide any explanation to a child, or feedback on how their views have been taken into account. Some sheriffs have taken more innovative approaches, such as writing letters to the child (there is also evidence of this in England). These steps are welcome, but the lack of consistency is not conducive to developing good practice, or to ensuring that any steps to communicate are not detrimental to the child. Clause 15 therefore needs to be supported by a (non-statutory) guidance or practice note, to help direct the judiciary

as to how best to explain decisions to the child, and the need for special sensitivity or care in certain circumstances (eg vulnerable children).

Moreover, I would like to see the duty in Clause 15 being framed in more robust terms: the fact that the court can decide not to comply where it deems it not to be in the best interests of the child leaves it open to a degree of judicial discretion. Again, this is partly a question of challenging and changing the existing culture: until judicial explanations of decisions are the norm, additional statutory "encouragement" will be critical.

Clause 16: Failure to obey order

This is one of the most important new measures introduced in the Bill, and I strongly endorse it. The concerns of treating parents as in contempt of court for failing to comply with a s11 order have been long recognised. They were recently expressed convincingly by the Inner House in *SM v CM* [2017] CSIH 1: "A failure on the part of one parent to comply with court orders for contact, even where deliberate, may be an instinctive shying away from the immediate prospect of contact rather than some calculated or pre-planned refusal to comply with the order of the court… A custodial sentence, particularly on a mother with whom the children live, should only be imposed with reluctance and as a last resort." (para 62).

As was noted here, the failure to comply may be an "instinctive shying away" from contact, based on more complex reasons than simply a deliberate refusal to comply. The proposals in the Bill to require the court to establish why the s11 order has *not* been complied with are a very important step forward. They will allow the court to ensure it has all relevant information to hand before determining what steps to take next.

Promotion of contact between looked after children and siblings

I strongly support a duty on local authorities to promote contact between looked after children and siblings. I am also very much in favour of the definition of sibling in the broad terms proposed in the Bill, to encompass half-siblings, step-siblings, and anyone the child has lived with and with whom they have a sibling-like relationship.

An additional measure here which would further enhance this provision would be to impose a duty on local authorities to maintain a record of looked after children with siblings: as far as I am aware, this information is not routinely or systematically collected, and practice varies between local authorities.

Contact centres

In the interests of disclosure: I am a trustee and on the Board of Directors for a Scottish charity which provides contact centre services.

I categorically agree with the proposals to regulate contact centres. I am uncomfortable with the current situation whereby the state, through the courts, will specifically refer families to contact centres (and in some cases, failure to comply with a court order in that regard could constitute contempt of court), but yet the state does

not actually provide contact centres for families to use. The central importance of contact centres to many families, and even more so in cases of domestic abuse, means that they should be regulated: both the physical premises in which they operate, and the training and qualifications of the staff.

The major caveat here is that, if they are to be regulated, then they will need far more financial support than is currently available: their charitable status does not sit easily with a greater degree of oversight, regulation, and use by the state.

Dr Gillian Black
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