JUSTICE COMMITTEE

CHILDREN (SCOTLAND) BILL

SUBMISSION FROM THE LAW SOCIETY OF SCOTLAND

Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Child and Family Law sub-committee welcomes the opportunity to consider and respond to the Scottish Parliament's Justice Committee *call for evidence on the Children (Scotland) Bill*. The sub-committee has the following comments to put forward for consideration.

Comments on the Bill

We welcome the opportunity that this Bill provides to reform the 1995 Act, reflecting changes in practice and in society over the last generation. We responded to the Scottish Government consultation on the review of Part 1 of the Children (Scotland) Act 1995 and creation of a family justice modernisation strategy in September 2018.[1]

Voice of the child

We have previously maintained that the presumption that a child aged 12 or over is of sufficient age and maturity to form a view should be retained. It is important that such a presumption is not taken to entail that those below the age of 12 are not of sufficient age. The presumption should not inhibit recognition that each individual child's view should be valued, listened to and given weight in decision-making, consistent with their rights under the United Nations Convention on the Rights of the Child (UNCRC). We have highlighted that the practice of taking views varies across Scotland and that greater awareness, training and engagement would improve consistency of approach.

Equally, there should be flexibility in the ways in which a child's views are obtained, whether by the F9 form, child welfare reporters, speaking directly to the judge or

[1] https://www.lawscot.org.uk/media/361103/18-07-31-fam-consultation-review-of-children-scot-act-1995.pdf

sheriff, child support workers or other means. Particularly because of the ways in which children communicate have changed since 1995, we believe that considering engagement through technology would be helpful.

It is important to maintain a range of options for a child to be heard, depending on different children's needs and circumstances. This must include options that consider the differing needs of children with disabilities. We do not believe that the child being heard directly by the judge or sheriff should be promoted above other options. The most appropriate option will depend on the child and the circumstances of the case. There may be good reason why a child's views should be taken by a child welfare reporter in a safe, less intimidating environment (such as at school or at home) rather than court. In other cases, the sheriff taking the child's views may be appropriate where there are allegations of undue influence, or disputes about the child's views.

The UNCRC entitles children to give views for all decisions that affect them. Consideration should also be given to how to ensure that children's views are heard at all stages of a court case, and in relation to each decision being made. This is particularly relevant in the context of cases taking place over an extended period of time – a child's views may change, and many individual decisions are likely to be made as a case progresses. Increased use of a children's advocate type role, with involvement from an early stage and lasting the duration of a case, could assist children to understand and participate more fully in the process. A right to express a view in the abstract, without a proper understanding of the process, is arguably nothing more than superficial compliance with Art 12 UNCRC. For the right to be meaningful, the child must have informed knowledge (age and stage appropriate) of the context of what their view relates to. The right to express a view also dovetails with the right to effectively participate: an informed understanding allows a child to elect to express a view to the extent they wish and would allow older children to make an informed decision about whether they want to participate in the process beyond that.

It may also be helpful to establish a mechanism to explain why a child is not giving views. This could help to emphasise that the norm should be for views to be provided and would also provide an opportunity for any obstacles to be identified and managed if they are preventing a child from expressing their views.

There are also likely to be issues with cases where parents are reaching agreement outside the court process. There is still a requirement for children's views to be taken in those cases, but it is much more difficult to assess whether that is happening. Further support and guidance for parents in these situations may be helpful, including raising awareness of child inclusive mediation as an option in suitable cases, as well as encouraging solicitors and sheriffs who are dealing with memoranda of agreement to ask questions around whether and how a child's views were sought and considered.

Further, where there is a dispute between the adults (parents or other care givers) as to whether, or in what form, a child's view ought to be obtained, consideration should be given to those adults providing details of their position. Preferably this would be done in writing, such as an affidavit, prior to a decision being taken, for example before a Child Welfare Hearing. In doing so it is anticipated that firstly minor disputes maybe capable of being swiftly resolved and secondly such details may assist the

individual obtaining the child's views to have a better understanding of the circumstances surrounding the child and how best to obtain the child's views.

Child welfare reporters and curators *ad litem*

In our response to the Scottish Government consultation in 2018, we considered that the current system for child welfare reporters and curators *ad litem* should not be changed, as Sheriffs would be best placed to determine needs locally. We also noted that it would be open to any Sheriff Principal to issue a practice note on the arrangements for appointment of reporters, as well as on the form and standards expected in relation to any such report, a step which would not require any change to the primary legislation or court rules.

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

The UNCRC puts high importance on the family unit, and gives broad definition to family, with the child entitled to contact with persons with whom the child has a strong personal relationship, unless contrary to their best interests. The focus of any question of contact must be on the rights of the child, not rights of others to the child. The provisions of section 11 of the 1995 Act are already flexible and enable a wide range of relationships to be preserved. Anyone with an interest can seek an order for contact under section 11. With the exception of siblings, we are not aware of any suggestion that particular relatives have found themselves prevented from raising actions to seek contact. There are a range of options for facilitating ongoing contact and relationships with family members, where this is in the best interests of the child. What steps are appropriate will vary from case to case.

Other requirements on the court

We have previously stated that in situations in which a child has an appointee (whether Children's Rights Officer, curator, advocacy worker or solicitor), this appointee may be best placed to explain a decision to that child. In other situations, we suggested that a Sheriff could be required to prepare a short explanation for the child as to the decision taken and reasons for it. That would give the child a neutral explanation, tailored to that child's level of understanding and circumstances. In the case of decisions made after proof, a child-friendly explanation of what the sheriff was asked to decide, what was decided and the reasons for it could be prepared. We commended the approach taken by Sheriff Anwar in a recent case where she explained her decision on contact in a letter to the children involved.[2]

The impact of delay in cases involving children is well understood. Including a provision that the court is required to consider the risk to the child's welfare is unlikely to address the underlying causes for delay. We believe that an approach that prioritised streamlining of court rules, developing a more front-loaded case management system and ensuring that there are sufficient resources available to the court and to the case, would more effectively resolve delay as an issue.

[2] *Mr Patrick (a pseudonym) v Mrs Patrick (a pseudonym)* [2017] SC GLA 46

Vulnerable witnesses

We support the restriction on self-representation in particular types of case, in order to tackle any risk of secondary victimisation. There are equivalent provisions in criminal cases, sexual offences or domestic abuse, and legal aid is available to ensure that such representation is resourced.

We also note the range of wider developments in the criminal justice system, particularly through victims and witnesses' legislation, the Criminal Evidence and Procedure Review, amended court rules and other initiatives. It is likely that best practice from criminal cases will have a positive impact on civil cases involving children.

Contact centres

We had previously highlighted the need for proportionate regulation and adequate funding of contact centres. These are crucial venues for continuing family engagement and need to handle challenging situations and work with vulnerable children safely, though operate under financial constraints and are often staffed by volunteers. Ensuring that any regulation is flexible enough to meet the individual needs of families and the services available in any local area, which can vary considerably, is also important.

Children's Hearings

We do not support a right to appeal by the Principal Reporter around deemed relevant person status. The function of the Principal Reporter at the children's hearing stage is largely to ensure the effective conduct and administration of the hearing. Appealing a decision on relevant person status would not be consistent with their role. The Principal Reporter already has the right to convene a Pre-Hearing Panel at any time to consider a person's relevant person status (where they consider the person may no longer meet the test). The 2011 Act also provides for constant review of deemed relevant person status. All relevant persons have a right to appeal such a decision, as does the child. This gives a number of checks and balances on such decisions.

The legal position around deemed relevant person status within the Children's Hearings system will be considered by the Supreme Court *In the matter of XY (AP) (Appellant) (Scotland)*[3].

Law Society of Scotland
15 November 2019

[3] Case ID: UKSC 2019/0134