

JUSTICE COMMITTEE**CHILDREN (SCOTLAND) BILL****SUBMISSION FROM DR KIRSTEEN MACKAY, OPEN UNIVERSITY**

Thank you for the opportunity to express a view on the draft Children (Scotland) Bill. Below I provide my views in respect of five areas where the current wording causes concern. These are:

- The views of the child
- Child Welfare Reporters: Local Authority Reporters
- Explanation of the decision of the court to the child
- Conferral of PRR: births registered outwith the UK
- Delay in proceedings

I also provide views commending the wording of two sections, being in respect of:

- Vulnerable parties
- Failure to obey orders

Current drafting: Areas of Concern

Views of the child

As currently drafted the Children (Scotland) Bill removes the presumption that a child is to be presumed to be of sufficient age and maturity to form a view at the age of 12 years from section 6, of the Children (Scotland) Act 1995. In respect of Section 11 of the Children (Scotland) Act 1995, the Bill only includes this presumption in respect of subsection 3 of the new 11ZB (child does not have to be legally represented in any proceedings if the child does not wish to be). The presumption that a child is to be deemed of sufficient age and maturity to form a view at the age of 12 years is also removed from section 16 of the Children (Scotland) Act 1995.

The Children (Scotland) Bill further removes the presumption that a child is presumed to be of sufficient age and maturity to form a view from the Adoption and Children (Scotland) Act 2007 by repealing section 14(8); and from the Children's Hearings (Scotland) Act by repealing the existing s27(4).

It is also the case that these repeals remove the statement indicating children below the age of 12 may also be deemed to have sufficient age and maturity to form a view. This being the (often misunderstood) phrase 'without prejudice to the generality of this subsection'.

My view is that, while the previous wording was cumbersome and not always understood by non-lawyers there is a risk that professionals working with children are likely to assume they are no longer under a duty to afford a child aged 12 and over an opportunity to express their views. That is, there is a risk of a reduction in the practice of affording children the opportunity to have a say in major decisions affecting them. This is likely to be contrary to the promotion of their welfare.

It would, in my view, be better to retain the age of 12 as the age at which children are deemed to have sufficient age and maturity to form a view but to simplify the statement indicating they may also have sufficient maturity and understanding below this age. For example, 'however children below the age of 12 years may also be deemed to have sufficient maturity and understanding to form a view.'

Child Welfare Reporters: Local Authority Reporters

Section 14 of the draft Children (Scotland) Bill requires that local authority reporters undertaking reports for the court under the Matrimonial Proceedings (Children) Act 1958, should be registered as Child Welfare Reporters in accordance with the draft section 101A of the Children (Scotland) Bill.

I wish to flag that those undertaking this work currently are qualified social workers who are registered with the Scottish Social Services Council (SSSC). That is they have already had to undergo appropriate degree level training in child welfare and acquire experience from working with (and supporting) families facing a wide range of difficulties.

I am of the view that the training local authority social workers have already undertaken in order to register to practice should be taken into account when assessing their application to become a 'Child Welfare Reporter.' This is particularly the case where this training may be deemed analogous to any training suggested for lawyers wishing to register (or to remain registered) as a Child Welfare Reporters.

It is important not to lose the expertise of social work professionals by creating unnecessarily complex barriers to their involvement in family actions.

Explanation of the Decision to the Child

Section 15 of the draft Children (Scotland) Bill introduces the unfortunate phrase 'giving the explanation to the child itself' at into a new Section 11E(4). Referring to a living person as an 'it' is generally considered demeaning. The term is unlikely to be used in legislation in respect of adults.

I am of the view that this phrase should be replaced with the words 'giving the information directly to the child' thereby avoiding the need for any pronoun.

Conferral of PRR: births registered outwith UK

Section 19 of the Children (Scotland) Bill addresses the conferral of parental rights and responsibilities where a child's birth has been registered outwith the UK. The draft new section 4B(2)(c) to be introduced includes the requirement that 'the mother of the child has consented to that person acquiring those duties, rights or responsibilities.'

I am of the view that the term 'freely consented' should be substituted for 'consented' in order to flag for the court the need to be satisfied that the mother's consent was given free from duress.

Delay in Proceedings

Section 21 of the Children (Scotland) Bill introduces a new S11ZA into the existing Children (Scotland) Act 1995. *Inter alia* this requires that 'when considering a child's

welfare, the court is to have regard to any risk of prejudice to the child's welfare that delay in proceedings would pose.'

I wish to flag the risk to a child's welfare that may be posed by prioritising 'avoidance of delay' over robust enquiries into the circumstances of the child. For example, a court might decide not to require a child welfare report (to clarify an issue) *on the basis of* the wording of the proposed subsection. This carries the risk that key information pertinent to the protection of the child, and to the promotion of the child's welfare, might not be known to the court when it makes an order that is likely to impact significantly on the life of the child.

I am of the view that the wording needs to be amended to clarify that 'avoidance of delay should not prevent the undertaking of enquiries to establish the circumstances of the child, where such enquiries are likely to be necessary for the promotion of the welfare of the child.'

Commendation of Current Drafting

Vulnerable Parties

Section 7 of the Children (Scotland) Bill proposes to modify the Children (Scotland) Act 1995 via the insertion of section 11B pertaining to 'vulnerable parties.' Such parties are those whom the court considers may experience distress when attending or participating in hearings and allows for the provision of special measures to alleviate some of this distress. This is in addition to protection to be afforded to those meeting the criteria of 'deemed vulnerable witnesses' (such as those who are protected by a non-harassment order) which is also to be introduced under section 4 of the Children (Scotland) Bill.

In my view the inclusion of provision for those who are vulnerable parties, but fall short of the criteria of those to be 'deemed vulnerable witnesses' is essential. My research into child contact disputes before two courts in Scotland found that 14% of the 299 of the children were living with their mother in a refuge for victims of domestic abuse at the time their parents' case came before the court (this rises to just under a quarter of the children in actions where allegations of domestic abuse were made). Yet not all these children had a mother who had a civil protection order or a father who was either subject to criminal proceedings or had a prior conviction (See Mackay (2013) The treatment of the views of children in private law child contact disputes where there is a history of domestic abuse: a report to Scotland's Commissioner for Children and Young People. Available at: <https://www.cypcs.org.uk/ufiles/views-of-children-and-domestic-abuse.pdf>)

Failure to Obey Order

Section 16 of the Children (Scotland) Bill proposes to introduce section 11F into the Children (Scotland) Act 1995, placing a duty on the court to investigate a failure to obey an order made under section 11 of the 1995 Act.

This is a welcome addition to the existing legislation as my research indicates that coercively controlling individuals may readily find on an apparent breach as an opportunity to punish a former partner. Where a resident parent is in apparent 'breach' for a failure of a child to attend at a specified time this may be an indicator that there

may be unaddressed concerns impacting on the child that the court needs to be made aware of.

I hope these comments are of assistance.

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