JUSTICE COMMITTEE

CHILDREN (SCOTLAND) BILL

SUBMISSION FROM SHARED PARENTING SCOTLAND

This submission is from Shared Parenting Scotland (formerly Families Need Fathers Scotland). The charity provides information and support to parents and family members who are affected by child contact problems after separation or divorce.
We receive more than 4,000 enquiries every year and run monthly support group meetings in Edinburgh, Glasgow, Aberdeen, Dundee, Stirling and Paisley. Maintaining or restarting full involvement with both parents is a key part of shared parenting, and we encourage and support this because of the benefits it can generally bring to children whose parents live apart.

We are contacted every day by parents, mainly fathers, who have either been completely prevented by their ex-partner from seeing their children after separation or who are limited to short contact periods of time with them. While limits on contact may be necessary in certain circumstances, there remain thousands of situations in which Scottish children have the care and support from a capable and loving parent disrupted or withheld.

Family courts will order contact when it is considered to be in the best interests of these children. Despite the widespread agreement that such decisions should be taken as quickly as possible, our experience is that far too many of the cases that get to court result in hearings lasting many months or years. The Child Rights and Wellbeing Assessment notes that 83% of court cases take longer than 6 months and 40% longer than 18 months[1].

Current legislation provides the framework for such decisions, hinged on three key principles: best interests of the child, no order unless necessary, and taking children's views. The court decides each case on its own merits within these principles. As noted by Professor Elaine Sutherland in her BRIA submission[2], *"... the Family Law (Scotland) Act 2006 amended the 1995 Act, s 11, adding two factors that the court must take into account when considering making an order in relation to PR&R – protecting the child from domestic abuse and taking account of the prospect of parental cooperation. The result is a partial welfare check-list that highlights two relevant factors, but makes no mention of other considerations that might be of equal or greater relevance in a given case."*

She goes on to suggest that a more comprehensive check-list would be desirable, not least because the UNCRC indicates support for " a non-exhaustive and non-hierarchical list of elements that could be included in a best-interests assessment by any decision-maker having to determine a child's best interests."[3]

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1 Scottish Legal Aid Board data on legally aided cases

2 https://www2.gov.scot/Topics/archive/1995-Act-review-BRIA-interviews/BRIA-Elaine-Sutherland

3 General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art 3, para. 1), CRC/C/GC/14 (2013), para 50.

While we agree with most of the measures in the Children (Scotland) Bill, we consider that it is a missed opportunity to do a lot more to guide sheriffs and judges in the difficult task of deciding what is in the best interests of a child when parents don't agree. The Bill seems outdated and lagging behind the reality of family life in modern Scotland in which parents and their children both have expectations of sharing the pleasures and the tasks of parenting. More involvement by both mothers and fathers is actively encouraged and endorsed in other areas of Government policy but if the relationship between the parents breaks down the perception of parenting in the Bill reverts to a mother carer, father provider paradigm that is unknown to many of the children affected.

We suggest that this is an opportunity to provide a more comprehensive check-list of elements including issues such as shared parenting, parental alienation and involvement of grandparents. Countries such as Australia, England/Wales, New Zealand and the United States all include statutory check-lists in family law. Sheriffs and judges have to take these check-list factors into account but are still free to make decisions based on the individual circumstances in each case.
The Bill and the Family Justice Modernisation Strategy could be also used to bring about a far more radical change in family justice, supporting children and parents to handle the consequences of separation while protecting them from domestic abuse, parental alienation and the other consequences which can accompany the breakdown of parental relationships.

Fifty years ago Scotland created Children's Hearings. Lord Kilbrandon recognised the existing legislation and its underpinning attitudes were out of date and out of touch with children's welfare. We believe this is a similar moment in the life of Scotland and an opportunity to take such a leap forward. We need a holistic approach to interpretation of the best interests of children which assists parents put their children first.

Family law reform is currently on the agenda of many countries, and Scotland could learn from this foreign experience and thereby regain a world-leading position in this aspect of law. Our report *"FAMILY LAW: The Way Forward for Scotland"* covers this in more detail.

1. Voice of the child

We agree that the views of children of all ages are relevant and important in court cases, but would caution that such views are very difficult to obtain particularly when children are below school age. Children should never be put in the position of choosing between their parents, and it is crucial that they are told that although their views are important the final decision may not include some or all of the things they want to happen.

The court should be provided with a menu of options for obtaining children's views and given general guidelines, while retaining freedom to decide the most appropriate method in each case. The menu should include a wider range of options such as children recording messages through social media. Sheriffs should only talk to

children if they have been trained in this process, as happens in Germany[4] and other countries.

In connection with criminal proceedings in which a child may be a witness, a system of Joint Investigative Interviewing has been in place for some years in which interviewers are trained in avoiding tainting the child's views, overtiring them or inadvertently leading them. Any approach to discovering children's views in contact or residence cases should be aware of these potential routes to misinforming the court.

Children are likely to feel they are under pressure. Sometimes parents and other family members may attempt to influence the child during the time views are being obtained. The person obtaining children's views should minimise this influence though measures such as meeting children away from their parents and seeing them more than once to enable the child to say what they really think. The report should indicate whether there are signs of undue influence such as the use of adult language or the child knowing too much about the court proceedings.

When considering the views of a child, the court should query whether these views have been subject to undue influence by the child's parents, family or any other source. This is particularly important if a child is now criticising or rejecting a parent with whom that child has previously had a close positive relationship. In parental alienation, the most extreme form of this influence, a child refuses to see a father or mother and advances implausible reasons why this rejection has occurred. Alienation is a form of child abuse in itself.

As reported by Dr Kirk Weir in his research study[5], the expressed views of children involved in high conflict family disputes need to be considered with great care. Dr Weir described his work in 60 English court cases. His involvement came after a Finding of Fact had dismissed any allegations of child abuse or domestic violence. In preparing his report to court, he interviewed both parents separately, and then met children on their own and with each parent. In the sessions bringing the alienated parent and children together, apparently stout resistance dissolved into normal loving contact, sometimes within minutes, sometimes after a hour or so. This was successful in all cases involving children under 5, in 80% of cases with children aged 5-7, and in 40% of older children.

Adding this consideration to the legislation complements the existing provisions regarding the protection of children from domestic abuse. Both factors are serious issues in some parental separations, and the court has the difficult job of deciding what is in the best interests of the child when faced with such allegations. Lady Hale, now president of the Supreme Court expressed this in Principal Reporter v K[6] *"No child should be brought up to believe that she has been abused if in fact she has not, any more than any child should be persuaded by the adult world that she has not been abused when in fact she has."*

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4 Karle, Michael, Gathmann, Sandra, The State of the Art of Child Hearings in Germany. Results of a Nationwide Representative Study in German Courts, Family Court Review 54(2) 167-185 (2016)

5 High Conflict Contact Disputes: The Extreme Unreliability of Children's Expressed Wishes and Feelings, Family Court Review, 49 (4) p 788-800 (2011) https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1744-1617.2011.01414.x

6 UKSC 56 (2010) para 44

As noted in the Child Rights and Welfare Assessment, domestic abuse is alleged in half of all court actions, which means that it is not a factor in many cases. Some of the allegations will not be upheld on examination. In a study of Scottish family court cases, Professor Tommy MacKay reports: *"Of 107 children who were the subject of psychological reports for the courts in this study, allegations of physical or sexual abuse had been made in 37 cases, and 26 of these were deemed to be false, with nine of the remainder unsubstantiated and two upheld."* [7] When allegations are made, a fact-finding stage should happen at the start of proceedings, with contact continuing on a supervised basis.

2. Children's Best Interests

Children should not be burdened with decisions that they are too young to take, and they should be protected as far as possible from the after-effects of parental separation. Protection of children from the violent or abusive behaviour of either parent is an important aspect of "best interests", but it should be balanced by acknowledging the benefits to children's emotional and psychological well-being of a continuing full relationship with both parents.

This aspect of protecting the child's best interests is neglected in the Bill. Research evidence from countries such as Sweden[8] shows that children in equally shared care have better outcomes than those in sole care, and a wide range of recent research documents the benefits of children achieving secure multiple attachments from a very early age even if their parents live apart[9].

Our experience based on ten years of case work in Scotland is that a large number of children are prevented from benefiting from this full involvement with one of their parents, usually their father, for periods ranging from a few months to many years. In many cases there is no need and no benefit for the children who previously perceived their parents to be equally and unequivocally committed to them to suddenly discover they now have a main parent and an 'add on' at weekends or holidays.

3. Child Welfare Reporters and curators ad litem

While we support the improvements in regulation, oversight and training requirements for child welfare reporters and curators ad litem, we question the proposed mechanisms and costs, and also whether these people are actually best equipped to undertake this work.

We hope that the legislation will enable the Scottish Government to make far more radical changes to these procedures. Most child welfare reporters and curators are lawyers, plus a few social workers. The fact-finding and reporting skills gained from a legal training should be supplemented by a full and practice-based understanding of key issues such as child development, family therapy, child psychology and

7 Educational & Child Psychology Volume 31 Number 3 (2014) p85, "False allegations of child abuse in contested family law cases:The implications for psychological practice"

8 Fransson, Emma & Låftman, Sara & Ostberg, Viveca & Hjern, Anders & Bergström, Malin. (2017). The Living Conditions of Children with Shared Residence – the Swedish Example. Child Indicators Research. 11. 10.1007/s12187-017-9443-1.

9 https://sharedparenting.wordpress.com/2014/05/22/45/

attachment. The Bill will add providing feedback to children to the tasks of a child welfare reporter, which also requires skills beyond those of family lawyers.

Parents who have to raise a court case to settle matters resulting from parental separation are likely to be facing significant problems. The court can help them by making decisions on their behalf when necessary and in the best interests of the children, but it currently offers very little in additional support to these needy families and can sometimes make their distress far worse through delays and financial costs. Child Support Workers and Parenting Coordinators were both mentioned in responses to the pre-legislative consultation. Parenting co-ordination is defined by the Association of Family and Conciliation Courts as "a child focussed alternative dispute resolution process in which a mental health or legal professional with mediation training and experience assists high-conflict parents to implement their parenting plan by facilitating the resolution of their disputes in a timely manner, educating parents about children's needs, and, with prior approval of the parents and/or the court, making decisions within the scope of the court order or appointment contract.[10]"

Using such posts to provide wider support to parents and children alongside reporting to court would help the process of recovery, while still leaving key decisions to the court. The cost of using a single professional to provide this support could be recovered through savings in the number of child welfare and other hearings. It is not economic good sense to have to pay for sheriffs, lawyers and associated court officers to determine where children should spend Christmas, whether a school holiday is deemed to begin on the Monday morning or the previous Friday afternoon or exactly where and what time hand-overs should take place, yet courts throughout Scotland spend many thousands of hours resolving these matters.

We suggest that the Bill should provide powers to the Scottish Government to introduce Parenting Coordinators and other family support posts within the court system, in line with the provisions that are already included in respect of Child Welfare Reporters and Curators. It might be desirable to undertake trials within certain courts in order to find out whether such posts can have the desired outcome of reducing the court time spent on regulating affairs once the main decision has been made. Similar changes made in Australia and the United States have been tested on a sample of cases before full implementation.

4. Factors to be considered re Contact and Residence orders

There is a fundamental problem in the naming of these orders. The use of the terms “residence” and “contact” is inaccurate and it also risks leading the parent who receives a residence order to wrongly assume that this gives them overall control of all the arrangements for the children covered by the order. The law doesn't actually give the resident parent this power, and we propose that both types of order are called “general issue orders” to tally with “specific issue orders”. A comparable change was made in 2014 to the Children Act terminology in England and Wales.

Terminology is important not just for the parents and their children but also because it spills over into all other professionals, agencies and institutions which may have a role in children's lives such as health providers,nurseries and schools. In our experience

10 http://parentingcoordinationcentral.com/Qualifications_of_a_PC.html

there is widespread misunderstanding in these agencies of the significance of the term 'resident' parent resulting in discriminatory behaviour.
Rather than just mentioning “important relationships with other people”, the Bill should insert a mention of grandparents in this section, to acknowledge their especial importance within the lives of children.

We also suggest that the court should consider a rebuttable presumption of equally-shared care when considering an order regulating where a child should live and what contact that child should have with the other parent. We suggest that the starting point should be equal care because there is considerable evidence that children who are in such shared care do significantly better on a whole range of measure than those in sole care, and that these advantages are maintained even when the parents are not in agreement[11] .

Countries in which a far larger proportion of children live in shared care than in Scotland tend to have higher levels of child well-being. Belgium introduced a rebuttable presumption in law in 2006, and court decisions for shared care have increased significantly. Belgian judges welcome this change and retain the power to order other care arrangements. Around 50% of decisions in Belgian courts are for shared care.

This provision would assist sheriffs by providing a starting point when the parents can't reach agreement. At present, court decisions tend to be for far shorter amounts of contact such as alternate weekends and maybe a weekday. Once a decision is made the 'no-order' principle makes it difficult to adjust that established level.

While our philosophy is based on an understanding that sharing parenting has benefits for the children involved, not least on their capacity for forming relationships when they become adults, we are also aware of the implications for the parents.
Parental roles in intact families in Scotland no longer operate on the basis that mothers look after children while fathers go out to work, yet this traditional gendered division still tends to operate when a family separates. Both parents work in the majority of intact families, and fathers who have become accustomed to sharing the upbringing of their children on an equal basis can often find that they are reduced to a visiting role after separation.

Resolution 209 of the Council of Europe[12] stresses the benefits for children of the involvement of both parents in their upbringing, and calls on member states to ensure that family law foresees, in case of separation or divorce, the possibility of joint custody of children, in their best interests, based on mutual agreement between the parents.

5. Other requirements on the court

Both children and parents would benefit from an enhanced requirement for the court to explain decisions and act in a more transparent manner. The decisions made in Section 11 cases have a fundamental impact on all family members, and the

11 Joint versus sole physical custody: Outcomes for children independent of family income or parental conflict, Journal of Child Custody, Vol 15 p35-54 (2018) https://doi.org/10.1080/15379418.2017.1422414
12 http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22220&lang=en

understanding and observance of court orders would be enhanced by the provisions of written explanations in plain language alongside any comments made in court.
In our work we hear from many parents who simply do not understand what is being said in court or what decisions mean for them. The Sheriffs Principal don'tt provide a practice note to sheriffs on this matter[13], yet practice varies widely across Scotland. Embedding this within legislation will lay down ground rules while preserving the freedom of sheriffs to make a wide range of orders to meet particular circumstances.

The provision regarding delay is welcome, but we suggest that "have regard to"should be replaced by stronger wording such as "must take particular care to avoid any delay". This is necessary because previous injunctions such as the Inner House comment by Lord Glennie[14] "The time taken to resolve disputes about contact should be measured not in years but in weeks or, at most, months." seem to have absolutely no impact when raised in court.

6. Vulnerable witnesses and special measures

We agree that an unrepresented party should not conduct their own case in an evidential hearing that involves a witness who is a complainer or victim of domestic abuse. While the appointment of a solicitor to represent that party should provide protection and support to all parties, we have concerns about how effective this measure will be, given the complexity of some such court actions. It is very difficult for a lawyer to pick up a complex case at short notice while still complying with all professional requirements as a representative.

Instead of introducing court-appointed representatives, we suggest that all Section 11 proceedings, not just child welfare hearings should be conducted on an inquisitorial basis by the sheriff or judge. This could also reduce the length of evidential hearings, saving court time and allowing quicker decisions.

Special measures are already used in some child welfare hearings, but we consider that the problem solving aspect of these hearings could be significantly impaired if this becomes a routine practice. The proposed introduction of supporters seems to undermine the role of solicitors in providing support to their client in such proceedings. An unrepresented party is already allowed to have a lay supporter with them in court.

7 Contact Centres

Scotland's contact centres carry out an essential role within the family justice system in providing supported and supervised contact and they should be provided with adequate, continuing funding alongside any increase in regulation and inspection. Uniform national standards, good quality staff training and more effort to achieve gender parity among staff are very important for the children who use the contact centres, but it would be wrong to consider that existing provision requires substantial enhancements.

The procedures envisaged in the financial memorandum seem to be disproportionate and over-burdensome. We are concerned that if financial support to contact centres is not provided alongside these measures there is a substantial risk that some contact

13 Letter to Families Need Fathers Scotland from SP Stephen, 12/7/18

14 (SM v CM [201] CSIH 1) para 66

centres may stop operating. There is already a lack of capacity in existing contact centres and significant areas of Scotland do not have any local contact centre provision, which seriously undermines the potential for resuming contact quickly when ordered by court.

Scottish contact centres have been developed as a national service by charitable organisations over the past 30-40 years to meet a clear need – this Bill should not risk undermining this process by imposing over-bureaucratic procedures. Contact centres and their services are not free and can involved parents in substantial outlays for supervised or supported parenting. A reduction of capacity or an increased charging regime could become an institutional discouragement to shared parenting.

8. Enforcement of contact orders

Current enforcement procedures relating to contempt of court are not working. It brings the existing law into disrepute when many pursuers discover after the time and cost of securing a contact order that: “it wasn't worth the paper it was written on.” This is mainly due to the difficulty of establishing contempt and because of the severity of available penalties which sheriffs are uncomfortable in imposing and which fathers themselves are unwilling to invoke. They say, “I don't want her to go to gaol. I just want her to do what the order set down.”

Requiring the court to investigate reasons for non-compliance is a start, but further measures could enhance compliance.

Parenting Coordinators have succeeded in enhancing compliance in the countries in which they have been incorporated into the court system. As well as assisting both parents to deal with any difficulties they encounter, the Coordinators can report quickly back to the court if serious non-compliance occurs.

Some courts make contempt orders and then suspend them to allow contact to restart, and this can be a way of avoiding the harsh punishments that are currently available. It would also help if the punishment for such contempt could include a community service order which can take place while the child is cared for by the other parent.

The Family Justice Modernisation Strategy in section 3.24 suggests that requiring a parent to attend a parenting class or do unpaid work may have the negative impact or take a parent away from a child, whereas we suggest that sending one or both parents to training in parenting skills or dispute resolution could actually provide great benefit to their children.

9. Contact with siblings

We agree that local authorities should be required to promote contact between siblings as well as other family members.

10. Births registered outside the UK

Our view is that parental responsibilities and rights should be awarded to all mothers and fathers of children born in the UK, and that similar recognition should be given to parents of children born outside the UK, irrespective of whether the place of birth has a procedure for recognising rights and responsibilities. To protect children in situations such as rape or incest, the court should be able to withdraw such rights readily on application pending a determination of whether such rights would benefit the child.

11. Hearings

Children's Hearings already have provision for hearing the voice of the child, but it would be sensible to consider aligning any processes that are developed for the courts with those in children's hearings.

12. Practical and financial impacts of the Bill

In our comments to the Finance and Communities Committee, we expressed concern at the proposed expenditure on both Contact Centre regulation and on the appointment and oversight of Child Welfare Reporters, and also outlined potential savings which could be achieved through a more wide-ranging approach to Child Welfare Reporting. While agreeing that expenditure on both these items is necessary, the proposed staffing and procedures would appear to be disproportionate to the regulation and oversight of existing processes. We appreciate that these arrangements will be subject to further consultation and more detailed consideration once the legislation is in place, but would suggest that the committee should form a view on whether the proposed expenditure is excessive.

13. Family Justice Modernisation Strategy

Just as some court cases take far too long to reach decisions, the process for making changes in the system are often too slow. Discussion of changes to Child Welfare reporters took three years to reach conclusions, and the redesign of the form F9 to obtain the views of the child extended over a similar period. We hope that the Strategy will proceed more swiftly, and would suggest that a body representing external stakeholders should be appointed to develop clear targets and oversee the progress of the Strategy.

Family Justice and the operation of courts is currently under review in many other countries. Valuable lessons can be learned from these reviews, and we can also learn from other countries which have inquisitorial process to decide family disputes, rather than our often damaging adversarial approach. Cases are kept away from the courts far more effectively in other countries, such as Norway and Sweden, and Scotland has already introduced a problem-solving court approach which could be used in the family cases in which decisions have to be made. We would also point to the Cochem model[15], in which cases are heard within 14 days, submissions are limited to one page and collaboration between key agencies is encouraged.

Those courts and the philosophy of the Violence Reduction Unit have shown that the old assumptions needed to change and have adopted a public health approach to their respective issues. We believe it is time for a similar change of attitude and culture. The present system lacks emotional intelligence.

14. Other issues

STATISTICS

The Scottish Courts and Tribunal Service should take steps to obtain far more accurate statistics on the operation of family courts, in order that the current situation

15 http://www.fnfscotland.org.uk/news/2014/7/20/the-family-judge-who-changed-his-approach.html

can be more easily understood and to monitor the impact of the changes that will be made though the Children (Scotland) Bill and the Family Justice Modernisation Strategy. It is totally unacceptable that major decisions involving significant amounts of public expenditure as well as a major impact on the well-being of children should be made without a sound statistical understanding.

PUBLICATION OF JUDGEMENTS

All the judgements resulting from proof hearings in the Sheriff Court and the Court of Session, and appeal judgements in the Sheriff Appeal Court and Inner House should be published in anonymised form, taking care that names, locations and any other distinctive features are removed. While this anonymising will involve a small amount of extra work, there will be a far more significant benefit obtained though this enhanced transparency.

CONSULTATION RESPONSES[16]

While the pre-legislative consultation exercise carried out in 2018 provided many valuable ideas, we are concerned that the Scottish Government's report on the consultation included the non-responses when calculating the percentage support for each proposal. This approach led to a reduction in the reported level of support or opposition to these proposals. The first percentage below is from the report and the second percentage is recalculated excluding non-responses:

Q6. Should Child Contact Centres be regulated? 66% vs 91%
Q9. Should the 1995 Act be clarified to make it clear that siblings, including those aged under 16, can apply for contact without being granted PRRs? 67% vs 90%
Q22. Should fathers who jointly register the birth of a child in a country where joint registration leads to PRRs have their PRRs recognised in Scotland? 55% vs 86%
Q23. Should there be a presumption in law that a child benefits from both parents being involved in their life? 50% vs 64%
Q28. Should the Scottish Government take action to try and stop children being put under pressure by one parent to reject the other parent? 56% vs 78%
Q33. Should section 11 of the 1995 Act be amended to provide that the court can, if it sees fit, give directions to protect domestic abuse victims and other vulnerable parties at any hearings heard as a result of an application under section 11? 51% vs 83%
Q36. Should action be taken to ensure the civil courts have information on domestic abuse when considering a case under section 11 of the 1995 Act? 50% vs 88%
Q38. Should the Scottish Government explore ways to improve interaction between criminal and civil courts where there has been an allegation of domestic abuse? 50% vs 85%
Q39. Should the Scottish Government introduce a provision in primary legislation which specifies that any delay in a court case relating to the upbringing of a child is likely to affect the welfare of the child? 54% v. 80%
Q44. Should the Scottish Government produce guidance for litigants and children in relation to contact and residence? 60% v. 92%
Q46. Should a person who is applying to record a change of name for a young person under the age of 16 be required to seek their views? 59% v.

16 https://www.gov.scot/publications/analysis-consultation-responses-consultation-review-children-scotland-act-1995/

Q47. Should S.I. 1965/1838 be amended so that a father who has a declarator of parentage and has PRRs can re-register the birth showing him on the birth certificate? 51% v. 90%

Shared Parenting Scotland
15 November 2019