JUSTICE COMMITTEE

CHILDREN (SCOTLAND) BILL

SUBMISSION FROM ROY MACKAY

I hope members of the Justice Committee believe in objective evidence (& can see the lack of it). I hope they believe in reason; in logic; and in the rule of law. But what on earth do the people who came up with this proposal think they're doing? Do they really understand the issues they're dealing with here? How objective and independent are they? And most important of all, how child focused are they?

I would like to invite you to consider a few of the more egregious elements of these proposals.

There are three principle problems with this Bill:

Problem 1. A failure to grasp that the role of Child Welfare Reporter (CWR) is – as the name suggests - primarily to do with human relations and only marginally to do with law.

Section 38 of the Explanatory Notes state:

> *Child welfare reporters and curators ad litem*
>
> 38. Sections 8, 13 and 14 cover the regulation of child welfare reporters and local authority reporters and curators ad litem appointed in cases under section 11 of the 1995 Act. Child welfare reporters provide reports to the courts on a child's welfare. At the moment, child welfare reporters are usually family lawyers but some are social workers. Curators ad litem can be appointed by the court to represent a child's interests in the litigation.

That's quite an extraordinary statement. Lawyers reporting on a child's welfare. It's even more extraordinary if you're familiar with the code of conduct by which Scotland's lawyers are bound:

> ## B1.10: Competence, diligence and appropriate skills
>
> **1.10** You must only act in those matters where you are competent to do so. You must only accept instructions where the matter can be carried out adequately and completely within a reasonable time. You must exercise the level of skill appropriate to the matter.

The role of CWR is the professional domain of the Social Worker (or in some circumstances the Psychologist).

You may find yourself asking why no-one – in the long history of this issue – seems to have asked questions like these:

1. Why have lawyers been permitted to do this (for years) when they don't possess the skill?
2. Why have Scotland's legal profession & judiciary tolerated this incompetent acting?
3. Why has the Scottish Legal Aid Board been paying around £4.5M pa for incompetent reports? (And what can be done to recover these public funds?)
4. What manner of devastation and harm have these lawyers - and the legal profession and judiciary who've endorsed them - been causing; in particular to Scotland's children?
5. To what extent does this explain the labyrinthine, expensive and perpetual nature of family law proceedings in Scotland?

Problem 2. Private family law has increasingly become a secondary channel for dealing with matters of risk.

The proper role of the courts in private family law is to deal with cases where parents cannot reach agreement over specific issues. It is not the place to deal with concerns of risk.

Social Workers within each Local Authority in Scotland have the skill, authority, remit and (perhaps limited) resources to deal with concerns of risk in a swift and effective manner. They also recognise the vital importance of children's attachment relationships to their parents and the importance of maintaining those attachment relationships, even in sometimes challenging circumstances. Social Workers in Local Authorities have statutory obligations in respect of these important matters.

When there is genuine concern for a child, whether that concern relates to risk of physical or emotional harm or neglect, or whether that concern relates to interference with that child's attachment relationship with its parents, there ought to be no delay. Social Workers have the core competence to deal with these issues. This is what they do.

So why are we increasingly keen – as we see with the measures proposed in this Bill - to develop a system of private family law which encourages people to stand in line for weeks, months and sometimes years to have their concern about risk heard in court? This Bill fails to realise that offering an arena in which parents are at loggerheads; where they may be fighting over an extended period, is itself a risk to children. And why do we encourage this when the skill, resource and statutory duty lies elsewhere (in the Local Authority) when, in private family law, the courts mostly appoint private practice solicitors as unskilled CWRs?

The Bill will exacerbate the double standards we already see over matters of risk, where the state is prepared to intervene and apply the most severe sanctions over matters which would be quite unthinkable in the public law arena.

Problem 3. Failure to even consider the necessity to have evidence of efficacy in the work of CWRs (formerly Bar Reporters). Failure to seek alternate viewpoints. Failure to engage with professionals with appropriate skill and relevant experience.

The proposal to establish a register of CWRs pre-supposes – without any objective research or evidence – that the work done by CWRs (formerly Bar Reporters) is efficacious. It does so without the Scottish Government having in any meaningful way consulted members of appropriate and relevant professions, i.e. Social Worker (Psychologist) when the work the CWRs are being asked to carry out requires the core competence of the Social Worker. The people involved and relied upon throughout the entire history of this matter have been almost exclusively lawyers.

The Bar Reporter's Working Group, established by the Scottish Government in 2013 was uniquely placed to sample the work of the then Bar Reporters and to subject that work to proper scrutiny. However, rather than begin with the evidence (the work Bar Reporters had done over many years) and work towards a conclusion, the group worked in the opposite direction. More egregiously, their failure to consider the possibility that something might really be wrong (not unreasonable given that these reports were once provided by professional Social Workers (Seale 1984[1]; Matheson 1987[2])) led them to dismiss the need to gather objective information. Their conviction that nothing was wrong – that their legal colleagues were above reproach – limited discussion and made them discount evidence to the contrary. They sought only those bits of information that confirmed their underlying intuitions and needs (perhaps for some: to not be exposed as having participated in or sanctioned acts of professional incompetence during their careers). These problems were exacerbated by the group's belief that it – and the wider legal profession - knew more than it did (especially in matters of human relations).

The Bar Reporters Working Group too was almost entirely dominated by lawyers and the judiciary. In their careers some of its members are likely to have performed the role of Bar Reporter; appointed Bar Reporters; or failed to object (on behalf of their clients) to the appointment of private practice solicitors appointed to that role, despite them having no skill to undertake the work.

Dr Lesley-Anne Barnes Macfarlane - the external academic commissioned by the Justice Committee to review both the current law and the proposed reforms in the Bill from a human rights perspective - is also a qualified solicitor who regularly represented children and adults in court. Her Edinburgh Napier University biography lists **her experience as a Child Welfare Reporter** and Curator ad Litem in complex family proceedings as informing her current research.

These proposals fail to protect future generations of Scotland's children from the potential self interest of a legal profession. Some members of the profession may have a great deal to lose both financially and in terms of reputation if the lack of

competence of Bar Reporters and Child Welfare Reporters over decades is exposed. The legal establishment has pulled off an extraordinary feat having helped guide the matter to a point today where the Scottish Government is on the verge of legitimising future incompetent acting. They've pushed for a framework for standards of competence based on only a few days training for a role that in all other circumstances would require degree-level qualifications and formal registration with a regulating body.

Of course training of this kind for lawyers is to be welcomed if it informs their core legal work, just as one might expect a lawyer serving the aviation industry to participate in CPD that might help him better understand the challenges faced by his clients. However, it's inconceivable that the aviation lawyer – on the basis of CPD training – would ever consider himself fit to fly a plane. Yet that's broadly the equivalent of what this Bill is setting out to legitimise.

The lack of appropriate skill in court proceedings creates a vacuum - something nature abhors – and there's a real risk that the investigations, decisions and interventions around child welfare and risk of harm, which should be evidence based, become ideologically driven or processed through a gendered lens. These failings, in themselves, leave Scotland's children at risk of harm.

It's important to point out that not all members of the legal profession endorse private practice solicitors acting as Child Welfare Reporters. Lawyers in other jurisdictions can scarcely believe we do this in Scotland. This committee might do well to invite evidence from those who see things differently. Andrew Smith QC is, I am told, someone who holds authoritative views on the matter.

Comment on the Voice of the Child proposals

I would also like to comment on one further matter within this Bill: the issue of how best to facilitate the views of children in proceedings. I agree with many of the proposals on this subject contained in the Bill. However I'd like to suggest again that the work of private practice solicitors must be scrutinised because too often they (sometimes as CWR, sometimes as Curator) are appointed to undertake this task under the guise of the child's UNCRC rights when in fact the objective is to conduct an investigative interview. Whilst it may in certain circumstances be necessary to combine establishing the views of a child and investigative questioning of that child, this is strictly the domain of highly skilled professionals such as Social Worker (Psychologist). It is completely unacceptable for anyone else to conflate a child's UNCRC rights with an investigative interview. This – conflating UNCRC rights with investigative questioning - needs to stop now.

There is no need to re-invent the wheel to facilitate children to express their views, nor is there a need to pay private practice solicitors to undertake this work. Scotland already has a well established, if small, Independent Advocacy Network which is very tightly and very well regulated. The services are mostly or largely provided by well trained volunteers. This network may of course need time and funding to expand

carefully to undertake this role. This is the way we should be enabling children to express their view; with staff who would be able to provide them with objective and comprehensive information and context and who could also undertake the very important task of informing the children of the progress and outcome of their case.

In an age of highly vocal social and other media, children have no voice. When they do have a voice on these platforms there's very often someone behind the scenes pulling the strings (often to advance the particular interests of adults with little or no thought for the best interests of children.) In such circumstances the court's role in advancing and protecting the paramountcy principle (the best interests of children must at all times be paramount) is more important than ever, as is Parliament's role in subjecting legislation to the most rigorous and objective scrutiny to ensure it is not tainted by ideological motives or bias.

Conclusion

When they take on the role of CWR, private practice solicitors assume for themselves powers they have no claim to. They turn the "knowledge" they obtain as a result into justification and theorising
over which ordinary mortals scratch their heads in powerless bewilderment.

Incompetent acting by private practice solicitors must be stopped **now.** Scotland's children must not be exposed to this whilst those responsible take another two years to flesh out plans – based on a few days or weeks training - to legitimise their incompetence and save their bacon.

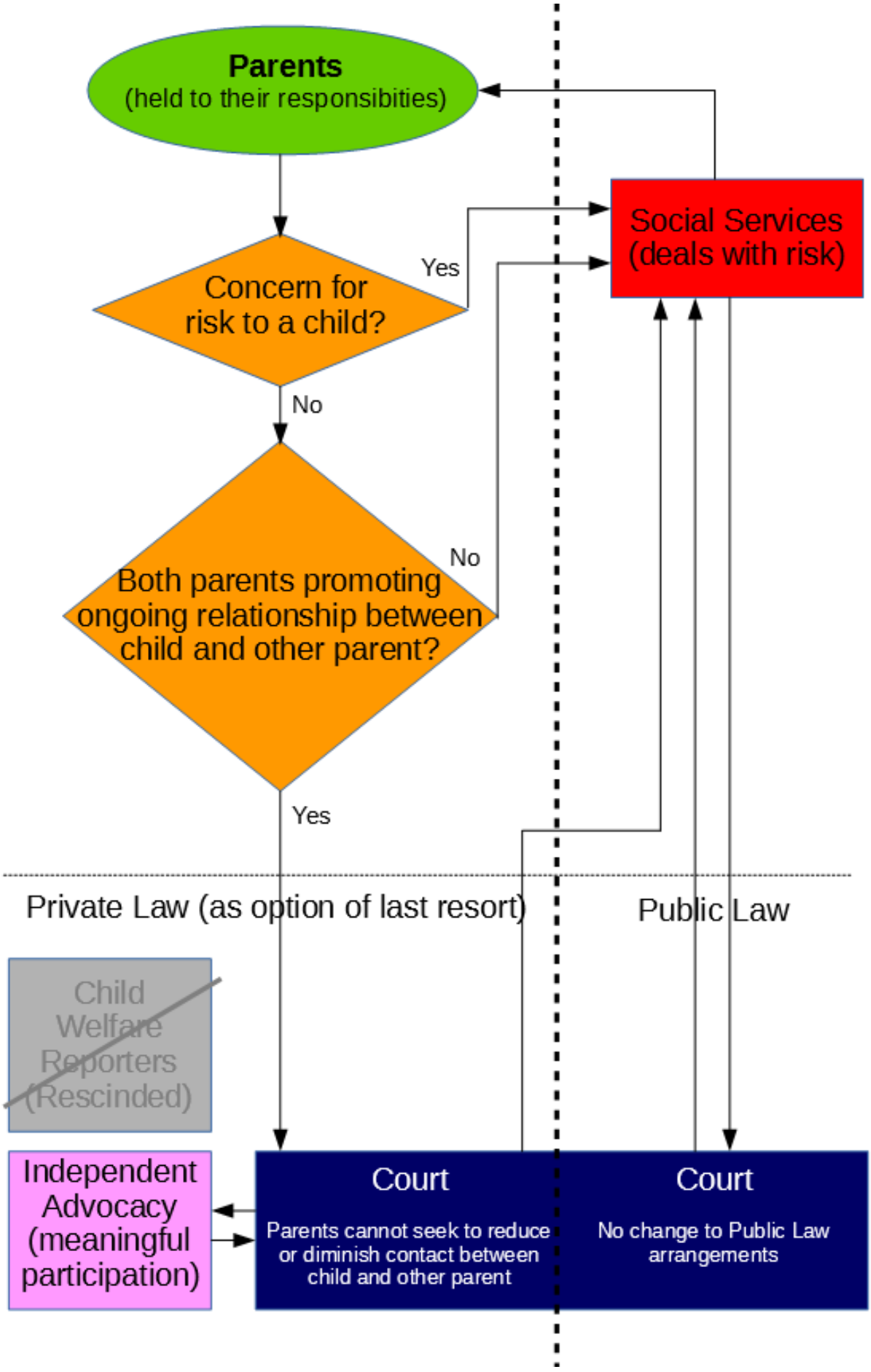
Diagram

Overleaf is a simple diagram illustrating the changes I propose here.

Personal Details / Disclosure Permission

I am a parent with relevant personal experience. I have studied family law issues and contributed to reforms in this area since 2010. I'm happy for my name and response to be published.

Roy Mackay
15 November 2019


Parents
(held to their responsibities)
Social Services
(deals with risk)
Concern for
risk to a child?
Yes
No
Both parents promoting
ongoing relationship between
child and other parent?
No
Yes
Private Law (as option of last resort)
Public Law
Child
Welfare
Reporters
(Rescinded)
Independent
Advocacy
(meaningful
participation)
Court
Parents cannot seek to reduce
or diminish contact between
child and other parent
Court
No change to Public Law
arrangements

REFERENCES

1. Seale, S. (1984) Children in Divorce: A study of information available to the Scottish courts on children involved in divorce actions. Scottish Office, Central Research Unit Papers

https://cloudup.com/ceyDqpPy4Oi

2. Matheson, S. (1987) Children in Divorce in the Sheriff Court: A study of information available to the Sheriff Courts on children involved in divorce actions. A follow-up study to earlier work on the Court of Session, reviewing progress since the introduction of divorce in the Sheriff Court. Central Research Unit, Scottish Office, Feb 1987

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