JUSTICE COMMITTEE

CHILDREN (SCOTLAND) BILL

SUBMISSION FROM CELCIS

The introduction of the Children (Scotland) Bill (the Bill) and the Family Justice Modernisation Strategy represent a significant opportunity to improve legislation and policy to better uphold children's rights and secure their best interests, particularly in relation to issues of family law and children's important relationships. We therefore welcome the opportunity to provide evidence to the Justice Committee to inform scrutiny of the Bill at Stage 1. Scotland is a nation committed to embedding and advancing children's rights in all levels of society, and is demonstrated by the Scottish Government's objective to incorporate the United Nations Convention of the Rights of the Child (UNCRC) into Scots law. We fully support this commitment, and in anticipation of incorporation it is a matter of utmost importance that any legislation passed in the interim is child's rights compliant and compatible with the UNCRC.

CELCIS is Scotland's centre for excellence for children's care and protection, based at the University of Strathclyde. In addition to overarching matters of children's rights, our evidence is focussed on considerations which particularly relate to the needs, views and experiences of children and young people with care experience, and those at risk and in need of protection. This includes the 2,688 children "at risk of significant harm" and thus on the child protection register in Scotland, as well as the 14,738 looked after children, and 6,109 young people eligible for aftercare nationally.[1] These are children and young people living (or previously living) with foster carers (34%), with friends or family in formal kinship care arrangements (28%), in residential accommodation (10%), in secure care (<0.5%), or at home with their birth parent(s), with compulsory social work supervision (26%). The lives, needs and circumstances of these children and young people are rich and diverse, as are their familial experiences and associated reasons for state intervention, and experiences within care and protection systems. Whilst these children and young people are not a homogenous group, their needs and circumstances may differ from those of other children and young people subject to family law proceedings. As such, it is vital that they are not inadvertently disadvantaged, and their particular needs are fully considered during the scrutiny of the Bill.

Views of the child

Children's rights to express their views freely in all matters affecting them are recognised as a general principle underpinning the UNCRC. Whilst a child's development, maturity and capacity should be taken into account alongside their views (in order to ensure that decisions are made in their best interests, and to avoid burden and undue responsibility being placed on children alone to make important decisions), the right to form and express a view exists for all children, without discrimination on the basis of age, or any other grounds. The Bill aims to advance a rights-based approach to considering children's views, however we are concerned that some advancements are limited, subject to unnecessary caveats, and leave much to discretion, which risks little change to the status quo.

[1] Scottish Government (2019). *Children's Social Work Statistics Scotland 2017/18*. Edinburgh: Scottish Government.

We support changes introduced by Section 11ZB(1)(a) of the Bill, which clarifies that children must be given opportunities to express their views in a manner suitable to them. Care and attention is required to ensure this is meaningfully implemented in order to achieve change. Despite children's right to express their views, adults often act as 'gatekeepers' to children's access to this right, particularly in formal settings.[2] It is important to children that there are a variety of options available so that they feel comfortable expressing their views, especially as, for some, it is not always easy to know who to trust.[3] Children and young people of all ages communicate their views through their behaviour, and considerable care and attention should be paid to ensure the views of babies and very young children, as well as children with special communication needs and disabilities, are heard. Courts and other settings where decisions are made must be appropriately equipped, and practitioners appropriately skilled, to facilitate views being heard in different ways. Systems should be designed and established to provide children with mechanisms to be heard, in addition to making decisions which protect children where this is necessary.[4]

The Bill removes the legal presumption that a child aged 12 or over is considered to be of sufficient age and maturity to form a view. We support this, in order to avoid the current situation where misinterpretations of this presumption result in the views of children under 12 being automatically seen as not necessary to consider. However, this is complicated by the retention of the presumption that a child aged 12 or over is of sufficient age and maturity to form a view for the purposes of legal representation in relation to matters under Section 11 of the Children (Scotland) Act 1995 (the 1995 Act). It is critically important not to conflate the rights of all children to express a view and to be heard, with their legal capacity, for instance to instruct a solicitor. There are arguments to be made around the consideration of age in determining a child's legal capacity, however this should not be confused with the rights all children have to form and express their views. Furthermore, we believe it is unhelpful to use chronological age alone as a benchmark. To do so is overly simplistic, and fails to allow recognition of the developmental needs of individual children, which require careful consideration particularly where children have experienced trauma and other adversity. These children may require additional help and support in a range of ways from trusted adults to feel safe to express their views. Neither this, nor their age, must be a barrier to their views being taken into account. Children themselves are clear that adults need to listen to them, rather than assuming children won't understand or have good ideas.[5]

Additionally, we are concerned with the caveats pertaining to the expression and consideration of children's views introduced by Section 11ZB(2) of the Bill, namely that courts do not need to give children the opportunity to express a view, or have regard to children's views, 'if the child is not capable of forming a view'. There should be no doubt that children do not require a test of their capacity in order to express their views. The Committee on the Rights of the Child clarify this in paragraph 20 of General Comment 12 (2009):

[2] Daly, A. (2016) 'Hearing Children in Proceedings – What We Can Learn from Global Practice', *Seen and Heard* 26, p42
[3] Children's Parliament (2018) *Love and protect us forever: A consultation with children for the review of Part 1 of the Children (Scotland) Act 1995*, Edinburgh: Children's Parliament
[4] Lehrmann, D. (2010) "Advancing Children's Rights to be Heard and Protected: The Model Representation of Children in Abuse, Neglect, and Custody Proceedings Act", *Behavioral Sciences and the Law*, vol 28, pp463-479
[5] Children's Parliament (2018) *Love and protect us forever: A consultation with children for the review of Part 1 of the Children (Scotland) Act 1995*, Edinburgh: Children's Parliament

"*States parties should presume that a child has the capacity to form her or his own views and recognize that she or he has the right to express them; it is not up to the child to first prove her or his capacity*"

To make this clear, we suggest that there is an expectation that children's views will be heard in all matters which affect them, and if they are not, the court must provide a clear and legitimate explanation as to why. The cases in which children's views are not heard, and the reasons for this, should be regularly monitored in order to learn more about the circumstances of these children, and how improvements can be made to the exercise of their Article 12 rights under the UNCRC. Fulfilment of children's rights for their views to be heard and considered can be evidenced through their views being recorded in official documents. Recent research regarding the recording of children and young people's views to inform decisions made in Children's Hearings about with whom they have contact found that the views of children aged 12 and under were clearly recorded in just 12% of cases, rising to 22% for those over 12. The research underscores that failing to record children's views supports conclusions that their views are not considered important, and that they do not influence decision making.[6] Children's views should be recorded by courts and all decision makers, failure to do so lacks respect for their rights and removes the voice of the child from their own record.

Communication of decisions

When decisions are made which affect children's lives, it is critical that children have the right support to understand them. We therefore support the introduction of Section 15 of the Bill, which clarifies that decisions about orders under Section 11 of the 1995 Act should be explained to children in a manner which the child can understand. Decisions must be communicated in a manner which best meets the needs of the individual child or young person, in an unbiased way, generally by (or with support from) someone the child knows and trusts. Children and young people should have access to support and information in an accessible format to understand how decisions have been made, and how their views have been given weight and informed the process. They should be able to ask questions about things they do not understand, and seek clarification repeatedly (if necessary) in the days, weeks and months following a decision being made. This is particularly important in cases where decisions are made which do not align with the views of the child, as in such situations, where there is no explanations regarding how the decision was made, children will struggle to understand why their views were sought at all.[7]

We are concerned that, rather than ensuring decisions are always explained, Section 15(3) contains caveats which allow for broad discretion in how and whether decisions are explained to children, which may result in little change to practice. **This is an area which would benefit from the Committee's scrutiny**. Courts are not required to explain decisions if they are satisfied that the child would not be capable of understanding the decision, if it is not in their best interests to be given an explanation, or if their location is not known. We are unclear of circumstances under which it would not be in a child's best interests to be given some sort of explanation for a decision of this kind. If a child cannot be located (which in itself would be extremely concerning),

[6] Porter, R. (2019) Recording of Children and Young People's Views in Contact Decision-Making. *British Journal of Social Work,* 0, 1-20

[7] Daly, A. (2016) 'Hearing Children in Proceedings – What We Can Learn from Global Practice', *Seen and Heard* 26, p42

or if they are not capable of understanding the decision (for example, due to being very young), the explanation should be clearly recorded by the court and made available for the child to access in future.

Sibling relationships

Sibling relationships continue to be especially vulnerable to disruption when children come into care.[8] Disruption in sibling relationships often initially occurs alongside the significant loss and change associated with becoming looked after away from home, compounding this adversity. Children and young people can struggle to re-establish close relationships with their siblings later in their journey, particularly if estrangement has been prolonged. Where arrangements are in place for brothers and sisters to spend time together, concerns often exist over the quality of these arrangements. In line with a rights-based approach, and the increasing evidence base reflecting the protective nature of sibling relationships, we welcome the proposed changes which strengthen the law to protect sibling relationships. The importance of this issue to Scotland's care experienced children and young people, and those working with them and on their behalf to pursue positive change, is reflected in the work of the ongoing Independent Care Review, and the Stand Up For Siblings (SUFS) partnership. CELCIS is a member of SUFS, we fully support the evidence the partnership has submitted to inform the Committee's scrutiny of the Bill, and **urge the Committee to give this full consideration**.

We welcome the introduction of a duty on local authorities, through Section 10 of the Bill, to promote, on a regular basis, personal relations and direct contact between a looked after child and their siblings. This strengthens existing duties under the Looked After Children (Scotland) Regulations 2009 (the 2009 Regulations) to assess contact with family members when considering placing a child away from home, ensures attention is given specifically to the sibling relationship, and extends existing duties on local authorities in relation to promoting contact with parents, to siblings. We also support the clarification that siblings' views are amongst those which should be ascertained by a local authority when making decisions with respect to a child they are looking after, or proposing to look after, when this is in the child's best interests. This leaves no doubt that siblings' views in relation to matters which could impact on the sibling relationship (such as separation and contact) must be sought at the earliest stage. Concerningly, research shows that children's views in relation to contact with their siblings are poorly documented in case files, and (where recorded) contact appears to diminish over time.[9]

We share concerns highlighted by SUFS that the proposed legislation retains the qualification that the new duties only apply where 'practicable' and 'appropriate'. We recognise there are a minority of circumstances in which it is not appropriate for a child to maintain direct contact or personal relations with their sibling(s). However, there is the potential that 'where practicable' may be loosely interpreted, and used to justify decisions which are not otherwise in the child's best interests. Clear accountability measures are needed where a decision is taken that direct contact between siblings is not practicable. Without changes to culture and practice, there is a risk that the

[8] Ashley, C and Roth, D. (2015). *What happens to siblings in the care system?* London, Family Rights Group; Jones, C., Henderson, G., & Woods, R. (2019). Relative strangers: Sibling estrangements experienced by children in out-of-home care and moving towards permanence. *Children and Youth Services Review*, 103, pp 226-235

[9] Jones, C. & Henderson, G. (2017) *Supporting Sibling Relationships of Children in Permanent Fostering and Adoptive Families*, Glasgow: University of Strathclyde

legislative improvements proposed will not result in positive change to the experiences of brothers and sisters. Whilst it must not replace face-to-face contact, to promote sibling relationships to the fullest extent, consideration of the range of ways in which contact can be facilitated must be afforded. Examples include using video messaging, social media, gaming, and sharing information via family or professionals. Sibling contact will often rely on the co-operation and support of birth parents, adoptive parents or carers. Information, training and ongoing support for parents and carers to enable them to understand the benefits of contact and respond to any emerging risks is required. Clarity on expectations of a local authority and others when making decisions and promoting and facilitating sibling contact should be outlined in guidance, and attention given to the implementation of the law and such guidance.

We welcome the broad definition of who is considered to be a sibling for the purposes of the Bill. This recognises the range of relationships care experienced children may have, which may have the character of a sibling relationship. The definition could be further improved by removing references to 'half-blood' and 'full-blood', this is antiquated legal language which may be alienating to some, and can be re-phrased. Additionally, in terms of language, we recognise that 'contact' has meaning within the law. However, the wider intention to maintain positive, loving relationships between brothers and sisters must not be lost through an emphasis simply on 'contact'.

We welcome Section 11 of the Bill, which clarifies that a person (including a person under age 16) can seek and be granted a contact order under Section 11 of the 1995 Act without automatically being given parental responsibilities and rights. This clarifies that an individual of any age can apply for contact with their sibling(s) through the courts, and is necessary to avoid current confusion and ensure consistency of children's access to their rights.[10]

The Bill does not introduce proposals specifically for courts to seek siblings' views in actions under Section 11 of the 1995 Act. Nor does it propose changes to the Children's Hearings (Scotland) Act 2011 or the Adoption and Children (Scotland) Act 2007, which we discussed in our response to the Scottish Government's consultation on the Review of Part 1 of the 1995 Act in 2018. Changes here could ensure siblings have rights to be notified of hearings and of permanence proceedings; to seek contact with their siblings; and to appeal decisions in relation to sibling contact. This is particularly vital in cases of adoption and permanence, as when such an order is made there is no opportunity for a sibling to seek contact at a later stage. A judgement by the Supreme Court (expected early 2020) in two cases relating to sibling rights in the Children's Hearing System will be important to inform any potential future changes in this regard.[11]

In addition to the proposals to strengthen contact and personal relations in the Bill, Part 10 of the Family Justice Modernisation Strategy commits to amend the 2009 Regulations to introduce a duty on local authorities to place siblings under the age of 18 together when they are looked after away from home, when it is in their best interests. This is a welcome strengthening of the law, recognising the rights of siblings

[10] Jones, F. & Jones, C. (2018) *Prioritising Sibling Relationships for Looked After Children*. Edinburgh: Community Law Advice Network

[11] UKSC 2019/0134 In the matter of XY (AP) (Appellant) (Scotland) and UKSC 2019/0063 ABC (AP) (Appellant) v Principal Reporter and another (Respondents) (Scotland) (https://www.supremecourt.uk/current-cases/index.html).

to share family life. It is important that these amendments come into force at the same time as Section 10 of the Bill. The effect will be such that, at the point of considering reception into care and at all subsequent reviews, local authorities will have to consider placing siblings together, and where such placement is not in the best interests of the siblings, promote and facilitate contact between looked after children and their separated siblings on an ongoing, regular basis. Placing sibling groups together presents very real challenges, in a context of limited availability of placements. Care Inspectorate figures indicate that last year, 24% of the 1,042 sibling groups in foster care were separated upon placement. The most common reason cited by local authorities for separating sibling groups was due to lack of resource.[12] For the proposed changes to translate into practice change, it is critical that resource implications are attended to, alongside a range of other implementation measures including guidance; culture change; analysis of systemic barriers; and facilitation of collaborative, innovative practice. It is concerning that the financial memorandum accompanying the Bill (and therefore relating to contact and views, as opposed to co-placement), anticipates no cost implications for the new duties on local authorities. **This requires further serious consideration**, as in many circumstances, increased promotion and support of sibling relationships will involve additional financial resources.

Child Welfare Reporters

We welcome the introduction of a register for child welfare reporters, and changes to the regulation and funding of these professionals. Such changes have the potential to improve access to justice, as well as consistency in child welfare reporters' training, qualifications and approach, to ensure their practice is underpinned by a shared understanding of key matters such as rights, children's development and trauma.

Child welfare reporters may be asked by the court to seek the views of children, or to undertake enquiries on behalf of the court into particular matters relating to orders under Section 11 of the 1995 Act. Whilst these matters often relate to parental separation, they will also relate to situations involving kinship care, for example where a kinship carer is pursuing a Kinship Care Order. The often sensitive circumstances and complexities of kinship care arrangements, and the particular needs of the children involved, differ from circumstances involving parental separation, and require specialist and nuanced understanding. The opportunity to ensure child welfare reporters consistently have sufficient training and understanding of the needs of children and kinship carers is a further benefit to the introduction of the register.

In implementing the changes the Bill introduces to the registration and regulation of child welfare reporters, we recommended account is taken of the learning from the establishment and operation of the National Safeguarders Panel, managed by Children 1st, given the similarities.

Delay in court proceedings

Recognition of the importance of minimising unnecessary delay when determining the living arrangements for all children is welcome, therefore we support the introduction of Section 21 of the Bill which requires courts to have regard to the risk that delays in proceedings can have on children's welfare. It is important that provisions in primary

[12] Care Inspectorate (2019) *Fostering and adoption 2018–19 A statistical bulletin*. Dundee: Care Inspectorate

legislation make a difference to practice, and children's experiences. Section 21 gives a stronger impetus to parties and to the court to take cognisance of children's welfare when considering delays in proceedings. Further actions to ensure provisions translate to meaningful change are also necessary, such as monitoring timescales and carrying out pilots and small 'tests of change' to determine what needs to happen differently in order for timescales to be improved.

Whilst as written, it applies to Section 11 of the 1995 Act, Children's Hearings proceedings, and adoption cases, we are concerned that Section 21 does not apply to court proceedings in relation to Permanence Orders, including Permanence Orders with authority to adopt, under section 84 of the Adoption and Children (Scotland) Act 2007, and we recommend that this is amended. This could be achieved by inserting, after subsection (4) of section 84 of the Adoption and Children (Scotland) Act 2007 *"(4A) 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."* The Scottish Government's 2015 strategy Getting it Right for Looked After Children and Young People recognises the importance of looked after children achieving stable placements as quickly as possible, and that life chances are better for those who achieve stability at a younger age. Timely decisions and reducing delay are critically important to protect children's longer term development and wellbeing.[13] The work of the Permanence and Care Excellence (PACE) programme at CELCIS is focussed on supporting local areas to improve the timescales to achieve permanent placements for children.

Children's Hearings

We welcome the changes introduced by Sections 17 and 18 of the Bill relating to appeals under the Children's Hearings (Scotland) Act 2011, and giving the Principal Reporter the right to appeal the decision of a sheriff in an appeal where deemed relevant person status is the issue. Being deemed a relevant person bestows particular rights upon individuals, such as the rights to attend all children's hearings, to appeal decisions, and to receive copies of all paperwork. It is in children's best interests to ensure appropriate safeguards in the law to prevent persons being deemed relevant when they should not be. Allowing the Principal Reporter this right of appeal also takes the onus off the child (or another relevant person) to submit an appeal. Family dynamics may be exceptionally complicated in some circumstances, and making the right of appeal available to the Principal Reporter is helpful where the child or other relevant persons feel uncomfortable doing this themselves.

Additionally, we welcome the commitment within the Family Justice Modernisation Strategy to amend the Children's Hearings procedural rules to give the local authority entitlement to receive safeguarder and other independent reports in advance of a Children's Hearing. As the agency responsible for implementing the Hearing decision, there are clear benefits to the local authority being in receipt of all information in advance, in order to put plans in place.[14]

[13] Mitchell, F. & Porter, R. (2016) *Permanence And Care Excellence (PACE): Background, Approach and Evidence*. Glasgow: CELCIS

[14] McDiarmid, C., Barry, M., Donnelly, M. & Corson S. (2017) *The Role of the Safeguarder in the Children's Hearing System*. Edinburgh: Scottish Government

About CELCIS

CELCIS is a leading improvement and innovation centre in Scotland. We improve children's lives by supporting people and organisations to drive long-lasting change in the services they need, and the practices used by people responsible for their care.

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