JUSTICE COMMITTEE

CHILDREN (SCOTLAND) BILL

SUBMISSION FROM THE FAMILY LAW ASSOCIATION

1. Introduction

Family Law Association is a professional organisation for solicitors specialising in Family Law or having a particular interest in the field. We also have associate members drawn from the Faculty of Advocates, legal academics and other professionals with an interest in Family Law.

The Family Law Association has members throughout Scotland who are practising both in large and small firms. Our membership is geographically wide spread throughout Scotland. Members carry out work both on private fee paying and Legal Aid basis. Some of our members are employed within law firms where there are specialist Family Law teams, whereas, other members are in more general practice, but have a particular interest in family law matters.

2. The Views of the Child

The present legislation the Children (Scotland) Act 1995 contains obligations to seek the views of children in matters concerning them. There is a presumption that a child aged 12 and over is mature enough to express views.

At present, the means by which the views of a child might be obtained are generally as follows: -

a) The child may complete a form F9 and return that to the court;
b) The Sheriff may choose to meet with the child personally and speak to the child directly;
c) The Sheriff may appoint a child welfare reporter and task the child welfare reporter with seeking the views of the child about any particular matter.

The format of the Form F9 has been amended and a new version of the form along with new procedural rules have been in use since late June 2019. The new format Form F9 is in a more “child friendly format”. At the point of sending court papers seeking Section 11 Orders to the court, the party seeking orders has to also submit a draft Form F9 for approval of the court. Although the court rules do not specify where the Form F9, if being used, ought to be served, practice is developing that Form F9s for school age children will be sent to the school, rather than to the child at the home address. This is to avoid the child potentially being influenced in the completion of the form by one of the parties involved in the case.

Changes were made to the court rules regarding the appointment of Child Welfare Reporters and, in particular, the rules now require that the court gives the child welfare reporter a clear remit. The Form F44 appointing the reporter sets out who the reporter is to interview, what other information such as social work or police records should be obtained and if a child is to be spoken to, the court sets out clearly the matters upon

which the child's views ought to be sought. These changes have generally led to far clearer and focussed reports.

It is not the experience of Family Association Members that the current legislation with the reference to a child of 12 or more being presumed to have sufficient maturity to provide views is preventing children younger than 12 expressing views in proceedings. In fact, generally speaking, the practice throughout the country would seem to be that children of school age will generally have their views sought by the court if orders are being sought.

It is the view of the Family Law Association members that it is important the issue of considering the best method, by which views of a child might be ascertained in any particular case, are considered at an early stage in the proceedings. The changes in relation to the Form F9 mean that practitioners are thinking carefully about the drafting of these forms and the questions to be put to children. As the interlocutor appointing child welfare reporters now needs to give a clear remit, generally careful thought is being given to these matters. Most sheriffs are good at going over clearly what issues a report is to address.

It is important to remember that every child is different. It is perfectly possible for a child of 8, for instance, to be sufficiently mature and potentially to have strong views that they wish to express clearly in any proceedings affecting that child. Equally, there could be another child of the same age who may not be sufficiently articulate or mature or may simply have no desire to express any views in proceedings.

In terms of the Bill, it is welcomed that a child is to be given the opportunity to express views in a manner suitable to the child. It is important that the individual child is considered carefully. The FLA would welcome measures to ensure that these matters are being properly thought through at an early stage of any court process.

The proposed amendment to Section 11, creating Section 11 ZA, broadly restates the existing law with the welfare of the child being the paramount consideration and the court not to make an order under Section 11 unless is considers it would be better for the child concerned that the order be made than no order be made at all.

3. Vulnerable Witnesses & Parties

Broadly speaking, the proposals contained in the Bill in relation to vulnerable witnesses are welcome and, in particular, the proposed prohibition on personal conduct of a case is welcomed.

The concerns the Family Law Association Members have expressed in relation to the proposals here are largely related to the practicalities. A civil case which is proceeding to evidence, tends to require months of careful preparation. The court papers or pleadings have to be in appropriate form and if a person has been representing him or herself, it is likely that the pleadings will need significant alteration or amendment to focus the issues in dispute for the proof. A solicitor taking on these cases would need considerable court experience and expertise. In practice, the Family Law Association would anticipate that sufficiently qualified solicitors may be reluctant to put themselves forward for inclusion on the list of solicitors who might be appointed. Such

solicitors could run the risk of a complaint being made to the Law Society of Scotland or Scottish Legal Complaints Commission by the party to whom they have been appointed since it may well be that the party does not want the solicitor acting or the duties of the solicitor as an officer of the court may conflict with what the party wants to happen. While parties having court appointed solicitors should be entitled to expect high standards of professional conduct and should be entitled to the same remedies that a client who has chosen their solicitor enjoys where a solicitor falls short of those standards, it is a concern that these court appointed cases could be a source of a disproportionately high number of complaints. Even if ultimately the complaints were not upheld, the stress, time and cost to solicitors in dealing with them would be significant. The rates of renumeration, if at existing Legal Aid rates or lower, would be likely to be unappealing given the amount of work and potential difficulties that might be involved in dealing with cases of this type.

Furthermore, a solicitor becoming involved at a late stage in proceedings is likely to lead to diets of proof having to be postponed to allow the solicitor time to adequately prepare. There will be delay in conclusion of cases as a result. It is hard to see practically how these difficulties might be avoided.

4. Register of Child Welfare Reporters and Associated Provisions

It is a source of considerable concern to the Family Law Association that the substance of the proposed changes in relation to Child Welfare Reporters are to be dealt with by way of secondary legislation. Experience of practitioners in relation to the changes in relation to management of Safeguarders and the list of Safeguarders to be appointed in Children's hearing cases has not been positive. It is important that there is clarity and transparency around the appointment process to ensure that Child Welfare Reporters are drawn from a wide pool of suitably qualified individuals.

One of the benefits of the current system in relation to the Child Welfare Reports is that the court is able to appoint child welfare reporters with significant local knowledge, for instance, of the child contact and other facilities that might be available locally to assist in the case.

A well thought out and carefully considered and prepared child welfare report can significantly reduce the scope of evidence in a case and in some cases can avoid cases having to proceed to evidential hearings at all. A good report can, in fact, in many cases, lead to resolution of the case.

A number of the concerns in relation to child welfare reporters and their activities have been addressed by the reforms of the process and in particular, the introduction of the Form F44 whereby the child welfare reporter is given a clear remit by the court. This means that the reports are focused on the issues about which the court requires assistance and it avoids the need for lengthy reports covering all sorts of ancillary matters that may not be relevant to the issues in dispute.

It is important that the persons preparing a child welfare reports are suitably trained and qualified. The Family Law Association is in favour of training child welfare reporters and also in favour of the training of child welfare reporters being an ongoing requirement for continued inclusion on any list. It is important that persons preparing

child welfare reports are suitably qualified and in particular that they have good knowledge of the legal process and court process. It is important that in preparing child welfare reports, the person acting as the child welfare reporter is able to receive large volumes of information, filter that information and identify the information that is relevant for the court. The writing of these reports is a skill and it is important that the persons appointed have the appropriate skill set to properly assist the court. The training programme must be well balanced and cover all aspects of the role.

The rates of renumeration for child welfare reporters must adequately reflect the responsibility and importance of the role. At present, the reports are most commonly funded by the Scottish Legal Aid Board. The Scottish Legal Aid Board grant sanction up to a limit of £3,000 and it is possible to apply to the Legal Aid Board for further sanction if there are good reasons why the report is likely to cost more than the usual sanction limit. The system must be adequately funded by the Scottish Government to ensure that good quality reports are available for the court.

5. Regulation of Contact Services

Contact centres provide an invaluable service to families in Scotland and the availability of contact centres is important in cases where contact has been problematic, because the contact centre can offer supervised and supported contact and can allow contact to resume after lengthy breaks. It is important that children are coming to contact centres that are adequate and suitable for purpose. However, it is also important to recognise that contact centres are generally run by charitable and voluntary organisations and any regulation should ensure that it is not overly onerous, which might have the unintended consequence of pushing certain providers out of the market place. In rural locations, the provision of these facilities is generally less wide spread and further, or heavy-handed regulation may lead to such facilities being unavailable altogether. Again, it is important that the Scottish Government make sure adequate funding is made available so that these invaluable services can be available for families in Scotland.

6. Further Provision about Orders Under Section 11 (1) Of the Children (Scotland) Act 1995

In the view of Family Law Association, any person being appointed as a Curator Ad Litem in a case involving a child should be legally qualified. The nature of the role is such that legal qualification is essential.

It is welcomed that decisions should be explained to the child or children involved in a case. It is important that the decision maker in the case has discretion to be able to direct when and by what means the decision is to be communicated to the child. For instance, in the view of the Family Law Association membership, it would not be essential where incremental increases in contact are being awarded by the court, that every single incremental increase should be communicated to the child. This would potentially involve children having a greater degree of awareness or involvement in court proceedings than is necessary which could cause upset/stress unnecessarily. We would submit that where a final decision is being made in a case, this should be communicated to a child. Also, where a Sheriff is making a decision in a case where the child's views about the particular issue have been sought, it is important that the

court communicate to the child the decision that has been made and in particular, if the decision being made by the court is at odds with what the child has expressed by way of the child's views in the matter. It is important that the court try to communicate to the child why the decision has been reached.

In situations where the court is going to give the child the communication directly, the decision maker at the court would have to have appropriate training in communication with children, and the communication should be done in a way that would not be likely to increase upset or distress to the child. It is important for the child that the decision is not communicated by either party to the action. The decision should be communicated in neutral language which may be difficult for a party to the action, particularly if he/she disagrees with the decision.

7. Failures to Obey Court Orders

There are practical issues around the duty to investigate failures to obey court orders. In some difficult family cases, one party to the court action may have set out clearly a position in relation to the matters before the court. After hearing evidence, the court may make findings in fact and decisions, which are at odds with what that party might wish. In difficult cases, notwithstanding court orders, such a party may continue to fail to obey the court order despite all of the issues having been fully canvased in an evidential hearing and decided upon before the court. It is important that any investigation into a failure to obey court orders does not simply lead to a rehashing of matters, which have already been dealt with at Proof.

In the view of Family Law Association Members, court orders are made day and daily in the Sheriff Courts up and down the country and, even if opposed by one of the parties to the court action, these orders are then implemented and worked with by the parties. There will always be difficult cases where one party to the court action is intransigent and unwilling to facilitate the smooth operation of any orders the court might make. These cases will always present significant difficulties for the courts and it is important that failure to obey the court's orders are investigated promptly, fully and dealt with appropriately by the courts. It is important that investigations into reasons for failure to obey court orders do not simply amount to revisiting facts already determined by the court and it is important that a party, not complying with a court order, is not given the impression that these investigations may lead to variation or discharge of a court order where there has been no significant change in circumstances and, there is no good reason for the failure to obey the court order.

8. Delay in Proceedings

It is important that the Family Courts are able to deal with issues concerning children promptly and without undue delay. Ultimately, however, it is important that the decision maker in any particular case has discretion about how to apply the welfare principles contained within the legislation. Every family is different and every court case involving a child that comes before the court will have different facts and circumstances. A properly trained judiciary should be capable of applying the legal framework to the facts and circumstances of the particular cases before it. It is important that the decision makers are trusted to get these decisions right. There will be cases where Sheriff and Judges make mistakes in relation to their assessment of

the welfare of a child, however, broadly speaking, most members of the judiciary dealing with these cases take their role exceptionally seriously and are doing the best they can to reach the best possible decisions for the children involved in the cases before the courts.

Family Law Association
10 December 2019