

JUSTICE COMMITTEE

CHILDREN (SCOTLAND) BILL

SUBMISSION FROM CHILDREN'S HEARINGS SCOTLAND

New presumption in favour of capacity

Some evidence to the Committee has suggested that the existing 12+ presumption relating to hearing a child's views should be replaced with a positive presumption that all children have the capacity to give their views. Would CHS / SCRA support this new presumption? What would the implications be for children's hearings and sheriff court proceedings relating to children's hearings?

CHS is in favour of removal of the existing legal presumption framed in s27(4) of the Children's Hearings (Scotland) Act 2011 that children over 12 are presumed to be of sufficient age and maturity to form a view to which a hearing or a children's hearing, pre-hearing panel or court must have regard when making a decision about a matter relating to a child. Panel members are required to establish whether they have the child's views in a hearing and are trained and guided to consider the views of children of any age.

The existing provision in s27(3) of the 2011 Act places a positive duty on panel members and sheriffs in children's hearings and related court proceedings to give children an opportunity to express their views and have regard to them.

Legal presumptions are, by their nature, capable of rebuttal. If the existing presumption were to be replaced by another, that might give rise to disputes between parties about the capacity of any particular child. Retaining the duty to seek and have regard to children's views unqualified by any legal presumption would mean that decision-makers would continue to be placed under a duty to seek children's views in relation to their decisions, irrespective of the child's formal capacity. A positive presumption of the nature proposed would simply restate the general provision in s27(3). Nevertheless if it were felt necessary to have an additional presumption in primary legislation CHS would not oppose that.

An alternative approach might be to remove the statement 'so far as is practicable' in s27(3) to strengthen the duty on children's hearings and courts to obtain children's views in decision-making about them without qualification. That would shift the emphasis for everyone involved with the child to helping the child to give their view about the matters under consideration by a children's hearing or the court by whatever means is possible for that child. If a child expresses a view, decision-makers must have regard to it. The child's age is relevant only insofar as the child's age and maturity has a bearing on the decision to be made.

How the child's views are heard

In children's hearings it seems that the chairing member must make reasonable arrangements to enable the child to express his or her views "in the manner preferred by the child." The chairing member is also required to ask the child whether the views attributed to the child in the professionals' reports accurately reflect the child's views.

Do these requirements work well in practice? If so, would they work in sheriff court proceedings covered by sections 1-3 of the Bill?

Rules of procedure for children's hearings require that any document submitted to a children's hearing should contain any views expressed by the child which have been given to the person who has prepared that document, and that the chairing member must check with the child that those accurately reflect their views. That provides a focus on the child's views both for those working with the child and the hearing considering recommendations by professionals. Data to evidence how well this is working is unavailable. CHS is working closely with the Panel Member community and the national Learning Academy to have children's hearings include reference to children's views and how these have been taken into account in children's hearings decisions.

The same requirements of report writers could equally be applied in court proceedings. It is unusual for children to be present during hearings in court. It would therefore be more difficult for a sheriff to ascertain directly of the child whether the child's views are accurately reflected in the child's absence.

Vulnerable witnesses

CHS written submission states that "Panel Members cannot authorise participation by video link or taken measures to involve vulnerable parties separately in discussion to support their effective participation." However, where children and vulnerable relevant persons are excused, the rules of procedure say that SCRA must "take all reasonable steps" to allow the child or relevant person to participate via telephone, video link, or any other method of communication if requested to do so by the child or relevant person). Do you think that participation by video link etc. should be possible in other circumstances? If so, when?

Current procedural rules allow SCRA to arrange participation by video link at the request of the child or relevant persons where they have been excused attendance in person. A child or relevant person may ask to be excused from attendance at a hearing. Panel members may excuse a relevant persons only if it is unreasonable to require the relevant person's attendance or their attendance is unnecessary. The legal test requiring that their attendance is either unreasonable or unnecessary cannot be applied if the relevant person wishes to attend the hearing.

In practice contributions to hearings by video link when a child or relevant person asks to do so takes place in exceptional circumstances. Panel members are not involved in decisions about when and how that might be permitted or managed. Panel members cannot require a relevant person's participation by video link in any circumstances, including where the relevant person's presence may present risk to the child or other people present at a hearing.

Panel members can exclude a relevant person or their representative from attendance at a children's hearing only in very limited circumstances; where their presence is preventing the child from contributing their views or is causing, or likely to cause significant distress to the child, not any other person. They may exclude the relevant person only for as long as is necessary to obtain the child's views or alleviate distress. As the hearing must be satisfied that the relevant person's presence at the hearing is

preventing the child from giving their views or causing distress, Panel members cannot exclude a relevant person before a children's hearing has begun.

CHS considers that where there are circumstances indicating that there is a reasonable prospect of risk or harm occurring to a child or other participant in a children's hearing from any person with a legal right to attend a children's hearing, Panel members should have the option to authorise attendance by video link, or to hear that person's contribution separately or via their representative. Application could be made prior to a hearing by the child, another relevant person, the Children's Reporter or the implementation local authority. A request before the hearing could be considered by a pre-hearing panel or before a children's hearing begins.

Investment would be needed to ensure video conferencing facilities of sufficient quality are available in each local authority and children's hearings centre.

Wider family members

To what extent are a child's relationships with his or her wider family (such as grandparents) considered when decisions are being made by a children's hearing?

Panel members have the power to make a contact direction regulating the child's contact with any 'specified person or class of persons'. This enables a hearing to direct contact arrangements in a way which protects the child but should maintain and support any other important relationship with the child. In guidance and training Panel members are encouraged to look beyond the relationship between a child and their parents and consider the child's relationships in the round. CHS has issued guidance to Panel members specifically to that effect in Chapter 8 of the Panel Members Practice and Procedural Manual, a link to which is included here.

Existing legislation places a duty on local authorities to facilitate children's contact only with persons with parental responsibilities and rights, for those children and young people accommodated in foster care or residential care. CHS welcomes the strengthening of legislation to support relationships between brothers and sisters in care.

Appeal against relevant person decision (section 17)

In its submission to the Committee, the Law Society of Scotland says that the function of the Principal Reporter is to ensure the effective conduct of a children's hearing and that appealing a decision on relevant person status (as proposed by section 17) would not be consistent with that role. Do you have any comments on this view?

The Principal Reporter has a responsibility to ensure a fair process in a children's hearing including that it is conducted in accordance with procedural rules. The chairing member of the children's hearing also has an important role to play in ensuring the effective conduct of a children's hearing. Panel members are responsible for making decisions about relevant person status. If a family member appeals a children's hearing decision to refuse relevant person status the Children's Reporter is the respondent in that appeal in relation to setting out the basis for the Panel Members' decision. Where the child or any other relevant person who objects to the family member being deemed to be a relevant person their interests are congruent with the case presented by the Reporter. If a Sheriff upholds such an appeal, in the absence of any power to appeal by the Children's Reporter the child or other relevant person

must then take responsibility for any appeal to a higher court. That places the child and family members in an invidious position, pitting family members against each other unnecessarily.

The Principal Reporter is the appellant in proceedings in the higher courts relating to other substantive decisions taken by Panel members. CHS considers that the limited extension of the Reporter' power to appeal will assist the courts in applying the test for deemed relevant person status consistently and fairly.

Children's Hearings Scotland
February 2020