JUSTICE COMMITTEE

CHILDREN (SCOTLAND) BILL

SUBMISSION FROM SCOTTISH CHILDREN'S REPORTER ADMINISTRATION

The response from the Scottish Children's Reporter Administration to additional questions in relation to the Children (Scotland) Bill asked by the Scottish Parliament's Justice Committee

- **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?

In our written submission to the Committee we said:

> "SCRA are of the view that the presumption should be that all children will have a view about their situation and circumstances, regardless of their age / maturity / ability to explain what their view is. The presumption should be that the Court takes account of the child's view; and as a result of that actively seeks to determine the view(s), take account of them and respond to them accordingly. It is the effective communication of the child's view which is critical – not the age at which the child is deemed able to have a view."

The implications of this for Children's Hearings and associated Children's Hearings Court proceedings are slightly different. In respect of Children's Hearings Court proceedings there will be more of an impact as children & young people are kept out of Court proceedings where possible. In an application to have a section 67 ground for referral established (a 'Proof' application) young children are often excused by the Sheriff from attending at Court; older children may be required to attend if the section 67 ground for referral relates to their own behaviour and they are not obviously represented. Even when children do attend at the Sheriff Court their views are not routinely conveyed to the Sheriff, so are not often taken into account.

Children's Hearings already understand that every child has a view – but sometimes that view is not about where they should live, or who they should see – as that has never occurred to them or been discussed with them, particularly if they are young. Children's Hearings also understand that children's views are dynamic, they can change and any child may modify or alter what they say as they are aware of the impact they could have on the people they love. Children require support before, during and after a Children's Hearing so that they are fully and appropriately informed about the Hearing and what it can do; so that they can give their views in a way which

suits them and so that they fully understand what decisions have been made and are supported to challenge those decisions if they want to. The Children's Hearings Advocacy Service will make sure that primary and alternate advocacy service providers in every one of Scotland's 32 local authorities is available for children who would like the support of an advocacy worker before, during and after their Children's Hearing. This support will also be available in any associated Children's Hearing Court procedure, so that the child's view will be central to all of the decision making.

- **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?

The Children's Hearings (Scotland) Act 2011 is very clear that a Children's Hearing has to be satisfied that it knows the views of the child about whom a decision is being made, before that decision is made. There are two key sections in the existing primary legislation:

Children's Hearings (Scotland) Act 2011 Section 27 - Views of the child

(1)This section applies where by virtue of this Act a children's hearing[F1, pre-hearing panel] or the sheriff is coming to a decision about a matter relating to a child.

(2)This section does not apply where the sheriff is deciding whether to make a child protection order in relation to a child.

(3)The children's hearing[F2, pre-hearing panel] or the sheriff must, so far as practicable and taking account of the age and maturity of the child—

(a)give the child an opportunity to indicate whether the child wishes to express the child's views,

(b)if the child wishes to do so, give the child an opportunity to express them, and

(c)have regard to any views expressed by the child.

(4)Without prejudice to the generality of subsection (3), a child who is aged 12 or over is presumed to be of sufficient age and maturity to form a view for the purposes of that subsection.

(5)In this section "coming to a decision about a matter relating to a child", in relation to a children's hearing[F3, pre-hearing panel], includes—

(a)providing advice by virtue of section 50,

(b)preparing a report under section 141(2).

AND

Children's Hearings (Scotland) Act 2011 Section – 121 Confirmation that child given opportunity to express views before hearing

(1)This section applies where a children's hearing is held in relation to a child by virtue of this Act.

(2)The chairing member of the children's hearing must ask the child whether the documents provided to the child by virtue of rules made under section 177 accurately reflect any views expressed by the child.

(3)The chairing member need not comply with subsection (2) if, taking account of the age and maturity of the child, the chairing member considers that it would not be appropriate to do so.

And in the Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Rules 2013 it stipulates:

Duties of chairing member of a pre-hearing panel or children's hearing

6.—(1) The chairing member of the children's hearing or pre-hearing panel must—

(a)take reasonable steps to ensure that the child and each relevant person are able to—

(i)understand the proceedings; and

(ii)participate in those proceedings;

(b)where, during the proceedings, the child wishes to express a view, make reasonable arrangements to enable the child to express those views in the manner preferred by the child;

(c)ensure that a record is made of—

(i)the decisions or determinations made by the children's hearing or pre-hearing panel, as the case may be; and

(ii)the reasons for those decisions or determinations; and

(d)sign and date the record of the decisions or determinations.

(2) Any requirement on the chairing member to inform those attending a children's hearing of the substance of any report, document or information or to explain any matter is subject to any decision of the children's hearing to withhold information under section 178 (children's hearing: disclosure of information) of the Act or by virtue of a non-disclosure request made in accordance with Part 19 of these Rules.

AND

Requirement to include child's views in documents

8. Where any document is to be given to members of the children's hearing or pre-hearing panel under, or by virtue of, the Act, or these Rules, the document must contain any views expressed by the child which have been given to the person who has prepared that document.

In theory the combination of sections 27, 121 and rules 6 & 8 mean that there is quite a lot of flexibility in how a Children's Hearing can take a child's view and that the way a child expresses their view is driven by them and their preferences.

However, in order for this to work in practice there needs to be a focus on supporting a child's understanding to enable them to recognise what they are being asked about and why – so that they can give a view informed by the context in which it is being requested. There may also need to be practical work done on translating the view the child gives – for example, a picture done during work with an art therapist may make complete sense to the therapist in the context of their work and ongoing conversations with a child; but on its own the picture in front of three panel members may be perceived as meaning something else altogether – or as just a picture.

Whether a child is able to confirm the accuracy of the view as depicted in the reports is more complicated and depends on the access the child has had to the reports and on the way in which a child has been prepared in relation to the content of the reports. Children can be adept at filtering information for their audience and will be more attuned to how other people (particularly their parents or those they care about) will receive the information, than the others within the Hearing (professionals and panel members).

The informed participation of the child in proceedings (in the Hearing or the Court) is complex and nuanced. The emphasis should be on ensuring that decision makers have the child's informed view front and centre. Decision makers will then need to balance the view from the child, in whatever format, alongside the other information available to them.

- **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?

SCRA is of the view that participation by video link etc already is possible in other circumstances, but the key issue is about the ability to direct the use of VC in certain circumstances. We consider that participation by video link or other 'remote' method constitutes attendance, although clarification of this would be helpful. Rule 19 specifies the situations where SCRA has a duty to facilitate such attendance, but the competence of remote attendance should not be limited to those situations. When we receive such a request, which is currently very rare, it is on the basis of it being requested by one of the parties to the Hearing. If it is considered appropriate then we will do our best to arrange this, but sometimes the facilities are not sufficient to allow this, e.g. access to suitable equipment, or security or confidentiality concerns.

Although attendance by VC can be arranged, a person with a right to attend can always currently attend in person. This is the case no matter what their previous behaviour, and SCRA often has to make special arrangements to ensure the health and safety of everyone attending. This right to attend in person can affect the child's and other relevant persons' willingness and ability to come to the hearing centre and

attend in person. A new power by which someone can be directed to attend only by remote means would help to address this situation. Criteria would require to be developed, and a clear process.

A hearing's powers of exclusion are limited to the statutory criteria. These are too limited in relation to the exclusion of a relevant person. It should be possible to exclude a relevant person because of impact on another relevant person, or possibly on others attending the Hearing, similar to the current provisions for impact on the child (significant distress and preventing views). Powers of exclusion should (and we think do) apply whether a person is attending in person or by remote means. Attending by VC will not address all the possible impact on the child or other relevant persons – for example they may still suffer significant distress or be unable to provide their views while the relevant person attending remotely is still 'present' on screen.

SCRA and CHS have been in dialogue with Scottish Government officials about changes to the powers of exclusion and a power to restrict attendance to remote means, in order to strengthen and simplify the approach that can be taken. This always has to be balanced with the rights of the individual to participate in proceedings that will affect their family life.

Technology now allows for 'virtual attendance' in a way that was not possible ten years ago - and the legislation should recognise this. SCRA is of the view that the Reporter needs to be able to make arrangements which suit the circumstances of individual families in advance of their Children's Hearing; and that panel members within the Children's Hearing need to have powers to make the Hearing as safe as possible. Where there is an individual who is likely to be disruptive, or whose personal attendance at a Hearing would distress others, we would suggest that a PHP or possibly the Reporter, followed by approval from the Hearing, could determine that the disruptive or abusive individual may attend only by means of a video link or other remote means.

Any change has to be based upon a reliable and future proof technological infrastructure that allows Reporters and panel members to make decisions without considering whether the technology will work, or is available. There will also need to be careful planning for such Hearings and it may have resource implications, e.g. there would need to be someone at the remote location to provide appropriate customer care, liaison with staff at the Hearing Centre, and general support and management.

- **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?

The consideration of the wider family network within a Children's Hearing depends on a number of factors, for example:

- which children are being considered in a Hearing – whilst panel members in a Hearing make decisions for individual children it is often the case that more

than one member of the same family comes to the Hearing at the same time, particularly if the issues of concern are relevant to all of the children.

- whether the assessment(s) in front of the Children's Hearing considers the wider family, and place the child within that context for the decision maker.

- whether the family has worked with Family Group Decision Making or another process which engages the strengths of the child's wider familial and societal network.

- whether wider family relationships are safe, protective and positive for the child(ren) who are involved with the Children's Hearing - this is not always the case and cannot be assumed.

Section 25 of the 2011 Act means that the welfare of the child throughout the child's childhood is considered and as such decision makers always have an eye to the people around the child who are key to their welfare. GIRFEC assessment means that professionals must look at the child's immediate and wider family network first in order to provide appropriate support, and look wider if that network cannot provide the necessary care and support. Decision making in the Children's Hearing takes the same approach and if support can be provided from within the family, then it absolutely should be. This can happen in a variety of ways – for example, it might be appropriate for a Grandparent or other family relative to take the care of a child whilst parent(s) live elsewhere; or a parent and child may choose to live in the home of a Grandparent or other family relative together, so that the parenting of the child is closely supported. Such decisions are sensitive, and professionals have to balance different emotions and relationships between adults whilst keeping their focus on the child or children.

Wider family members, and in particular grandparents, often play a direct part in a Children's Hearing. Sometimes they meet the definition of relevant persons and therefore have the full rights of attendance and appeal. Often they are invited to attend a Hearing by the Reporter as they are identified as people who may have an important contribution to make to the discussion. They also frequently attend to support one of the parents at the Hearing. If there is a family member who is playing an important role in caring for or supporting the child then it is likely that they will be involved in the Hearing.

If wider family members are not in attendance then Panel Members would be looking to the GIRFEC report for information about the child's relationships with wider family.

- **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?

In their written response to Committee the Law Society said:

> "We do not support a right to appeal by the Principal Reporter around deemed relevant person status. The function of the Principal Reporter at the children's hearing stage is largely to ensure the effective conduct and administration of the hearing. Appealing a decision on relevant person status would not be consistent with their role. The Principal Reporter already has the right to convene a Pre-Hearing Panel at any time to consider a person's relevant person status (where they consider the person may no longer meet the test). The 2011 Act also provides for constant review of deemed relevant person status. All relevant persons have a right to appeal such a decision, as does the child. This gives a number of checks and balances on such decisions."

SCRA agrees that the Reporter is not a party to the Children's Hearing and should not have an appeal right in relation to the decision of the Hearing.

SCRA sees the provisions in section 17 of the Children (Scotland) Bill as doing two things;

1) section 17 (2) makes clearer the circumstances in which a Sheriff can make an order deeming a person to be a relevant person, so that it applies to someone who has recently had a request to be 'deemed' a relevant person refused as well as to someone who has had the 'deemed' status, but it has been removed;

2) section 17 (3) gives the power of appeal to the Reporter – to appeal the decision made by the Sheriff following an appeal of a decision of a Children's Hearing or Pre-Hearing Panel decision. This would be in line with the Reporter's leave to appeal a determination of a Sheriff in relation to an application to determine a section 67 ground or the decision made by a Sheriff on appeal of a Children's Hearing decision.

It would allow the Reporter to challenge decisions which may be made by a Sheriff which are inconsistent with previous case law and which could become the basis for further decision making. The focus of family members is quite rightly not on the detail of the case law – but on the reality of the situation they are managing.

As Alistair Hogg, Head of Practice and Policy, SCRA said in his oral evidence to the Committee (p51):

> "I understand that what is proposed will allow the principal reporter to appeal a Sheriff's decision on that matter rather than to appeal a decision that the hearing has made, which I agree would be inconsistent with our function. We very much welcome the ability to appeal a sheriff's decision on deemed relevant person status because, at the moment, we see many cases in which decisions are made and in which other parties to proceedings who would have a right of appeal are unable to exercise that function for personal reasons. We are unable to pursue that and, therefore, shape the test relating to deemed relevant person status, which can have a big impact on not only individual cases but more generally if precedents are set."

SCRA Practice & Policy Team, February 2020.