Children (Scotland) Bill – stage 3 briefing

The Law Society of Scotland is the professional body for almost 12,000 Scottish solicitors. We seek to influence the creation of a fairer and more just society and are strongly committed to our statutory duty to work in the public interest and to both protect and promote the rule of law.

As a professional body, we have experience of the current disclosure system. The scheme is integral to how we promote and maintain professional principles as a regulator - on admission to the profession, re-entry to the profession or as part of our anti-money laundering regulation. Any reforms to the current disclosure system must not diminish the protection to the public, while respecting the rights of the individual and ensuring that the process is clear, predictable and certain to all involved.

We provided [written evidence](https://www.parliament.scot/S5_JusticeCommittee/Inquiries/JS519CH32_LSS.pdf) to the Justice Committee call for views in November 2019 and had previously provided [our response](https://www.lawscot.org.uk/media/361103/18-07-31-fam-consultation-review-of-children-scot-act-1995.pdf) to the Scottish Government consultation on the review of Part 1 of the Children (Scotland) Act 1995 and creation of a family justice modernisation strategy in September 2018.

There are several significant amendments proposed at stage 3. We do not support the changes proposed around child welfare reporters, the provision around professional misconduct for referrals to child contact services or ADR. We do support changes around the expression of views by the child, and effective participation. Our briefing provides more detail around each of these areas, which we hope helpful for the scrutiny of the Bill at stage 3.

# Child welfare reporters

The role of child welfare reporters is crucial in ensuring the welfare of the child. Around 90% of this work is currently conducted by solicitors, effectively and to high standards. The Bill would introduce a register for these reporters, with the ability to make regulations to specify the standards for inclusion or retention on the register, the process for inclusion (or removal) from that register, appointment and remuneration in individual cases (and for publicly funded cases under the legal aid system, there are already controls around remuneration).

Though we maintain that the current system delivers on this crucial role, representing the welfare of the child effectively, we appreciate the rationale for the establishment of a register and hope to work with Scottish Government and other stakeholders to ensure an effective registration regime. An amendment suggested for stage 3 is that “only a social worker registered with the Scottish Social Services Council may be appointed as a child welfare reporter”[[1]](#endnote-1).

We do not support this amendment, as we believe the change is unnecessary. The Sheriff already has the power to call for a social work report in a child welfare case, in terms of OCR 33.21A. The practical effect of this amendment, therefore, would be to reduce the sheriff’s options by making the appointment of child welfare reporters as an alternative redundant. Given children’s cases can be infinitely varied in circumstance, a broader suite of options for a sheriff allows the sheriff to take the step best suited to a child’s individual circumstances, which is consistent with the welfare-centred focus of the legislation.

The proposal at this stage would leave the question of resources unaddressed. It seems highly unlikely that the present level of reports could be replaced by social worker-only reports without a significant impact of both the timescales for and progress of child welfare case and other, essential child protection work those social workers are needed for.

The proposed change may misunderstand the function of a child welfare reporter. Whilst such reporters almost always involve a recommendation being given, their principal purpose is to ingather information for the sheriff to assist in his or her decision making. In those circumstances, and bearing in mind we are less likely to be dealing with the cohort of particularly vulnerable children (as, logically, those children should be within the children’s hearing system), it is unclear why a social worker’s expertise would be needed to discharge that function.

Existing s11 social work reports are of variable quality. Social workers are used to carrying out structured assessments, under the GIRFEC framework. They are skilled at those reports because they have specialist knowledge of that framework. By contrast, s11 reports from social workers are unstructured reports. Without detailed knowledge of the procedure rules, rules of evidence and the role their report plays in the wider court process, in some cases their reports can be less helpful than, say, a report from an experienced family law practitioner.

There may be unintended consequences to this proposed change and we highlight three possible areas:

* In particularly contentious cases, a child welfare reporter might subsequently be appointed as curator and sisted as a party so as to help protect the child’s interests throughout the process. If child welfare reporters are all social workers, they couldn’t be, meaning either that valuable option disappears or a Solicitor curator is appointed, meaning the child has to deal with a second individual.
* Some families (including children) have trust issues with social work, whereas they may be more likely view a differently disciplined practitioner as independent. A child welfare report is a useful procedural tool to assist in ensuring effective participation. There is a risk that particularly vulnerable people’s voices could be lost or diminished in the process, potentially impairing their ability to fully and effectively participate.
* Child welfare reports belong to the court and occur in a largely confidential process. Social work reports are largely called for where there is existing social work involvement, but this would change that. What happens if a social worker does a report which raises a welfare issue about a child not previously known to social work? In normal circumstances, it is for the sheriff to decide whether to make a referral to SCRA. Can a social worker use that information themselves and take steps independently of the case? What are the data protection implications of them using the sensitive personal data of individuals in that way when it was given to them in a specific context?
* In a child abduction context, where the return of a child is sought under the 1980 Hague convention, the views of children from the age of 5 upwards are routinely sought (and indeed the taking of such views is mandatory in European cases). The courts will make use of child welfare reporters to take those views (and sometimes child psychologists). In Scotland, Hague cases align with the 6-week time limit the convention notes for the case to be concluded. Therefore, child welfare reporters are usually given a very tight timescale to produce the report. While the child welfare reporters’ remit is specified by the court, such reports are very different from s. 11 cases. They deal mainly with the question of whether a child consents to the return to their country of habitual residence to have the court their decide their welfare. We would be concerned that social work departments would have the expertise or resource to solely deal with child welfare reports in this context.

# Regulation of child contact services

We support the regulation of child contact services, as these centres are regularly required to handle challenging situations and work with vulnerable children. The details for the standards for regulation will be established by regulations, and it will be important to ensure that they are sufficiently robust to protect the welfare of the children involved, while also flexible enough to meet the individual needs of families and the services available in local areas across Scotland. Adequate funding will be required, to ensure that contact centres are safe, clean and properly operated, though there also needs to be recognition of the limited resources available and the reliance on volunteers rather than paid employees at these centres.

We envisaged that all child contact services would be regulated, though the provisions of the Bill entail that there could remain unregulated provision. The Bill currently requires courts to refer to regulated centres, though does not include other referrals, such as from solicitors, social workers, GPs or other professionals within its scope. An amendment at stage 3[[2]](#endnote-2) would prohibit solicitors (or others on their behalf) from making referrals to unregulated child contact services and to make a failure to comply potentially a matter of professional misconduct.

We appreciate the concerns addressed by this amendment, to ensure that child contact takes place in regulated spaces. The amendment does not include, however, other sources of professional referral, risking referrals being made to unregulated centres following the implementation and commencement of the Bill. We do not support the proposed amendment in its provision that “failure [not to refer to a regulated child contact service] may be treated as professional misconduct or unsatisfactory professional conduct”.

We have no issue with amendment 20, which inserts new section 101CA (1) which provides that solicitors should be statutorily bound to refer children to regulated contact services. However, we take the view that the provisions of 101CA(2) are unnecessary. A breach of a duty imposed upon a solicitor in any statute is subject to the underlying law which emanates from the Solicitors (Scotland) Act 1980. Section 34 of the 1980 Act authorises the Law Society to make rules for regulating in respect of any matter the professional practice, conduct and discipline of solicitors. In terms of Section 21 of the Interpretation Act 1977 “subordinate legislation” means ‘…rules…made…under any Act’[[3]](#endnote-3).  Section 34 (4ZA) of the 1980 Act provides that if any solicitor fails to comply with any rule made under section 34 that failure may be treated as professional misconduct or unsatisfactory professional conduct. Accordingly, the rules under which a solicitor practices are subordinate legislation in the same category as Orders in Council, subordinate orders or other regulations made under statutory authority.

The practice rules for solicitors are clear that a solicitor’s fundamental duty to act in the best interests of clients is subordinate to the solicitor’s duty to comply with the law. The Law Society’s Practice Rules, B1: Standards of Conduct, state[[4]](#endnote-4):

‘1.4.1 You must act in the best interests of your clients subject to preserving your independence and complying with the law, these rules and the principles of good professional conduct.”

Breach of a statutory prohibition applicable to solicitors, of the nature of that proposed, would therefore constitute a breach of the Society’s practice rules. The 1980 Act already provides that such a breach may be treated as professional misconduct or unsatisfactory professional conduct.  The proposed subsection is therefore unnecessary and inappropriate repetition of a provision already contained in the legislation which governs the regulation of solicitors.

# Welfare or best interests

It is proposed to amend the Bill to so that section 11 refers to the “best interests” of the child concerned rather than the “welfare” of the child[[5]](#endnote-5). This is a change of significant magnitude and we believe that further consideration and consultation required before contemplating such a change. As such, we do not support the amendment and for several reasons:

* The “welfare of the child” is a familiar concept in Scots law that is well-understood and on which there is a substantial body of case law. It may be broadly equivalent to “best interests of the child”, However, the very fact that terminology has been changed would open the door to an argument that the test has, in fact, been altered. Given that the welfare of the child lies at the heart of so much decision-making about children in Scotland, ambiguity and the resulting uncertainty would be undesirable.
* Changing welfare to best interests in the 1995 Act would render it inconsistent with other key Scots child law statutes and, in particular, the Adoption and Children (Scotland) Act 2007 and the Children's Hearings (Scotland) Act 2011. It is my view that we should be seeking to achieve greater consistency and coherence in Scots child law, not less. The Children and Young People (Scotland) Act 2014 introduced the term “well-being” into the legislative lexicon, creating the opportunity for debate over the extent, if any, to which it differs from welfare. To add another term would lead to further fragmentation and, again, greater ambiguity.
* “Best interests” is, of course, the term used in the United Nations Convention on the Rights of the Child. Since the Scottish Government has committed to incorporating the Convention into Scots law as fully as is possible within the legislative competence of the Scottish Parliament, it might be argued that adopting the language of the Convention would be desirable. We believe, though, that any significant changes to the established language of Scots law should proceed on the basis of consistency across statutes and should be undertaken only after full consultation.

# Expression of views by the child

Several amendments[[6]](#endnote-6) have been made to allow the child to control the method by which his or her views are expressed, at least in the first instance, and we support these amendments. There is some ambiguity in Article 12 of the UN Convention on the Rights of the Child and in *General Comment No 12* over whether the choice of mechanism for expressing views to a court or tribunal vests in the child or the state[[7]](#endnote-7). To empower the child in this way, it would certainly be unproblematic from a CRC point of view, even if this goes further than required.

However, the Bill has lost the very valuable reference, found in the Children (Scotland) Act 1995, to it being the child’s choice whether he or she expresses views at all: the reference to “if the child wishes to express the view”. That avoids the child being placed under any pressure to do so, something supported by the United Nations Committee on the Rights of the Child: in *General Comment No 12: The Right of the Child to be Heard*, CRC/C/GC/12, [16]: “Expressing views is a choice for the child, not an obligation.”

# Effective participation

Issues around effective participation at Children’s Hearings have been raised, for instance, in the recent Supreme Court case of *ABC v Principal Reporter[[8]](#endnote-8)*, around how brothers and sisters are able to participate and the rights of access that they have in proceedings. Though the court determined that “[current] measures should work if the children’s hearings are conducted in a practical and sensible manner and in compliance with the guidance given by the Principal Reporter and Children’s Hearings Scotland”, there was recognition of the importance of “the interest of both the child and the sibling in maintaining a sibling relationship through contact (or through placement if both are subject to CSOs) in most cases.”

The amendment suggested for stage 3[[9]](#endnote-9) aims to address the potential difficulties which arise from the Supreme Court’s decision. This amendment in principle would look to resolve these by creating a middle ground, allowing affected children a right of participation without the consequences that would flow from them being a relevant person. Maintaining sibling relationships for looked after children is such an important issue and one that the legislative scheme to date has failed to adequately deal with and we support this change.

The criteria for enjoying such status is not set out in the Bill and would be set by secondary legislation from the Scottish Ministers, relying upon s177 of the 2011 Act. It would be preferable to include this within the Bill itself. There is no provision for a right of appeal against a decision not to confer such status. The former seems essential, given the panel are a lay tribunal and this is a potentially complex question of mixed fact and law. Persons seeking deemed relevant person status have a discrete right of appeal against a decision about that in terms of s160. The situation is broadly similar, and there seems no reason not to afford a similar right of focused appeal.

There is also no provision for a right of appeal against a decision taken by a panel which affects the rights of a person with such a status. The thrust of the Supreme Court judgment includes avoiding a dramatic expansion of the people involved in decision making, and so a completely open right of appeal would not be appropriate. The right could be restricted to appealing decisions which materially affected that person’s personal relations with the child. In practice, it would largely be focused on appeals against a measure (or probably more commonly a failure to make a measure) of contact between them.

There is a right to representation but no arrangements for funding. This may not be capable of resolving through secondary legislation, as the provisions for who can get ABWOR/children’s legal aid are set out in primary legislation (see s28B et seq of the Legal Aid (Scotland) Act 1986). When funding for persons seeking to be deemed relevant persons was made available, that came from amendment by virtue of s191 of the 2011 Act. Funding for representation makes these rights practical and effective, so there may need to be further consideration around how to ensure this can occur.

# Alternative dispute resolution

There is undoubtedly a role for alternative dispute resolution to help resolve disputes effectively and an amendment at stage 3 seeks to develop this provision[[10]](#endnote-10). However, we anticipate very complex issues and competing positions around the broadening of ADR, which would require very careful consideration. We believe that further consultation is important, before developing proposals in this area.

We are concerned about the provisions on mandatory mediation meetings. Though it would only be attending the meeting, not participating in mediation itself, that would be mandatory; and there is a domestic abuse exception. When the Justice Committee looked at mandatory mediation, in 2018, the proposal was rejected[[11]](#endnote-11).

The English experience of Mandatory Information and Assessment Meetings (MIAMs), where the “mandatory” element was introduced by the Children and Families Act 2014, s.10(1), has not been positive[[12]](#endnote-12). In Ireland, the legislation provides for MIAMs being available in family and succession proceedings (Mediation Act 2017, s.23) and the court can “invite the parties” to consider mediation, but it is not mandatory (s.16), though it remains a question as to how an invitation from the court, as opposed to a direction, might be perceived.

1. Amendment 40, section 8, Marshalled List of Amendments for Stage 3 (<https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/children-scotland-bill/stage-3/first-marshalled-list-of-amendments-at-stage-3-children-scotland-bill.pdf> [↑](#endnote-ref-1)
2. Amendment 20, after section 9, Marshalled List of Amendments for Stage 3 [↑](#endnote-ref-2)
3. <https://www.legislation.gov.uk/ukpga/1978/30/section/21> [↑](#endnote-ref-3)
4. <https://www.lawscot.org.uk/members/rules-and-guidance/rules-and-guidance/section-b/rule-b1/#:~:text=1%3A%20Application.%20Save%20when%20and%20to%20the%20extent,your%20personal%20integrity%20is%20beyond%20question.%20B1.3%3A%20Independence> [↑](#endnote-ref-4)
5. Amendment 46, section 13A [↑](#endnote-ref-5)
6. Amendments 8, 12-16 and 31 [↑](#endnote-ref-6)
7. Elaine E Sutherland, ‘Listening to the Voice of the Child: The Evolution of Participation Rights’ (2013) 26 *New Zealand Law Review* 335, 344-345) [↑](#endnote-ref-7)
8. [2018] CSIH 72 [↑](#endnote-ref-8)
9. Amendment 34, before section 17 [↑](#endnote-ref-9)
10. Amendment 31, after section 16 [↑](#endnote-ref-10)
11. Justice Committee, *I won’t see you in court: alternative dispute resolution in Scotland*, SP Paper 381, 9th Report, 2018 [↑](#endnote-ref-11)
12. A. Moore and S. Brookes, “MIAMs: a worthy idea, failing in delivery” 2018 Private Client Business 32. [↑](#endnote-ref-12)