

JUSTICE COMMITTEE

CHILDREN (SCOTLAND) BILL

SUBMISSION FROM DR NICK CHILD

After retiring from my NHS CAMHS career in Lanarkshire to work in a family therapy team, I have spent the last ten years increasingly – the last five years full-time – working alongside families and professionals in order to study how family law systems work, and in particular the system here in Scotland.

Stop and think again

1. I submit that the Justice Committee must stop a system that is not fit for purpose. The bill presents tinkering that, if approved, will prolong the system's unfit life for sorry generations of children to come. Here I focus on the regulation of Child Welfare Reporters.

2. I will compare the private and public family law systems to show how they have become conflated, confusing and conflictual. The result is often that no one deals competently with concerns of risk and children's welfare in families after parents separate. This promotes delay and gaming of the system that makes things worse for children.

3. To anyone with the expertise to see it – one familiar with the role of the Child Welfare Reporter, who has studied their reports – this is the work we train social workers to do. This role requires the professional skill of the social worker, not the private practice solicitor. Social services daily serve at the frontline with support and access to other resources. They already have the expertise to deal with risk effectively and swiftly. Social services already attend to the aims of this bill: to promote children's best interests, their views and involvement, their protection from abuse. Instead of tinkering with private family law, we should focus on better resourcing social services and the public family law system to be able to deal with matters of risk that currently present in the arena of private law.

4. The prior consultation for this bill (2018) received several authoritative evidence-based critiques by professionals who are qualified in the field of children and families and experienced in work within family law. The contributions of qualified professions have not been sought over many years of developing family law in Scotland. Their views have again been largely ignored by an established and exclusive in-group in the drafting of this bill. MSPs are outside the groups that continued to shape the bill. That scrutiny is essential here.

5. There is more to say about the various measures proposed in this bill. It's been said in consultation and largely ignored. So I focus on establishing registers of Child Welfare Reporters: Who on earth could be against such a warm and comforting idea as this – creating better qualifications for a core role? My argument will show you why the Justice Committee must take the issue seriously and therefore not support what is proposed.

‘Get it right for every child’?

6. Scottish politicians, Scots family law, and the Scottish Government famously profess global aspirations to make their top priority, the paramountcy of children’s welfare, ‘getting it right for every child’, and many other notionally child-inclusive and child-focused approaches and attempts to make our institutions trustworthy. The long-standing custom and practice in private family law of appointing private family law solicitors as Child Welfare Reporters (CWR) fails these noble sentiments. It is openly acknowledged that they have no requirement for any training and qualification for that special role. The jaws of observers outside Scotland drop in astonishment when they learn that private practice solicitors report to the courts on a child’s welfare. Here in Scotland, no one bats an eyelid.

7. Except in one area of Scotland, CWRs are now always lawyers (Financial Memorandum, para 55). That wasn’t the case at the start in the 1980s (Seale 1984; Matheson 1987). In these early reports by the same keen but junior civil servant (Sue Seale became Sue Matheson) – at a time when what we now face in family law was hardly imaginable – the issue of the competence of lawyers versus social workers is not considered and hardly mentioned. But we know from those reports that social workers once did bar (now CW) Reports before lawyers took over. One sheriff (mentioned in her reports) and one family lawyer I’ve met in recent years, recognise that lawyers are not qualified for the role of CWR. These two are exceptional: they recognise what their code of conduct requires of all lawyers (see para 17 on Rule B1.10). Apart from these two individuals, the institutional blindness to the question of competence continued through the years. How far this blindness has been self-interest or groupthink naivete can never be told. Even a report by a senior legal academic (Whitecross 2011) and the Bar Reporters Working Group (2013-2016) which was set up to look at lawyers’ competence as CWRs, do not look at competence.

8. The concern about competence eventually appeared. It was poorly addressed by the Bar Reporters Working Group though that was its task. That group’s membership was almost all lawyers. There was no canvassing of wider and appropriate professional opinion on this question; there was no research done. So the Working Group failed to adequately advise Scottish Government officials nor did they canvass wider opinions. The Working Group eventually recommended a tokenistic measure of training to legitimise long-standing practice. This was unacceptable to the Lord President. It has been authoritatively criticised in consultation. Yet here it is now in the draft bill. The relevant legal people at several levels and Scottish Government civil servants have no excuse for failing to tackle the issue. With that ignorance uncovered, culpability for failing to address this now is clear.

Competence: Social workers and solicitors as CWRs

9. The bill continues the assumption of decades that a lawyer has an interchangeable competence to that of a psychologist or a social worker. For example, the Policy Memorandum, para 89 states that: “... over 90% of CWRs are lawyers ... The Scottish Government recognises the important skills that child psychologists and social workers

could bring to this [CWR] role”. But in fact, as we see, the Scottish Government has spent decades systematically leaving out what those qualified professions could bring.

10. It is plainly wrong to assume that the skills lawyers bring to the role are equivalent to what a social worker or psychologist would bring. Certainly, there needs to be a register of qualified professionals for any role like CWR. But a yet-to-be-decided minimal training and register is condescendingly offered (eg Explanatory Notes, para 43) to those who are already far more qualified through long years of training that a lawyer has none of. To be their equivalent, lawyers would need the same years of training in a child and family profession to reach the point where a bit of extra CPD would be enough to qualify them as a CWR.

11. The bill perpetuates the ignorance. The training proposed means that children and families in complex situations are still going to be served by the unqualified. Remember that qualified social workers once did do bar (now CW) reports but were displaced by private practice solicitors. Imagine if, instead of serious concerns for emotional and other abuse and harm of children, the concern raised in private family law was for their physical troubles, say, bad teeth or diabetes. Would we allow lawyers to take over as the children’s dentist or their paediatrician? Even if lawyers had lots of CPD in these specialisms, it would still be unthinkable that they take on the job of dentist or doctor to the child. There would be an instant outcry. The less concrete matter of children’s welfare and risk of psychological harm passes unnoticed. If the unqualified can do the job of a social worker or a psychologist, then why do we bother to train those professions at all? In this case, misplaced trust and respect in the institution of the law throws a blanket over what should otherwise raise the same outcry.

12. Through the decades, lawyers have increasingly chosen to recommend each other through courts for sheriffs to appoint as CWRs – sheriffs who have themselves been brought up as part of the same culture. Social workers have been mostly pushed out or have drifted away under pressure of service cut-backs and increased workload. So, the pattern of private practice solicitors as CWRs has come to dominate. The issue of competence has been long hidden under lawyers’ control, kept from relevant outside scrutiny, but has emerged recently. But in this bill – when the wrapping is removed – competence still remains as concerning as ever. Can the Justice Committee see that this is a “licence for boy scouts to do open-heart surgery” (Child, 2018).

13. In relation to the children’s rights requirements under UN CRC, it is important to note the incompetence in conflating two different functions. Participation in matters that affect them is not the same as investigating concerns of risk and abuse. Investigation of risk normally entails special protocols and interviews with children by specially trained staff. Only under the external influence of UN CRC has private family law grafted on the use of unqualified interviewing and tokenistic proformas for these purposes. The right to participation is only offered to a child when there is a question of risk to investigate, when major decisions about their welfare hang in the balance. This investigation is not done competently in private family law.

Training and qualifications

14. So private solicitors have had “no formal training or qualifications requirements”. Some have suggested that decades of making a big mistake makes it acceptable. If that were so, this bill would not be bothering to try to amend it. The bill says the brief training will cover topics such as 'domestic abuse, coercive control and report writing'. A fuller list of topics should include many other aspects required for competent assessment and work with children and families entailed in providing CW Reports. It should include interviewing children and adults (in families). The role of CWR includes subsequent interpreting, assessing and reporting on matters relating to child development, psychology, education, personality, behaviour and mental health disorder, family relationships (and therefore adult personality, mental health disorder, etc), attachment and attachment disorders, separation and stress, trauma, harm and risk assessment, managing child protection, understanding children’s immature perception, memory, and vulnerability to influence and loyalty, all tied in with multidisciplinary working, interagency liaison, and so on. This is all part of competent child and family social work. That could never be replicated inside the private family law system. And why would you try when it is already available outside it?

15. Social workers and other professionals trained for work with children and families qualify after many full-time years of training. They are managed and supervised, subject to professional standards set by professional bodies who have responsibility for training, registration, qualification, CPD and complaints systems designed for those who work with children and families and for child protection protocols and services. Of course, they require extra training for work in a family law context. But a few days CPD plainly cannot be enough for solicitors who have none of the underpinning of professional child and family training.

16. But there’s some more to this incompetence. Apart from the rare exceptions, solicitors, sheriffs and other lawyers involved have, for these same decades in this regard, ignored their own code of conduct. This is the Law Society of Scotland’s Rule B1.10 on “Competence, diligence and appropriate skills: You must only act in those matters where you are competent to do so. ...”. Even legal authorities and academics have not been competent to spot what you’d have thought legal minds would be most competent to spot: they have failed to apply their own rule of competence. Solicitors who have not challenged in court the appointment of fellow solicitors as CWRs, and the Scottish Legal Aid Board in agreeing to use public funds to pay unqualified CWRs, have also ignored these rules about competence. Now we can end this long trail of incompetence before it gets brought to a more embarrassing arena.

17. The Policy Memorandum with this bill says (para 91):

The first option is do nothing and retain the status quo. This would not be a palatable option for the majority of stakeholders as it does not protect the best interests of the child. Very few respondents to the consultation have said that there should not be a change to the existing system.

This helps round up the argument. It opens up the bill’s sleight of hand. In contrast to what it says here, the bill presents something that is so minimal that, in fact, it does ‘do nothing’. It does it in a way that it hopes will look like it’s doing something. To make it ‘palatable to stakeholders’ it appears to ‘change the existing system’. But this is so

minimal that it does not amount to any real change. It is essentially 'the status quo' with an empty smile on it. It will not 'protect the best interests of the child' any more than it has in the past.

Conclusion

18. Private family law was never designed to deal with serious concerns for children as if it was a frontline agency. Its operational mode is the diametric opposite of how social services do that job along with other frontline agencies under public family law. Decades of displacing them has in turn undermined the role, resources and functioning of social services. When faced with post-separation concerns for risk and child welfare, many simply yield to private family law: 'It's not our job ... it's a contact dispute' busy workers say, consigning children who have been identified as a concern to the limbo of long-drawn-out processes of private family law for months if not years, ever more likely then to be failed by the incompetent system.

19. The incompetence will continue for future solicitors and associates should they be appointed or paid as the draft bill proposes after 'qualifying' for the proposed register for CWRs after the guestimated few days of training. Compared to the standards of training of those who are actually competent, a few days is a shockingly inadequate training and qualification for a solicitor for the task of CWR.

20. This bill should have recognised more honestly the competence required for the task of CWR. Instead, despite authoritative advice, the bill seeks by sleight of hand to pass off a miniscule bit more training of a complex skill for solicitors as an acceptable solution. I have shown just how unacceptable this proposal is, how culpable those who approve this measure will be, how the world would eventually see what we've been doing all along in Scotland.

21. The Justice Committee now have an opportunity to adopt afresh an old established principle: return serious child welfare issues to an already functioning, potentially more competent agency. That is social services as part of the established front line under public family law. In that case, there would not be a need to train lawyers or any other private family law in-house duplicate service for the task of preparing CWRs. This renewed old principle will also promote better fundamental individual responsibilities and rights, better justice, coherent purpose, structure and funding than private family law can offer. Amend this bill substantially and it could actually achieve its aims. These are: the paramountcy and best interests of the child, child-inclusion, child protection, and children's welfare, together with the welfare of their families – the people children are attached to, depend on, and who are responsible for them.

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FOR REFERENCE: SELECTED RELEVANT PARAGRAPHS**FINANCIAL MEMORANDUM**

10. Currently, CWRs are appointed from lists held by the Court of Session and the six Sheriffs Principal. There are no formal training or qualifications requirements for CWRs and their appointment to the lists is not time limited.

32. CWRs would also require to undergo training on topics such as domestic abuse, coercive control and report writing. Even if the administration and operation of the register of CWRs were to be managed in-house it is not envisaged that the training would be run in-house. Based on estimated costs of £400 per day from stakeholders of running courses the total cost of providing four days training to each CWRs is estimated at £0.67m (400x4x421).

55. Based on an average cost of £2739 per report, the table below shows a range of costs between £0.14m - £0.28m for 50 and 100 additional Child Welfare Reports respectively. The Scottish Government heard from stakeholders that there are very few Child Welfare Reports prepared by social work departments. The Scottish Government understands that there are Child Welfare Reports prepared by social work departments in the Comhairle nan Eilean Siar and Dumfries and Galloway. Figures from Comhairle nan Eilean Siar show that in 2018 it produced 25 Child Welfare Reports. This figure has been doubled to account for Dumfries and Galloway and then additional figures added to reflect the uncertainty of these number of reports that local authorities currently produce.

EXPLANATORY NOTES

43. Section 14 amends section 11 of the Matrimonial Proceedings (Children) Act 1958 as it applies to cases under section 11 of the 1995 Act. This amendment means that if a local authority employee wishes to continue to act as a child welfare reporter then the employee would need to apply to be on the register of child welfare reporters and meet the required eligibility criteria.

POLICY MEMORANDUM

89 The Scottish Government is aware that currently over 90% of CWRs are lawyers and is grateful for the skills that lawyers bring to this role. However, one of the aims of the Bill is to encourage more non-lawyers to apply to become CWRs. The Scottish Government recognises the important skills that child psychologists and social workers could bring to this role.

Alternatives

91 The first option is do nothing and retain the status quo. This would not be a palatable option for the majority of stakeholders as it does not protect the best interests of the child. Very few respondents to the consultation have said that there should not be a change to the existing system.

CALL FOR VIEWS

According to the Scottish Government, the aims of the Bill are to:

- > ensure the views of the child are heard in contact and residence cases;
- > further protect victims of domestic abuse and their children;
- > ensure the best interests of the child are at the centre of contact and residence cases and Children's Hearings; and
- > further compliance with the United Nations Convention on the Rights of the Child (UNCRC) in family court cases.

The Bill makes various changes to existing legislation try to achieve these aims, including:

- > encouraging the views of younger children to be heard, by removing the presumption that a child over the age of 12 is of sufficient age and maturity to form a view;
- > establishing registers of child welfare reporters (who can seek the views of the child or undertake other enquiries and make reports to the court) and curators ad litem (who can be appointed to safeguard the interests of a child during the proceedings);
- > protecting vulnerable witnesses in court in cases concerning children, for example, by prohibiting a party personally questioning a witness where there are allegations of domestic abuse;
- > adding to the list of factors the court must consider when making decisions about contact and residence;
- > regulating child contact centres, where services are provided for children to maintain contact with parents and other family members they are not living with;
- > promoting contact between looked after children and siblings; and
- > recognising parental rights and responsibilities obtained outwith the UK.

.... Your response does not need to cover all of these areas (1 to 13) and you can focus on those that are relevant to you or your organisation. Also, you are welcome to cover other areas in your submission that you think are relevant to the Committee's consideration of the Bill