26 May 2020

Margaret Mitchell MSP,
Convener, Justice Committee,
Justice Committee Clerks,
Room T2.60,
The Scottish Parliament,
Edinburgh.
EH99 1SP

By email - justicecommittee@parliament.scot

Dear Convener,

CHILDREN (SCOTLAND) BILL - STAGE 1 REPORT - 7th REPORT (SESSION 5)

I write to provide further information to the Committee, in relation to paragraphs 49-56, 74 and 75 of the Stage 1 report and the recommendations at paragraphs 76 and 77 relating to the education of the judiciary and judicial specialisation.

At paragraph 56 of the Report, the Director of the Judicial Institute for Scotland’s letter dated 4 March 2020 is referred to. He reports that he is confident that the content and level of the Institute’s overall provision meets the needs of judicial office holders in this area. That letter was sent in response to the Committee’s letter dated 24 February, in which the Institute was specifically asked what training is currently delivered to the judiciary in domestic abuse and child law.

As outlined in the Institute’s strategy, the entire purpose of the Institute is to identify and respond continually to the needs of judicial office holders as those develop and change. It undertakes a range of activities which are designed to ensure that both its learning needs analysis and educational responses are robust. This involves the Director and Deputy Director working with a team of educationalists to assess the impact of forthcoming legislation, identify new learning needs, and design appropriate learning interventions. Clearly, this includes scrutiny of the Children (Scotland) Bill as it progresses through Parliament and ensuring, as stated in paragraph 74 of the report, that the Institute responds to ‘any changes in practice that the Bill brings about’.
The Director's proposed approaches to significant developments are discussed at the Institute's Board. It consists of the Director and the Chair and Vice-Chair who are both Senators of the College of Justice. The meetings are attended by the Institute's Head of Education who provides advice. The Board last met on 21 May 2020. The Bill was an agenda item. The Bill will also be discussed, and views sought, at the Institute's Council, on which all judicial office holders, notably sheriffs, are represented, on 8 June. The Institute has noted the evidence contained in the Stage 1 report at paragraphs 49-56 and has made some initial observations in Table A.

The Institute has a strong reputation for ensuring that the learning needs of judicial office holders are met fully and timeously. Its response to raise awareness of the Domestic Abuse (Scotland) Act 2018 through a highly innovative blended learning programme, which every salaried judge in Scotland would have completed, had its ninth and last course not been postponed due to COVID-19 restrictions, is just one example of that. Another is its current plans to design an appropriate response to the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019. Table A includes more details of both programmes. The Institute's response to the Children (Scotland) Bill might involve re-designing current programmes or alternatively it may design an entirely new programme.

Read together with its strategy, its previous annual reports provide lengthy descriptions of the Institute's previous programmes and how it undertakes its work.

As regards judicial specialisation, I wrote to the Public Petitions Committee on 9 July 2018 on this issue. I attach a copy for ease of reference. The access to justice issues, and the very real practical difficulties, which I highlighted there remain. The evidence which the Committee received on the Bill indicates that Professor Sutherland and Dr Whitecross echo those concerns.

The courts are continuing to make inventive uses of technology at present, because needs must. However, we are having to identify and resolve issues on the hoof. Longer-term learning from that will need collated before it will be possible to assess whether, for example, remote hearings work sufficiently well for all court users with special needs or those in geographically remote areas with limited broadband access. It is my hope that some of the courts' many innovations, which have been rapidly developed to deal with Covid-19 challenges, may be put to good use when more normal times return. It may be that the experience will prompt improvements in the administration of justice, along the lines which I have been advocating for many years, for all court users.

Yours sincerely

[Signature]

1 Partly online, partly face to face
2 Alternative arrangements are currently being put in place.
Table A

51 Several stakeholders suggested that, in order for the Bill's policy aims to be achieved, there is a need for judicial training on a variety of topics, including domestic abuse and coercive control, trauma, child development and effective communication with children.

Institute response:

The Institute has and will continue to cover these topics on a rolling basis. As it scrutinises the learning needs arising from the Bill, current programmes may be adapted or it may introduce new programmes.

Example: Throughout the course of 2019, for the first time ever the Institute trained nearly every salaried judge in Scotland as part of a multi-faceted innovative blended learning programme covering all of the topics referenced by stakeholders that are noted in paragraph 51 of the Report.

Example: The Institute is currently designing its blended learning response to the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019, which has a strong emphasis on communication with children.

52 In particular, Children 1st and Scottish Women's Aid highlighted that there is no specific financial provision in the Financial Memorandum for judicial training in speaking to children. In a joint submission to the Finance and Constitution Committee, they suggested that such training is necessary because "there is often inconsistent practice and methods of engagement in this area".

Institute response:

This is noted by the Institute. As outlined in the Institute’s strategy, it is a fundamental aspect of the Institute’s educational philosophy that judicial education does not affect the independence of the judiciary or individual decisions that will be taken in cases.

53 Similarly, the Children and Young People's Commissioner Scotland suggested that some sheriffs could benefit from training on hearing the views of children, particularly to improve understanding of "the child's evolving capacities".
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<th><strong>Institute response:</strong></th>
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9 July 2018

Ms Lynn Russell
Assistant Clerk
Public Petitions Committee
The Scottish Parliament
Edinburgh
EH99 1SP

By email only to: petitions@parliament.scot

Dear Ms Russell,

CONSIDERATION OF PETITION PE1631 – SPECIALIST SHERIFFS

Thank you for your letter of 11 June 2018 in relation to the above petition, which I have considered along with the Official Report of the Public Petitions Committee.

Your letter notes that the Courts Reform (Scotland) Act 2014 (“the 2014 Act”) gives the Lord President the power to ‘determine that family cases be heard by specialist family sheriffs’. It goes on to ask whether any ‘criterion exists for the Lord President to determine when and in what child contact cases this happens.’

The applicable legislation

Before considering the possible merits of specialist family sheriffs, it is important to bear in mind what sections 34 and 35 of the 2014 Act say, and to understand the extent of my powers under these provisions. For the Committee’s convenience, the text of sections 34 and 35 is set out in Annex A to this letter.

Section 34 empowers me to ‘determine categories of sheriff court case’ that I think are ‘suited to being dealt with by judicial officers that specialise in the category of case’. If I were to decide that “family actions” (which would include the contact cases, referred to in your letter) are a category of case that would be suited to being dealt with by specialist sheriffs, it would then fall to the sheriffs principal to decide what arrangements, if any, should be put in place in the sheriifdoms to give effect to this.

Section 35 is drafted in permissive terms. It states that the sheriffs principal ‘may designate one or more sheriffs of the sheriifdom as specialists’ to deal with a category of
case. They would not have to do this. Since the efficient disposal of business in the sheriff courts is the responsibility of each individual sheriff principal, I would be reluctant to force them to do so against their will.

The use of specialist sheriffs to date

So far, only personal injury cases have been determined as suited to being dealt with by specialist sheriffs. These specialist sheriffs sit only at Edinburgh Sheriff Court, in the All-Scotland Personal Injury Court, a statutory creation which has national jurisdiction. A party who wishes to have a case dealt with by a specialist personal injury sheriff must therefore bring the action in Edinburgh, where all hearings will take place.

Although sheriffs principal do have the option of appointing specialist personal injury sheriffs in other courts, this has not yet happened. This is due to the difficulties with the programming of court business that are discussed below.

Practical and operational considerations – family actions

Some of our larger courts already have a number of sheriffs who are dedicated by the sheriffs principal to hearing family cases. Other courts operate a management system whereby a sheriff or specified group of sheriffs actively control and manage the allocation of family business, taking account of the individual requirements of any particular case. These arrangements reflect the reality that, in courts where it is possible to allocate family business to a dedicated pool of sheriffs, this is already being done. It does not require the exercise of the powers in sections 34 and 35 of the 2014 Act.

The sheriffs principal have already taken steps to ensure, wherever possible, that there is judicial continuity in family proceedings. This is impossible to achieve all the time because of factors outwith the control of the sheriffs principal, including cases not concluding as scheduled, timetabling constraints and judicial illness.

A requirement for a specialist family sheriff in our smaller and medium-sized courts would be impractical. The timely disposal of the business of these courts requires sheriffs to deal with a wide range of civil and criminal cases. Sheriffs in these courts deal with the whole ambit of family proceedings and, as noted above, they retain control and management of cases from the start, wherever possible. Removing these cases from their portfolio would result not only in demotivation but also in the loss of considerable experience built up over many years.

The introduction of specialist family sheriffs in every sheriffdom would involve adopting one of two approaches, each of which would give rise to a number of difficult issues:
1. ‘Hub’ courts

Each sheriffdom could have a family ‘hub’; that is one court where specialist sheriffs would be based. They would hear family cases in that court only. The downside of this is that many individuals would have to travel further than at present to get to court. In the rural and island areas, this could involve very long distances. Family actions frequently involve unrepresented parties and multiple hearings that must be attended by the parties personally. More so than in any other type of case, in family actions it is extremely important for parties to have access to a local court.

2. Mobile sheriffs

A number of specialist sheriffs could be appointed in each sheriffdom to sit in all the courts in that area on a rotational basis. This would prove a challenge from a court programming perspective. It is likely to promote considerable delay in family actions, which would have to be scheduled around the availability of the specialist sheriff to go to a particular court. It would be especially difficult to deal with urgent matters (for example, where a child is in danger), which cannot always wait a number of days.

I have not discussed the above approaches in detail, but hope the brief outline will help the Committee to understand why the introduction of specialist family sheriffs would not be a panacea. I appreciate that the idea sounds very attractive in principle. In reality it is unlikely to deliver the advantages hoped for. Rather it would be likely to create problems of its own.

Child welfare hearings – proposal to introduce shrieval note sheets

The Committee’s previous discussions have recognised that this proposal has already been considered and rejected by the Scottish Civil Justice Council’s Family Law Committee (FLC). There are a number of reasons for this. These are explained in paragraph 2.11 of the report by the FLC’s sub-committee on case management1. An extract of the relevant text is set out in Annex B to this letter.

The support for the introduction of shrieval note sheets seems to be based on a need to ensure a flow of information where a number of different sheriffs preside over a series of child welfare hearings. My understanding is that, where achievable, sheriffs principal endeavour to ensure that a single sheriff deals with successive child welfare hearings.

Where this is not possible, the court interlocutor is a record of any decision made at the hearing. In situations where a party feels that additional detail must be brought

1 This is available online at www.scottishciviljusticecouncil.gov.uk/committees/family-law-committee, by clicking on the papers for the FLC’s meeting of 23 October 2017.
to the attention of the presiding sheriff, the informal nature of child welfare hearings, coupled with the general requirement that parties attend personally, affords ample opportunity for this to be done.

[Signature]

[Signature]
ANNEX A

COURTS REFORM (SCOTLAND) ACT 2014, SECTIONS 34 AND 35

34 Determination of categories of case for purposes of judicial specialisation
(1) The Lord President of the Court of Session may, by direction, determine categories of sheriff court case that the Lord President considers to be suited to being dealt with by judicial officers that specialise in the category of case.

(2) The Lord President may determine categories of case under subsection (1) by reference to subject matter, value or such other criteria as the Lord President considers appropriate.

(3) The Lord President may issue different directions under subsection (1) in relation to different types of judicial officer.

(4) The Lord President may vary or revoke any direction made under subsection (1).

(5) In this section—
   "judicial officer" means—
   (a) a sheriff,
   (b) a summary sheriff,
   (c) a part-time sheriff,
   (d) a part-time summary sheriff,
   "sheriff court case" means any type of proceedings (whether civil or criminal) that may competently be brought in the sheriff court.

35 Designation of specialist judiciary
(1) This section applies where the Lord President of the Court of Session has made a direction under section 34.

(2) The sheriff principal of a sheriffdom may—
   (a) in relation to any category of case determined in the direction that may competently be dealt with by a sheriff, designate one or more sheriffs of the sheriffdom as specialists in that category of case,
   (b) in relation to any category of case determined in the direction that may competently be dealt with by a summary sheriff, designate one or more summary sheriffs of the sheriffdom as specialists in that category of case.

(3) The sheriff principal may designate the same sheriff or summary sheriff in relation to more than one category of case determined in the direction.

(4) The sheriff principal of a sheriffdom may at any time withdraw a designation made (whether by that sheriff principal or another) under subsection (2) in relation to any sheriff, or summary sheriff, of the sheriffdom.
(5) The Lord President may—
(a) in relation to any category of case determined in the direction that may competently be dealt with by a part-time sheriff, designate one or more part-time sheriffs as specialists in that category,
(b) in relation to any category of case determined in the direction that may competently be dealt with by a part-time summary sheriff, designate one or more part-time summary sheriffs as specialists in that category.

(6) The Lord President may at any time withdraw a designation made under subsection (5).

(7) The designation of a sheriff, summary sheriff, part-time sheriff or part-time summary sheriff (a “designated judicial officer”) under this section does not affect—
(a) the designated judicial officer's competence to deal with any category of case other than the one in relation to which the designation is made, or
(b) the competence of any other sheriff, summary sheriff, part-time sheriff or part-time summary sheriff to deal with the category of case in relation to which the designation is made.
ANNEX B

EXTRACT FROM REPORT OF THE FAMILY LAW COMMITTEE’S SUBCOMMITTEE ON CASE MANAGEMENT IN FAMILY ACTIONS

Paragraph 2.11 of the report concludes that the introduction of shorthand note sheets as a means of recording what occurred at child welfare hearings would be inappropriate for the following reasons:

(a) The additional judicial time and resources required to complete such a note would lead to a reduction in the number of child welfare hearings that could be scheduled in the court programme, which would increase delay.

(b) If this practice were to become formalised, the status of such a note could be problematic. If it were to be a part of process, it might result in child welfare hearings being diverted into discussions about the content of the note and what was said at the previous hearing, rather than focussing on the welfare of the child. The note could also be subject to appeal, which might lead to it taking on a more formal status. On the other hand, if the note was not part of process, there could be a question as to exactly what its status might be, and how it should be retained, given its confidential nature. It is currently up to individual sheriffs to make their own notes as they see fit, but these issues might be raised if the practice were to become formalised, such that all sheriffs were compelled to take these notes.

(c) It is already the case that there is a record of decisions taken at a child welfare hearing – namely, the interlocutor. If, in addition, a note were to be required detailing the discussions that led to the decision, this could bring about a fundamental change in the nature of child welfare hearings. At present, they are intended to be informal and fully focused on the welfare of the child. If notes were to be taken as a means of recording what unfolded at the hearing, there is a risk that this could be undermined – parties could become more entrenched and not want to be seen to concede ground.

(d) It would not be a practical “one size fits all” solution. In courts with only one sheriff, completing such a note would not serve any purpose. Some courts, such as Glasgow and Edinburgh, have particular sheriffs who are dedicated to family actions and hear the majority of family cases in those courts. This means that greater judicial continuity is possible, which lessens the need for a note.