

# Children (Scotland) Bill 2019

## Balancing the rights of parents and children: Report Summary

### The Children (Scotland) Bill 2019

The **Children (Scotland) Bill 2019** was introduced on 3 September 2019. The purpose of the Bill is to ensure that children's best interests, and hearing their views, are at the centre of family law court cases.

In particular, the Bill proposes updates to **Part 1 of the Children (Scotland) Act 1995 ('the 1995 Act')**, the legislation that currently regulates family court cases. The Bill also introduces greater regulation for professionals and professional services working with families involved in family court cases. Securing safety is a key aim of the Bill and it proposes new safeguards for victims of domestic abuse.

### Background

In family law court cases, the **most important consideration is the best interests/welfare of the child**. However, courts must also balance the competing rights of different family members. For example, the rights and interests of each parent require to be carefully considered while ensuring that children can also be appropriately involved when courts make decisions. All of this can result in tension between the rights of parents and their children in family cases.

The Children (Scotland) Act 1995 is now 24 years old. Since the 1995 Act came into force, two international treaties have become increasingly important in Scotland. These treaties set out certain fundamental rights belonging to individuals. They are: (a) the **European Convention on Human Rights ('ECHR')** and (b) the **United Nations Convention on the Rights of Child ('UNCRC')**.

The Human Rights Act 1998 'incorporated' the ECHR into UK law. Incorporation means that national courts and public bodies should act in a way that is compatible with the provisions of the ECHR. The UNCRC provides a comprehensive statement of the human rights of all children (those aged 18 or younger). It has not yet been incorporated. The Scottish Government intends to introduce **another Bill very soon that will incorporate the UNCRC**.

### Purpose of Report

In view of the above, it is important to ensure that existing and proposed legislation is compatible with the rights set out in the ECHR and the UNCRC. **The purpose of the Report is to consider:**

- a) **The balance currently struck between the rights and interests of parents and children** in the Children (Scotland) Act 1995.
- b) **How the balance of rights might change** if the Children (Scotland) Bill 2019 becomes law.

### What the Report says about the current law

The **Report explains the impact of key rights** from the ECHR and UNCRC on family law cases about children. These rights include:

- **ECHR: Article 6** (right to a fair hearing), **Article 8** (right to respect for private and family life) and **Article 14** (right not to be discriminated against), and
- **UNCRC: Article 2** (child's right not to be discriminated against), **Article 3** (child's best interests), **Article 6** (right to life/development/survival), **Article 12** (child's right to express a view), **Article 18** (recognition of 'common responsibilities' of both parents in child's upbringing) and **Article 19** (protection from all forms of physical or mental violence, injury or abuse while in the care of parents/carers).

The Report also outlines the main sections in **Part 1 of the Children (Scotland) Act 1995**. It is explained that the current protections the law gives to **vulnerable witnesses** under the Vulnerable Witnesses (Scotland) Act 2004 are not tailored to family law cases and do not extend to Child Welfare Hearings. Child Welfare Hearings are hearings in family cases where the court tries to identify the issues in dispute and where both parties are present in court. Most family court cases are resolved in the course of Child Welfare Hearings, rather than proceeding to a final hearing where evidence is required to be given by the parties. At present, the parties sit across the table from each other at Child Welfare Hearings, even when there have been allegations of (or a conviction for) abuse.

Concern is also expressed in the Report regarding the **lack of infrastructure supporting children involved in family cases**. For example, Part 1 of the 1995 Act requires the court to ascertain whether children wish to express a view. However, children are not given options as to how they might prefer to express their view. Nor are there clear or consistently available mechanisms in place for supporting, guiding or informing children involved in family court cases. Children are also unlikely to be told by professionals involved in their case: (a) what decision has been reached, (b) how the court has reached that decision or (c) how their views were taken into account.

The Report outlines certain key principles in the 1995 Act (in particular, the 'welfare test'). The vast majority of parenting disputes are resolved out of court. **The 1995 Act currently provides an appropriate framework that:**

- **Enables lawyers to advise clients about their rights** and possible outcomes in family law disputes, and
- **Assists courts as to how to balance the rights of parents and children** in family cases before them.

However, **the Report argues that some specific provisions of the 1995 Act are outdated**, given our current understanding of the rights set out in the ECHR and the UNCRC. These include:

- **The presumption that children age 12 and above are mature enough to form a view.** This creates an expectation that most children who are 12 or older are able to express a view while most children under that age may not be. Article 12 of the UNCRC says that all children (i.e. children of *any* age) who can form a view and wish to express that view must be allowed do so and, importantly, be listened to.
- **The legal status of unmarried fathers and their children.** Around half of Scottish children are now born to unmarried parents. The law treats unmarried fathers differently from other parents (i.e. mothers and married fathers). As the 1995 Act currently stands, there may be issues in particular about compliance with Article 8 of the ECHR (right to respect for private and family life) and Article 2

of the UNCRC (child's right not to be discriminated against based on the child's birth status).

### What the Report says about key proposals in the Bill

The Bill is noted to be wide-ranging in scope. Some of the sections of the Bill propose changes to the substance of the 1995 Act (i.e. what the law says) while other sections propose changes affecting how family cases will operate (i.e. how the law is applied in practice).

Overall, the Report says that the **key aims of the Bill are compliant** with the rights set out for parents and children in the ECHR and UNCRC. The Report says that **the following provisions in the Bill are most relevant to the rights of family members** involved in family cases:

cases:

- **Section 1 would remove the presumption (i.e. the starting point for the court) that a child 12 years and over is capable of expressing a view.** The policy intention is to ensure that courts hear from younger children as well as those over the age of 12. This **would more closely align the 1995 Act with the spirit of the UNCRC.** However, a number of issues arise with regard to **the lack of detail** found in the proposed sections relating to hearing children's views. **No specific provision** has been included in the Bill to support children by making family court processes more **child-friendly**. For example, one option, supported by current Scottish research, would be the introduction of a **child support worker**, a role consulted upon by the Scottish Government but which does not feature in the Bill. Another possibility would be to give children **some choice** over the manner in which they express a view. Without such provision, the removal of the age presumption is likely to make **little difference** to the environment in which children express a view.
- **Section 15 would create a new duty on the court to explain (most) decisions to (most) children.** This can be viewed as a **positive step** in terms of respecting the Article 12 rights of children to be heard and taken seriously. However, as with the above proposal, **several concerns are raised.** These relate to: (i) **limitations** on the duty to provide feedback; (ii) a lack of detail surrounding the **delivery, content and quality of explanations** to be given; (iii) the absence of proposals relating to creating a more **child-friendly environment.**
- **Sections 1, 12, 21 would restate, and add to, the statutory factors the court must take into account when deciding an individual case.** In particular, these sections introduce a **checklist of factors** for the court to consider in family cases. The Report explains that **valid human rights arguments can be made both for and against** the creation of a statutory checklist. Broad considerations involved in creating a checklist are discussed with reference to (a) **Article 3** of the UNCRC (child's best interests), (b) **guidance issued by the UN Committee on the Rights of the Child** and (c) the approach adopted in other countries. The proposed checklist is then reviewed with reference to three questions:
  - **Is the checklist unbalanced?** The checklist contains three elements to which the court 'must have regard'. The checklist focuses on (i) protection from abuse/risk of abuse; (ii) the effect that the order might have on the child's parents in bringing up the child; (iii) the effect that the order might have on the child's important relationships with others (in practice this might include, e.g. siblings, grandparents). Elements (ii) and (iii) are new.

The Report considers that, on the face of it, the checklist does not appear unbalanced.

- ***Is the checklist incomplete?*** This depends on the aim of the checklist. With the exception of addressing domestic abuse, the checklist is largely future-focused. This means that it is concerned with the likely impact that the court order may have on certain aspects of the child's welfare. Most of the important elements that the UN Committee on the Rights of the Child says should feature on a welfare checklist are absent. So, deciding what is best for the child would be, as before, left to the broad discretion of family courts.
- ***Will the checklist keep children safe?*** The Report notes that some 'shared parenting' provisions in other jurisdictions contributed to an environment in which children were placed at risk. The checklist does not create a shared parenting presumption. The 'protection from abuse/risk of abuse' provisions currently found in section 11(7A)-(7E) of the 1995 Act are broadly re-enacted in the proposed checklist. Those provisions already give courts tools to address abuse.
- **Sections 4 – 7 would create additional safeguards for vulnerable witnesses / parties in family cases.** The Bill seeks to achieve this in two main ways. First, it extends the provisions of the Vulnerable Witnesses (Scotland) Act 2004 by widening the group of individuals who can be **deemed vulnerable** in family cases. This has been designed to include victims of domestic abuse. Secondly, it creates a **new protective 'special measure'** (a prohibition on examination or cross-examination by an abuser/alleged abuser) for possible use in family cases. In particular, this includes using these provisions in Child Welfare Hearings where parties are required to sit across the table from each other. The Report discusses the human rights most relevant in such cases. It concludes, overall, that the proposed safeguards for vulnerable witnesses and parties in court proceedings can be viewed in a positive light. **The Bill introduces protective measures when and where they are required in family cases.**
- **Sections 8, 9 and 13 would create a system of regulation for professionals and professional services involved in family cases.** Three main areas have been addressed:
  - **Section 8: regulation of child welfare reporters ('CWRs').** CWRs are individuals appointed by courts to undertake specific enquiries in family cases. An important part of their role can be to seek (and report back on) the views of children. Most CWRs are solicitors. Some concerns have been raised about inconsistency in respect of (a) when and how often CWRs are appointed by courts, (b) their training and (c) fees charged for reports. Section 8 would enable Scottish Ministers to create a register of CWRs and to establish clear systems relating, e.g., to training and fees. This supports a key aim of the Bill and, on the face of it, is unlikely to have a negative impact upon the balance of rights in family cases.
  - **Section 9: regulation of child contact services.** This section would enable greater regulation by Scottish Ministers of child contact centres (i.e. conflict-free venues facilitating contact between children, parents and others). There are currently 41 child contact centres in Scotland, with most centres being staffed by volunteers. The proposed regulation of contact services (e.g. contact centres) is welcomed. However, the report considers potential issues relating to the possibility of a reduction in such

services. Such a reduction would raise concerns in terms of complying with Article 3 of the UNCRC (child's best interests).

- **Section 13: regulation of curators ad litem.** Like CWRs, curators are individuals appointed by courts in family cases. Unlike CWRs (who may seek the views of children), curators are appointed to safeguard a child's best interests. Section 13 would allow Scottish Ministers to establish a register of curators. The section would also require that courts only appoint a curator where 'necessary' and that courts reassess the appointment of that curator every 6 months. This section would likely lead to (a) a reduction in the number of curator ad litem appointments made in family cases, and (b) a lack of ongoing involvement of curators in family cases. This could have an impact on the best interests of vulnerable children in family cases.

**Section 16 would establish a new duty to investigate the failure to obey a court order.** Courts currently have the power to find parties in 'contempt of court' if they fail to obey a court order. A party found in contempt can be fined or imprisoned. Findings of contempt are used sparingly in family cases because it is generally assumed that the child's best interests are not served by punishing his or her parent. Section 16 would empower the court to investigate situations in which the court has reached the stage of considering whether to: (a) find a person in contempt or (b) change the order currently in place. The section would also allow the court to instruct a CWR to carry out the investigation. This could assist the court in ascertaining whether a contempt of court exists or whether there are other circumstances leading to non-compliance with a court order. **This section could, if enacted, empower courts to identify a failure to obey a court order with a view to suggesting a solution focused on the child's best interests (Article 3, UNCRC).**

**Dr Lesley-Anne Barnes Macfarlane**  
**Edinburgh Napier University**  
**October 2019**