

## INFORMATION PAPER BY THE SCOTTISH GOVERNMENT

### INFORMATION PAPER ON FORTHCOMING POLICY PAPERS FROM SCOTTISH GOVERNMENT ON CHILDREN (SCOTLAND) BILL AND THE FAMILY JUSTICE MODERNISATION STRATEGY

#### Introduction

1. This paper by the Scottish Government provides information on likely forthcoming policy papers to the Family Law Committee of the Scottish Civil Justice Council (FLC) from the Scottish Government on the Children (Scotland) Bill<sup>1</sup>, if the Bill is enacted by Parliament, and on the associated Family Justice Modernisation Strategy (FJMS)<sup>2</sup>.
2. This is just for information at this stage. More detailed policy papers will be submitted to the FLC in due course. Paragraph 2.29 of the FJMS indicates that the Scottish Government will produce a policy paper for the FLC in 2020 on implications of the Bill in relation to matters such as rules of court. Full implementation of the Bill if it is enacted by Parliament will take some years, given the need, for example, for secondary legislation in a number of areas.
3. This is an open paper.

#### Children (Scotland) Bill

4. The Scottish Government introduced the Children (Scotland) Bill into the Scottish Parliament on 2 September 2019. The is informed by the outcome of the consultation on the Review of Part 1 of the Children (Scotland) Act 1995 (the 1995 Act)<sup>3</sup>. The consultation responses have been published where the Scottish Government has permission to do so<sup>4</sup>. The Scottish Government has also published an analysis report<sup>5</sup>.
5. The policy objectives 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 any contact and residence case and Children's Hearing; and
  - Further compliance with the United Nations Convention on the Rights of the Child in family court cases.
6. The Scottish Government have identified that the following provisions in the Children (Scotland) Bill may require changes to the Ordinary Cause Rules and the equivalent rules in the Court of Session.

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<sup>1</sup> <https://www.parliament.scot/parliamentarybusiness/Bills/112632.aspx>

<sup>2</sup> <https://www.gov.scot/publications/family-justice-modernisation-strategy/>

<sup>3</sup> <https://consult.gov.scot/family-law/children-scotland-act/>

<sup>4</sup> [https://consult.gov.scot/family-law/children-scotland-act/consultation/published\\_select\\_respondent](https://consult.gov.scot/family-law/children-scotland-act/consultation/published_select_respondent)

<sup>5</sup> <https://www.gov.scot/publications/analysis-consultation-responses-consultation-review-children-scotland-act-1995/>

### Views of the child

7. Section 1 of the Bill amends section 11 of the 1995 Act to require the court to give the child an opportunity to express their views in a manner suitable to the child. The Bill also provides that the court should have regard to any views expressed taking into account the child's age and maturity.
8. This amendment may require significant changes to Chapter 33 of the Ordinary Cause Rules on family actions and to Chapter 33A on civil partnership actions<sup>6</sup> and to Chapter 49 of the Court of Session Rules to reflect:
  - That the court should give the child an opportunity express their views in a manner suitable to the child;
  - That the child may have given their views in a way other than through the form F9; and
  - The language used in the Bill about the court taking into account the child's age and maturity.
9. This provision in the Bill may require amendments to the Form F9 to reflect that the child should be able to give their views in a way that is suitable to them. This may include speaking directly to the court, by completing a form or through submitting a drawing or a letter.

### Restricting personal conduct of a case in proceedings involving vulnerable witnesses including victims of offences

10. Sections 4 and 5 of the Bill introduce a new special measure into the Vulnerable Witnesses (Scotland) Act 2004 prohibiting a party from personally conducting the remainder of their case in certain circumstances. This special measure is available in proceedings where the court is considering making an order under section 11 of the 1995 Act and in Children's Hearings court proceedings.
11. As this is a new procedure, rules are likely to be required on the procedure when an individual has been restricted from personally conducting a case in either the sheriff court or the Court of Session.

### Authorising special measures to protect vulnerable parties in Child Welfare Hearings

12. Section 7 of the Bill gives the court the power to order a range of special measures if attending or participating in Child Welfare Hearings is likely to cause distress which could be alleviated by use of a special measure. One of the special measures is participating via live video link.

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<sup>6</sup> The Scottish Government has also recently introduced the Civil Partnership (Scotland) Bill into Parliament: <https://www.parliament.scot/parliamentarybusiness/Bills/112997.aspx> If enacted, this Bill will extend civil partnership to mixed sex [opposite sex] couples. If enacted, any references in rules to civil partnerships being same sex may need to be changed and the Scottish Government will provide a policy paper accordingly. Similar changes were made when same sex marriage was introduced: [https://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/flc-meeting-files/7-april-2014/paper-5-2a---marriage-and-civil-partnership-\(scotland\)-act-2014---sg-paper.pdf?sfvrsn=2](https://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/flc-meeting-files/7-april-2014/paper-5-2a---marriage-and-civil-partnership-(scotland)-act-2014---sg-paper.pdf?sfvrsn=2)

13. This provision may require an amendment to rules 33.22A(5) and 33A.23(5) of the Ordinary Cause Rules which specify that all parties shall, except on cause shown, attend the Child Welfare Hearing personally.

#### Establishing a register of Child Welfare Reporters

14. Section 8 of the Bill establishes a register of Child Welfare Reporters held by the Scottish Ministers (or a contractor working on behalf of the Scottish Ministers). It also provides that a court may only appoint as a Child Welfare Reporter a person who is included on the register. Individuals would be eligible to apply to be on the register if they met minimum standards in relation to training and qualification set down in regulations.
15. This section of the Bill follows the Scottish Government's previous correspondence with the Lord President on the qualifications, experience and training of Child Welfare Reporters after the working group in this area<sup>7</sup>. Section 13 of the Bill makes provision on establishing a register of curators ad litem in relation to cases under section 11 of the 1995 Act.
16. The Bill also gives Scottish Ministers the power to set the fee rates for Child Welfare Reporters. This would mean that Child Welfare Reporters would be funded by the Scottish Ministers (or by a contractor working on behalf of the Scottish Ministers) rather than by the Scottish Legal Aid Board or privately funded as currently. This provision is likely to necessitate the removal of Ordinary Cause Rules 33.21 (3)(b) and (7), 33A.21 (3)(b) and (7) and Court of Session Rules 49.22 (3)(b) and (7) as all Child Welfare Reporter fees will be paid by Scottish Ministers.
17. Establishing a register of Child Welfare Reporters if the Bill is enacted will take some time given the need for secondary legislation and for consultation on that secondary legislation.

#### Regulation of child contact centres

18. Section 9 of the Bill makes provision on the regulation of child contact centres and provides that where the court makes a contact order which requires any contact to take place within Scotland at a contact centre, the court may only require that contact to take place at a centre operated by a regulated provider. This may have implications for court rules. If the Bill is enacted, it will take some time for section 9 to come into force given the need for secondary legislation.

#### Factors to be considered before making order

19. Section 12 of the Bill makes provision on factors for the courts to consider before making an order under section 11 of the 1995 Act. This might have implications for court rules.

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<sup>7</sup> The correspondence after the Working Group on Child Welfare Reporters is at <https://www2.gov.scot/Topics/Justice/law/17867/reporters/letters-judiciary-Sep-16>

### Local authority reporters

20. Section 14 of the Bill 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 they would need to apply to be on the register of Child Welfare Reporters and meet the required eligibility criteria.
21. The Bill does not restrict a court from asking for a report from social work other than a Child Welfare Report.
22. This provision is likely to mean that a local authority employee acting as a Child Welfare Reporter would be subject to Ordinary Cause Rule 33.21 or Court of Session Rule 49.22. Therefore, Ordinary Cause Rules 33.21A and 33A.21A and Court of Session Rule 49.22A are likely to no longer be required.

### Explanation of decisions to the child

23. Section 15 of the Bill provides that the outcomes and reasons for decisions are explained to the child concerned in an impartial manner if the court considers it in the best interests of the child. Feedback can either be provided by the court itself or by a Child Welfare Reporter.
24. This provision is likely to require an amendment to Ordinary Cause Rules 33.21(1) and 33A.21(1) and Court of Session Rule 49.22(1) to add this function into the list of reasons a court may appoint a Child Welfare Reporter.
25. This provision may also require new court rules for both the sheriff court and Court of Session on the procedure when a Child Welfare Reporter has been appointed to explain a decision to a child.
26. This provision is also likely to require amendments to the form of annex to interlocutor appointing a Child Welfare Reporter (Form F44<sup>8</sup>) to set out the tasks to be undertaken by the Child Welfare Reporter.

### Failure to obey an order

27. Section 16 of the Bill introduces a requirement on the court to investigate non-compliance with an order. This investigation can either be by the court themselves or in more complex cases by appointment of a Child Welfare Reporter.
28. This provision is likely to require an amendment to Ordinary Cause Rules 33.21(1) and 33A.21(1) and Court of Session Rule 49.22(1) to add this function into the list of reasons a court may appoint a Child Welfare Reporter.

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<sup>8</sup> [https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/forms/sheriff-court-forms/ordinary-cause-forms/form-f44\(actions-or-minutes-to-vary-lodged-on-or-after-24-june-2019\).doc?sfvrsn=6](https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/forms/sheriff-court-forms/ordinary-cause-forms/form-f44(actions-or-minutes-to-vary-lodged-on-or-after-24-june-2019).doc?sfvrsn=6)

29. This provision is also likely to require amendments to the form of annex to interlocutor appointing a Child Welfare Reporter (Form F44) to set out the tasks to be undertaken by the Child Welfare Reporter.

#### Appeals to the Sheriff Appeal Court and Court of Session

30. Section 18 of the Bill replaces references to Sheriff Principal with Sheriff Appeal Court and amends the appeal route for appeals against a sheriff's decision in Children's Hearings Court Proceedings to the Sheriff Appeal Court in the first instance, with leave then required to further appeal to the Court of Session.

31. This provision is likely to require amendment to the Act of Sederunt (Care and Maintenance Rules) 1997<sup>9</sup> to determine procedure for the Sheriff Principal Appeal Court to remit an appeal to the Court of Session.

#### Extension to sheriff court of enforcement powers under the Family Law Act 1986

32. Section 20 of the Bill allows the option for orders from elsewhere in the UK that are registered in the Court of Session to be enforced in the sheriff court. For orders enforced in the sheriff court the provisions in Chapter III of Part I of the Family Law Act 1986 regarding jurisdiction will apply.

33. Chapters 71.7 and 71.8 of the Rules of the Court of Session sets out the procedure for how these orders can be enforced and applications to sist or refuse enforcement proceedings in the Court of Session. It is likely that these chapters would need to be replicated in the Ordinary Cause Rules.

#### Delay in proceedings likely to prejudice child's welfare

34. Section 21 of the Bill makes provision on delays in proceedings prejudicing child's welfare. This might have implications for court rules

#### **Family Justice Modernisation Strategy (FJMS)**

35. At the same time as the Children (Scotland) Bill was introduced the Scottish Government published the FJMS. This sets out work that the Scottish Government is proposing to do that does not require primary legislation. This includes submitting a number of papers to the FLC.

#### Paper on the implications of extending Ordinary Cause Rule 33.22 in relation to mediation to all family and civil partnership actions

36. At the meeting of the FLC on 8 July 2019 the Scottish Government committed to producing a policy paper on the implications of extending Ordinary Cause Rule 33.22 in relation to mediation to all family and civil partnership actions. This is reflected in paragraph 7.20 of the FJMS. The Scottish Government will produce a policy paper for the FLC in 2020 accordingly. This will take full account of domestic abuse, as outlined in paragraph 4.27 of the FJMS.

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<sup>9</sup> <https://www.legislation.gov.uk/ukxi/1997/291/contents/made>

Preventing repeated litigation in family cases

37. The Scottish Government proposes to make regulations under section 102 of the Courts Reform (Scotland) Act 2014 (2014 Act) in relation to family cases under section 11 of the 1995 Act. Section 102 of the 2014 Act enables the Scottish Ministers, after consultation with the Lord President, to make regulations allowing the Court of Session, the sheriff court, or the Sheriff Appeal Court to make an order in relation to a person who has behaved in a vexatious manner in civil proceedings.
38. These regulations may require new rules for the sheriff court and Court of Session regarding the procedure to be followed to apply for an individual to be deemed vexatious and when a party has been deemed vexatious.

Use of plain English in the family courts

39. Paragraph 6.24 of the FJMS notes that the Scottish Government proposes to submit a policy paper to the FLC on the use of plain English in the family courts, including the language used in interlocutors, to help litigants and children.

**Scottish Government  
October 2019**