

(Paper 5.3A, FLC 27 October 2014 and Paper 5.1C, FLC 23 February 2015)

PAPER BY THE SCOTTISH GOVERNMENT ON CHILD WELFARE REPORTERS AND POTENTIAL CHANGES TO COURT RULES

Introduction

1. This paper by the Scottish Government is an open paper.
2. The Scottish Government is chairing a working group on child welfare reporters (sometimes known as “bar reporters”). Child welfare reporters provide advice and recommendations to the sheriff or the judge in cases under section 11 of the Children (Scotland) Act 1995, which covers matters such as parental responsibilities and rights (PRRs), contact and residence. The working group chaired by the Government brings together members of the judiciary, the Scottish Court Service, the Faculty of Advocates, the Law Society of Scotland, the Family Law Association, the Scottish Legal Aid Board, Families need Fathers and Scottish Women’s Aid.
3. More background on the working group can be found on the Scottish Government’s website¹.
4. There are a number of drivers for this work. Inevitably, a key driver is resources. The cost of most child welfare reports falls onto the legal aid budget and represents considerable expenditure – over £4 million a year. This is a considerable investment and the Government needs to ensure the money is wisely spent and the cost remains sustainable. In particular, it is important that the remit for reports is clear and that reports are focussed and structured appropriately. The need is to provide focussed reports germane to the disputed issues in a cost effective way. This need has driven the working group and its recommendations.

General points

5. A number of general points have arisen during the work of the Working Group, including:
 - 5.1 Most child welfare reporters now are solicitors but some may come from other backgrounds such as social work. Nothing is laid down centrally on training, qualifications and experience. The Sheriffs Principal (and the Lord President, for the Court of Session) hold lists of persons who may be appointed by the court.
 - 5.2 Child welfare reporters need to provide focussed reports with recommendations, to inform the court.
 - 5.3 The work of a child welfare reporter is challenging, given issues such as the sensitive nature of the cases, the need to be skilled in interviewing children and the need to provide clear and robust recommendations.
 - 5.4 On the whole, the group did not support a radical (and long-term) option of centralising the child welfare reporter service (so that, for example, reporters would be appointed centrally and fees

¹ See <http://www.scotland.gov.uk/Topics/Justice/law/17867/reporters>

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set centrally)². The group recognises that in many cases the current system can work well. However, the issue of centralisation could be revisited if the outcomes desired by the Working Group are not achieved.

5.5 The Scottish Court Service are working to ensure that child welfare reporters have the necessary PVG clearance.

5.6 Some child welfare reports are just aimed at obtaining the views of the child.

5.7 The legislation provides that the welfare of the child is the paramount consideration of the court and that the court should, taking account of the child's age and maturity, give the child an opportunity to express views and have regard to such views as the child may express. It is important to ensure that procedures and processes in relation to child welfare reporters reflect that the child is at the centre of the case³.

5.8 Day to day practice in family cases and in the appointment of child welfare reporters varies considerably across Scotland. In some parts of Scotland, child welfare reporters appear to be known as "curators *ad litem*" which can cause confusion in terms of terminology and also in terms of what reporters may be asked to do.

5.9 Reports can sometimes be provided just before the relevant hearing which makes it hard for the parties and their agents to read them in time.

5.10 The remit of the reporter should be clear and transparent.

5.11 It should be clear what the reporter has to do to carry out the remit and what the reporter has actually done.

5.12 Other than in highly exceptional circumstances, the final report should be available to the parties.

Outcomes of the working group

6. The working group agreed that the Scottish Government should put forward a policy paper to the Family Law Committee on potential changes to court rules. The working group is also working in other areas including:

6.1 Sheriff Sheehan is producing information which could be used by members of the judiciary.

6.2 Sheriff Sheehan is producing a guide for reporters to follow after they have been appointed in a particular case.

² Models in other areas are safeguarders in child welfare hearings <http://www.children1st.org.uk/what-we-do/our-services/search-our-services/safeguarders-panel/> and the Children and Family Court Advisory and Support Service (CAFCASS) south of the border: <http://www.cafcass.gov.uk/about-cafcass.aspx>

³ The Government intends to put a further policy paper to the Family Law Committee for the meeting on 27 October about the voice of the child in family cases. This policy paper will include suggestions for improving Form F9.

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6.3 The Government is producing a guide for litigants on what child reporters do. The intention is that this guide would be provided to litigants in cases and would be published on the Scottish Government and Scottish Court Service websites. We also intend to produce a similar guide for children.

6.4 The Family Law Association are considering what training they could provide to child welfare reporters. Any such training would be open to all reporters although, clearly, other bodies (such as the Faculty of Advocates) may also provide training.

6.5 The Government intends to write to the Sheriffs Principal and the Lord President on matters such as appraising reporters; on whether the lists of persons eligible for appointment as reporters should be in the public domain; and whether persons added to the lists should be added for fixed periods of time (which could be renewed).

The rules

General

7. Rules on family actions are at Chapter 49 of the Court of Session Rules⁴ and Chapter 33 of the Sheriff Court Ordinary Cause Rules⁵. The current specific rules on the appointment of child welfare reporters are at 49.22 of the Court of Session Rules and 33.21 of the Sheriff Court Ordinary Cause Rules. The changes to Rules suggested in this paper would apply to both the Court of Session and the sheriff court.

Terminology

8. The Government suggests that Court of Session Rule 49.22 and Ordinary Cause Rule 33.21 be amended so that references to “reporters” be changed to “child welfare reporters”. The Government sees two potential advantages in this:

- First of all, it would reflect a view from the Working Group that we should move away from the term “bar reporters” and, instead, use the term “child welfare reporters”. The Working Group felt that “child welfare reporters” is a clearer term and reflects more closely what reporters actually do.
- Secondly, there is, as recorded at paragraph 5.8 above, different terminology used across Scotland and this can effect what a reporter is actually asked to do. Greater consistency in terminology might encourage greater consistency in practice.

The nature of the appointment

9. In line with the general principle in the 1995 Act that the welfare of the child is paramount, the Government proposes that Court of Session Rule 49.22 and Ordinary Cause Rule 33.21 be amended so that reporters are only appointed when this is in the best interests of the child.

⁴ <https://www.scotcourts.gov.uk/rules-and-practice/rules-of-court/court-of-session-rules>

⁵ <http://www.scotcourts.gov.uk/rules-and-practice/rules-of-court/sheriff-court---civil-procedure-rules/ordinary-cause-rules>

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10. In line with the need to deal with cases expeditiously, the Government proposes that Court of Session Rule 49.22 and Ordinary Cause Rule 33.21 be amended so that reporters are appointed when this is needed to ensure that the case can be decided in an effective and efficient way. This is in line with Ordinary Cause Rule 33.22A(4) which provides that at the Child Welfare Hearing the sheriff shall seek to secure the expeditious resolution of disputes in relation to the child.

The interlocutor: the appointment and the remit

11. Following discussions in the Working Group, the Government proposes a number of changes to the rules. The aim is to produce clarity in the remit and in how the reporter should carry out this remit.

12. First of all, the Government suggests the Rules be amended to include standard powers for reporters. These powers could be used individually or combined, depending on the circumstances of the case, with judicial discretion to add more if appropriate. Proposed powers are:

12.1 Obtain previous documents relevant to the case.

12.2 Obtain other reports relevant to the case.

12.3 Obtain other information relevant to the case such as social work records, GP records and information from a contact centre.

12.4 Interview the child.

12.5 Visit the child's nursery or school.

12.6 Interview the parents, visiting and inspecting their homes when required.

12.7 Interview other relevant persons, such as family members and friends.

12.8 Speak to relevant professionals such as GP, psychologist, social worker, police, child-minder.

12.9 Observe contact.

12.10 Write report, with recommendations.

12.11 Such further powers as are added by the judge or the sheriff.

13. This approach would increase transparency as the default powers would be in the Rules themselves, rather than in an interlocutor which is not particularly easy for third parties with an interest to access.

14. Secondly, the Government proposes that the Rules be amended so that all interlocutors appointing a reporter would set out:

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- Why it is in the child's interests for the court to appoint a reporter.
- Why a report will help ensure the case is dealt with efficiently and effectively in line with the requirement to ensure expeditious resolution of disputes in relation to the child.
- What the reporter is asked to do (eg outline the child's views and/or the issues the court would like the reporter to report on).
- How the reporter is to do this (eg who the reporter should interview and where – such as whether there is a need to interview the child at home and whether there is a need to see contact in operation).

15. The remit of the reporter may need to reflect existing reports which the court already has (or expects to receive). For example, the court may already have reports from the local authority about child protection issues or providing a risk assessment in cases where there are allegations of domestic abuse. Where these reports are available, any report from the child welfare reporter should be more limited in scope to avoid duplication and reduce the time spent on the case and overall costs.

16. Thirdly, the Government proposes that style interlocutors on the appointment of reporters could be added to the Rules. Draft style interlocutors are attached at Annex A.

17. Fourthly, the Working Group has prepared a checklist for judges and sheriffs to add to interlocutors to give clarity on the remit of the reporter and what the reporter is asked to do to carry out this remit. The intention is that this checklist would form part of the interlocutor and so should form part of the style interlocutors to be added to the rules. This checklist is attached at Annex B.

Instructing the reporter

18. Currently, Court of Session Rule 49.22(2) and Ordinary Cause Rule 33.21(2) provide that when making an appointment the court shall direct that the party who sought the appointment or, where the court makes the appointment of its own motion, the pursuer or minuter, shall instruct the local authority or reporter.

19. The Government does not consider the reference to "instruct" appropriate. The term "instruct" is commonly used in the client/lawyer relationship. In these instances, the reporter is appointed as an officer of the court. We consider that the rules should reflect this.

20. Therefore, the Government would propose a number of suggested changes to the Rules.

21. First of all, the Government suggests that rules be added on greater clarity in the interlocutor appointing the reporter. More detail on this is contained in paragraphs 11 to 17 above.

22. Secondly, we suggest the rules be changed so that the clerk of the court would, once the appointment is made, intimate a copy of the interlocutor on the reporter, with that then constituting the reporter's appointment.

23. Thirdly, we suggest the current reference in the rules to "instructing" the reporter be changed with the rules making provision instead on the reporter contacting the parties' agents (or parties themselves when they are not represented) to:

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23.1 obtain appropriate contact details and any relevant mandates (e.g. consent to release of information either from the GP or the school);

23.2 obtain a full set of pleadings, productions and affidavits that were lodged in court before the reporter was appointed.

Expenses

24. Currently, the Rules provide that when making an appointment the court shall direct that the party who sought the appointment or, where the court makes the appointment of its own motion, the pursuer or minuter, shall be responsible for the fees and outlays of the local authority or reporter.

25. In practice, the Scottish Government understands that in most cases the fees and outlays of reporters are met by the legal aid budget.

26. Having no provision at all in the Rules could perhaps suggest that the fees and outlays of a reporter would not be recoverable. As a result, having no provision does not appear to be an option.

27. The Government is of the view that the current rule may not be entirely fair. The child welfare report is for the benefit of the child and to assist the court in resolving a dispute about the child's welfare. As a result, the Government proposes that the rules be amended so that there is a 50:50 split between pursuer and defender of the fees and outlays of the local authority or reporter, with judicial discretion to vary this split on cause shown.

Cases that raise further issues

28. In a small number of cases, the reporter may come across issues which give rise to concerns, such as child protection. Paragraph 322 of the National Guidance for Child Protection in Scotland (2014) states that all staff that comes into professional contact with children have a responsibility to share concerns with the relevant agency⁶.

29. The guidance states that when staff recognise a child's wellbeing is compromised and/or a child is experiencing, or likely to experience, risks to the child's wellbeing the staff *"have a responsibility to follow local procedures for sharing these concerns with the Named Person. Where there is a concern about the child's safety or possible harm to the child, these concerns should also be shared without delay with police or social work so that they can consider whether the harm is significant and whether a child protection order needs to be sought, or other action taken to address the concerns"*.

30. The reporter may also need to seek further judicial guidance. The Government proposes that for cases where the reporter needs such further guidance, the rules be amended to provide that the reporter contact the clerk of the court outlining the nature of the issue and seeking appropriate direction from the court.

Sending the report in

⁶ The guidance is at <http://www.scotland.gov.uk/Publications/2014/05/3052/11>

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31. When the report is completed, Ordinary Cause Rule 33.21(5) currently provides that when receiving a report the sheriff clerk “shall send a copy of the report to each party”. Court of Session Rule 49.22(5) is along similar lines. The Working Group has noted that modern practice is that the reporter will usually send the report to the parties’ agents, as well as to the court.

32. Therefore, the Government proposes the rules be changed to remove the requirement on the clerk of the court to send the report to the parties and, instead, proposes that the reporter be required to send the report to the court and to the parties.

33. One point raised in the Working Group was that reports can sometimes be submitted very close to the hearing at which the court will consider the report. This can make it difficult for parties to read the report in good time. Therefore, the Government proposes the Rules be amended so that the report is sent to the court and to the parties a minimum of three clear working days before the hearing at which the court will consider the report.

Summary of suggested changes to the Rules

34. A summary of suggested changes is at Annex C

Curators *ad litem*

35. The Working Group has suggested that work needs to be carried out in relation to curators *ad litem* in some family law cases. The Working Group has not yet considered this in any detail and this paper does not propose any changes to the Rules in relation to curators *ad litem* although the paper does note, at paragraph 5.8, that in some cases reporters are described as curators *ad litem*, which can lead to confusion.

**Family and Property Law: Civil Law and Legal System Division
Justice Directorate
Scottish Government**

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ANNEX A: STYLE INTERLOCUTORS

Voice of the child (only)

The Sheriff appoints [named individual] as a child welfare reporter. The Sheriff has concluded that the appointment of a child welfare reporter is in the best interests of [named child]. The Sheriff instructs [named individual] to [report the views of the child to the Court] and assigns [date] as a Child Welfare Hearing so that the report is to be sent to the court and the parties no later than [three clear working days before the hearing].

Disputed arrangements in relation to residence

The sheriff appoints [named individual] as a child welfare reporter. The sheriff instructs [named individual] to consider the future arrangements for residence and contact and to undertake enquiries as set out in the appendix hereto. Assigns [date] as a child welfare hearing and ordains (named individual) to lodge the report with the court no later than 3 clear working days before said hearing.

Contact

The sheriff appoints [named individual] as a child welfare reporter. The sheriff instructs [named individual] to undertake enquiries as set out in the appendix hereto and to make recommendations to their court in relation to the child [insert child's name and date of birth] contact with the pursuer/defender. Assigns [date] and ordains [named individual] to lodge the report with the court no later than 3 clear working days before said hearing.

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ANNEX B: CHECKLIST TO BE INCLUDED IN STYLE INTERLOCUTORS

• **Remit of Reporter**

✓

<input type="checkbox"/>	A Disputed residence
<input type="checkbox"/>	B Disputed Contact
<input type="checkbox"/>	C Disputed Specific Issue Order
<input type="checkbox"/>	D Child's views only

• **If A, B or C – is the Reporter required to:**

<input type="checkbox"/>	Visit both parents' homes
<input type="checkbox"/>	Speak with parents new partner(s), if so specify which;
<input type="checkbox"/>	Interview grandparents - if so specify which;
<input type="checkbox"/>	Visit child/children's school/nursery
<input type="checkbox"/>	Speak with childminder/nanny
<input type="checkbox"/>	Speak to GP/health visitor for the child
<input type="checkbox"/>	Speak to GP re one of the parties: if so specify issue...
<input type="checkbox"/>	Speak to other professional e.g. child psychologist treating child; if so please specify...

<input type="checkbox"/>	Social work check and if applicable speak to relevant social worker
<input type="checkbox"/>	Police/criminal records check – either/both parties
<input type="checkbox"/>	Advocacy service/ independent witness regarding domestic abuse issues
<input type="checkbox"/>	Other witnesses: if so specify...

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• **If B – is the Reporter required to:**

<input type="checkbox"/>	Observe contact
<input type="checkbox"/>	Observe child in home environment pre/post contact
<input type="checkbox"/>	Visit parent(s) homes
<input type="checkbox"/>	Obtain information from Contact Centre (restricted to record of parties' attendance)

- **In all cases the Reporter is required to ascertain the child's views (where the child is of sufficient age and maturity and wishes to express a view)**

Other comments/instructions to Child Welfare Reporter:

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ANNEX C: SUMMARY OF PROPOSED CHANGES TO THE RULES

Paragraph in paper	Proposed rule change
8	Rules to make provision on reporters being termed "Child Welfare Reporters".
9	Rules be amended so that reporters are appointed only when this is in the best interests of the child.
10	Rules be amended so that reporters are appointed when this is needed to ensure the case can be decided in an effective and efficient way.
12	Rules to contain a set of standard powers for reporters.
14	Interlocutors to set out: <ul style="list-style-type: none"> • Why it is in the child's interests for the court to appoint a reporter. • Why a report will help ensure a case is dealt with efficiently and effectively. • What the reporter is asked to do • How the reporter is to do this.
16 (and Annex A)	Style interlocutors to be introduced.
17 (and Annex B)	Style interlocutors to include checklist.
22	The clerk of the court to intimate the interlocutor on the reporter, with that then constituting the reporter's appointment.
23	Existing provisions in the Rules on instructing the local authority or reporter be removed and replaced with provision on reporter asking parties for contact details, mandates and documents already lodged in court.
27	Rules be amended so that there is a 50:50 split between pursuer and defender of the outlays of the local authority or reporter, with judicial discretion to vary.
30	Rules be amended so reporters seeking further judicial guidance are directed in the first instance to the clerk of the court.
32	Remove the requirement on the clerk of the court to send the report to the parties and, instead, reporter be required to send the report to the court and to the parties
33	The report to be sent to the court and to the parties a minimum of three clear working days before the hearing at which the court will consider the report.