

MAKING LAW FOR CHILDREN IN SCOTLAND: TURNING COMMITMENT INTO REALITY

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Abstract

This note discusses ongoing developments in Scottish law concerning children and the creation of more children's rights-based legislation in Scotland. Two steps being taken by the Scottish government are considered. The first of these is the current Children (Scotland) Bill, which is intended to modernize and render more child-centred certain aspects of family law. The second step is the commitment to introducing, imminently, a further Bill to fully incorporate the United Nations Convention on the Rights of the Child into Scottish Law. The discussion below is distilled from the author's recent report, *Balancing the Rights of Parents and Children* (Barnes Macfarlane 2019), commissioned by the Scottish Parliament Justice Committee.

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[A] INTRODUCTION: THE COMMITMENT

It has long been the stated commitment of the Scottish government that Scotland becomes 'the best place in the world to grow up' (Scottish Government Announcement 2019a). Various steps have been taken in recent years towards achieving this highly ambitious aim. This note focuses on two significant steps currently in progress. The first of these steps is the reform of the statutory framework regulating private family law cases through the introduction of the Children (Scotland) Bill 2019. The main focus of the Bill is the provision of better support for the many children caught up in parental disputes about their care and upbringing. The second step, discussed below, is more wide-ranging in nature: the pledge to incorporate the United Nations Convention on the Rights of the

Child (UNCRC) into Scottish Law. The Scottish government has said that it will introduce a Bill in 2020 to fully incorporate the UNCRC.

[B] THE CURRENT CHILDREN (SCOTLAND) BILL

Unlike England, there are no specialist family courts in Scotland. Instead, there are detailed procedural court rules applicable to different types of family law court cases (see e.g. the Ordinary Cause Rules: chapter 33). These procedural rules facilitate the day-to-day operation of family law cases in Scotland. The substantive law governing private family disputes (i.e. disputes between parents and/or wider family members) is found in part 1 of the Children (Scotland) Act 1995.

The overarching framework set out in part 1 of the Children (Scotland) Act 1995 provides for the acquisition and exercise of ‘parental responsibilities and rights’ (the Scottish equivalent of ‘parental responsibility’), the paramountcy of the child’s welfare and the granting of court orders such as ‘residence’ and ‘contact’ awards. There is also a specific requirement to ascertain whether a child wishes to express a view where that child is considered to possess the ‘capacity’ to do so. In those circumstances, the court must take account of that view (section 11(7)(b)). Part 1 of the 1995 Act has remained largely intact for 25 years—a period during which much of Scottish family law has been reformed or rewritten.

However, in more recent years, concerns have been raised by court users and support groups about the operation of the Children (Scotland) Act 1995. Many of these concerns are child-centred. They include: (i) the imposition of an age presumption, currently 12 years of age, in respect of capacity to express a view; (ii) the lack of specific provision for domestic abuse victims and witnesses; (iii) the dearth of mechanisms to address failure to obey court orders; (iv) inconsistencies surrounding the use of ‘child welfare reporters’ (independent reporters, usually solicitors, appointed by the court to investigate and make recommendations); (v) the detrimental impact of delay in any final determination; and, significantly, (vi) the lack of infrastructure to support, guide and inform children involved in family law court cases.

The Children (Scotland) Bill 2019 (the 2019 Bill) was introduced on 3 September 2019 to address the above-mentioned concerns and is currently progressing through the Scottish Parliament. It follows a lengthy public consultation and government review of the Children (Scotland) Act 1995 in 2018. The 2019 Bill was also published simultaneously with the

Family Justice Modernisation Strategy outlining the government's longer-term commitment to updating the family law court system in Scotland (Scottish Government 2019b). In this regard, the 2019 Bill can be viewed as the first significant step in the government's strategy to improve the experience of family members (both adults and children) involved in family law litigation.

Two of the key aims of the 2019 Bill are to place children's best interests at the heart of family cases and to ensure that their views are heard. Respectively, these aims accord with Article 3 (consideration of the child's best interests) and Article 12 (child's right to be heard) of the UNCRC. The government has also sought to incorporate various aspects of guidance published by the United Nations Committee on the Rights of the Child (the Committee) in the Bill. For example, the Committee's General Comment No 12, 'The Right of the Child to Be Heard' (Article 12) stresses that listening to children requires that children are properly supported and, in particular, made aware of how their views have been taken into account. This has been reflected by a provision in the 2019 Bill to impose a duty upon courts to explain family law decisions to children who are the subject of the dispute.

Five proposals in the current Bill that are particularly significant from a children's rights perspective are discussed below

(1) Removal of the Age Presumption for Children Expressing a View in Family Law Cases

Section 1(2) and 1(3) of the Bill proposes the removal of the age presumption for children being deemed mature enough to express a view, currently set at age 12.¹ The policy intention behind this section is ensuring that courts hear from younger children as well as those aged 12 and over. Regardless of the longstanding statutory presumption, Scottish courts often do take account of the views of younger children when making orders in family cases (*Shields v Shields* 2002). Accordingly, removing the reference to the age of 12 is most welcome as it assists in clarifying the law.

In addition, neither Article 12 of the UNCRC, nor the guidance issued on the article by the Committee, specifies a minimum age limit for expressing a view. The Committee has also stressed that Article 12:

¹ It is also worth noting that the current age presumption of 12 years old, found in section 2(4A) of the Age of Legal Capacity (Scotland) Act 1991, is left untouched by the 2019 Bill for the purpose of instructing a solicitor. The retention of such an age presumption in connection with instructing a lawyer may well be an issue for wider discussion and debate in Scottish law.

imposes no age limit on the right of the child to express her or [their] views, and discourages States parties from introducing age limits either in law or in practice (General Comment No 14 on ‘Best Interests’: paragraph 21).

The rationale for this is that full implementation of Article 12 requires respecting all children as rights-holders from the earliest stages in life. Even very young children can use a wide range of communication methods to convey understanding, choices and preferences. Research also confirms that biological age is not the sole determining factor of capacity, or ability, to form a view. Many other factors (including e.g. experience, environment, levels of support provided) can affect a child’s ability to form or express a view (Lansdown 2005: 9).

However, as has long been observed by the international human rights community, simply “putting the law in place” is inadequate to achieve ... effective implementation of children’s rights.’ (Perrault 2008: 1). Notwithstanding the prospect of involving younger children in family court cases, no specific provision has been made in the Bill to render court processes themselves more child-friendly. It is this lack of detail about the infrastructure to support and empower children (regardless of age) that has generated particular concern among children’s rights organizations. It raises questions about a proposed new culture in which no minimum age is benchmarked for capacity to express a view.

One possible solution, supported by recent Scottish research (Morrison and Tisdall forthcoming 2020), would be the introduction of a child support worker, a professional appointed solely to protect and advise the child. This role was consulted upon by the Scottish government in its 2018 review of the Children (Scotland) Act 1995, but it does not currently feature in the Bill (Scottish Government 2018).

(2) Introduction of a List of Factors for Courts to Consider in Deciding Family Cases

There is currently no equivalent in Scotland to the checklist found in section 1(3) of the English Children (Act) 1989. Scottish courts are instead bound to apply a three-part welfare test, set out in section 11(7) of the Children (Scotland) Act 1995. Broadly speaking, that section provides that: (i) the welfare of the child is paramount; (ii) the court should not intervene by making any order about a child unless it is better to do so than not at all; and that (iii) any child who wishes to express a view should be free to do so and should be listened to. There are also additional provisions, inserted by the Family Law (Scotland) Act 2006, requiring the

court to consider particularly the risk of domestic abuse (now section 11(7A)-(7E) of the Children (Scotland) Act 1995).

The 2019 Bill proposes a new section 11ZA of the 1995 Act, which contains (among other things) a statutory checklist. Such lists are often loosely termed ‘welfare checklists’. The various parts of this checklist are distributed throughout the 2019 Bill in a somewhat confusing fashion. For example, the list factors proposed by sections 1(4) require to be read in conjunction with the additional factors proposed in sections 12(2) and 21(2). This is because, only when taken together, do they create the intended checklist. The court would require to have regard to the totality of this checklist in deciding family cases brought under part 1 of the Children (Scotland) Act 1995.

In particular, the proposed checklist contains three factors to which the court must have regard. These include: (i) protection from abuse/risk of abuse (the new provision is a slightly reworded version of the anti-abuse provisions currently found in section 11(7A)-(7E)); (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 would include, for example siblings and grandparents, although it is perhaps disappointing that siblings in particular were not explicitly mentioned in this section of the Bill).² Elements (ii) and (iii) are new. The question might be raised as to why such a checklist should be introduced now in Scotland.

The consultation responses to the 2018 Scottish government review had been divided as to whether the introduction of a statutory checklist in family cases would be considered helpful. One concern expressed by respondents was that the creation of a statutory checklist might hamper the wide and long-standing discretion exercised by Scottish courts in family cases. However, the checklists used in other jurisdictions, including England, were reviewed. It was noted that a checklist might provide greater assurance to contemporary court users that all professionals involved in family cases would be required to consider the same list of factors. It has been suggested that the accessibility that a checklist could provide was also noted to be a desirable feature in family

² Section 12 of the 2019 Bill, which is concerned with private family law cases brought under part 1 of the 1995 Act, does not mention siblings specifically. Section 10 of the Bill (which is concerned with public family law provisions) does. Section 10(2) imposes a legal duty upon local authorities. It provides that ‘they must take active steps to promote on a regular basis, personal relations and direct contact between [a looked after] child ... a sibling’ (whether half or whole-blood) and ‘any other person with whom the child has lived or is living and with whom the child has’ a sibling-like relationship.

court cases: a well-drafted checklist should make it easier for family members (including children) to understand the rationale behind decisions that have such great impact on their lives (Barnes Macfarlane 2019: 31).

(3) New Obligation to Explain (Most) Decisions to (Most) Children.

There is currently no statutory requirement that decisions made in family law court cases are explained to the children concerned by professionals involved in the court system. Section 15(2) of the Bill proposes the insertion of a new section 11E to the 1995 Act entitled ‘Explanation of court decisions to the child’. It will be the court’s duty to ensure an explanation is provided. The inclusion of the proposed section in the Bill represents a positive step forward in terms of respecting the Article 12 rights of ‘all children to be heard and taken seriously’ (General Comment No 14 on ‘Best Interests’: paragraph 2).

The new duty will apply to most of the decisions made by courts that affect most children. However, where the court considers that it is not in the best interests of the child to give an explanation, the court need not comply with the duty to explain (proposed section 11E(3)(b)). This is problematic from a children’s rights perspective. In particular, the section lacks clarity as to what ‘best interests’ might mean in the context of explaining family case outcomes to children. It begs the question as to whether decisions not to explain family case outcomes to children on the grounds of their ‘best interests’ would prove to be a highly unusual practice, or commonplace? For example, a child may be unwell, or particularly upset by the circumstances surrounding their family breakdown. Or, sensitive details about the adults’ relationship may have influenced the court’s decision, and it might be thought better not to disclose those details to the child. However, arguably none of these circumstances should remove the need to give the child some appropriately worded explanation about the decision that has been made.

In exceptional circumstances, it might be in the child’s best interests that they do not receive an explanation of the court’s decision. Yet, there is a danger that this particular best interests test, as currently worded in the 2019 Bill, might operate to prevent explanations to children becoming the regular practice in family cases.

(4) Imposition of a New Duty to Investigate Failure to Obey Court Orders

Section 16 would empower the court to investigate further in situations in which the court has reached the stage of considering whether to find a person in contempt or change the contact/residence order currently in place. The rationale is that such a duty would assist in ascertaining whether a contempt of court has been demonstrated or whether there are other circumstances (e.g. domestic abuse) leading to non-compliance with a court order.

Scottish 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 their parent (see e.g. comments of the Inner House (Scottish Appeal Court) in *SM v CM* 2017: paragraph 62). The child’s perspective on this issue may be quite distinct from that of their parent. It is disappointing to note that there is no reference in section 16 of the 2019 Bill to the duty to investigate, including ascertaining the child’s views on the issue of compliance.

(5) New Anti-delay Provision where Delay Is Prejudicial to the Child’s Welfare

This duty in the 2019 Bill requires the court to ‘have regard to any risk of prejudice to the child’s welfare that delay in proceedings would pose’ (section 21(2A)). The focus of the new section is delay that is prejudicial to the child—rather than the sometimes unavoidable, or necessary delays that can occur in complex family cases. The provision is also designed to avoid a repeat of *B v G* 2012, a Scottish family case in which the UK Supreme Court strongly criticized delay and the unnecessary expense.

Overall, it is fair to say that, while the 2019 Bill is clearly directed towards achieving a number of positive outcomes, the content of the Bill is not easy to absorb. It contains many insertions, deletions and amendments (including amendments to the amendments already proposed). Also, if part 1 of the Children (Scotland) Act 1995 is amended as proposed by the Bill then that statute will become considerably more complicated in layout than it currently is. This raises the issue of accessibility again: would the terms of the 1995 Act, as amended by the Bill, then be capable of clear explanation to members of the public seeking advice about a family law dispute? At present, there is also a lack of

detailed provision in the Bill (and in the supporting documentation) regarding the steps required to better support children. Without such provision, the removal of the age presumption is likely to make little difference to the environment in which children express a view. This is concerning, particularly given the key aims of the Bill.

The 2019 Bill is still progressing through the Scottish Parliament. As observed above, the Bill seeks to address a number of issues concerning children and their rights that are much in need of discussion and debate. As such, the Children (Scotland) Bill 2019 presents a welcome opportunity for improving not only the substantive legal provisions but also the systems and processes governing Scottish family law court cases.

Next, the commitment to fully incorporate the UNCRC is briefly discussed.

[C] THE PROPOSED FULL INCORPORATION OF THE UNCRC

Last year marked the 30th anniversary of the adoption, by the United Nations, of the UNCRC and it is now the most widely ratified human rights treaty in the world. The UNCRC is a comprehensive statement of the human rights of all children (individuals up to the age of 18 years). So far, the UK has ratified the UNCRC. Ratification is not the same as full incorporation. Ratification means that a state has committed itself to taking steps to implement an international convention into its national laws, policies and practices. However, like the other UK jurisdictions, Scotland has yet to fully incorporate the UNCRC into domestic law.

The Scottish approach to date where children's rights are concerned has been to incorporate certain specific UNCRC rights in relevant statutory provisions (see e.g. Adoption and Children (Scotland) Act 2007, sections 2, 9.15, 20, 31, 32, embedding aspects of Articles 3, 12, 7, 9, and 21 of the UNCRC). Scottish courts have also on occasion referred to the UNCRC when making decisions about children and young people (see e.g. *Dosoo v Dosoo No 1* 1999; *White v White* 2001; *O v City of Edinburgh Council* 2016). Yet, without incorporation, there is no requirement that courts or authorities consider or apply the provisions of the UNCRC. In a wider sense, this means there is currently no guarantee that the rights of children will be given proper regard when decisions affecting them are made.

Full statutory incorporation of the UNCRC in Scotland has long been promised. Small legislative steps towards this aim have been taken in

recent years. For example, the Children and Young People (Scotland) Bill 2014, originally mooted as being the legislation that might incorporate the UNCRC, instead placed duties on Scottish ministers and public bodies to report on their activities in promoting children's rights (sections 1-4). Five years passed and then, on 22 May 2019, the Scottish government launched a consultation seeking views on the best way to fully incorporate the UNCRC (Scottish Government 2019a). The focus of this consultation was on identifying the best way to provide what the Scottish government described as the 'gold standard' for incorporating children's rights into Scottish law. On 20 November 2019, marking the date of the 30th anniversary of the adoption of the UNCRC, the government announced that the Bill to incorporate the UNCRC will:

[T]ake a maximalist approach ... incorporate[ing] the rights set out UNCRC in full and directly in every case possible—using the language of the Convention (Scottish Government Announcement 2019b).

It is hoped, then, that such an approach would promote recognition of the specific rights of children to a position of general parity with the current implementation of human rights in practice. The Human Rights Act 1998 fully incorporated the European Convention on Human Rights (ECHR) into UK Law. By virtue of this UK-wide legislation, it is possible to bring legal proceedings asking the court to review the conduct of a public body where there are concerns that the body has breached human rights (section 6). It is also possible to ask a court to interpret any existing statutory provision so that it is compatible with the ECHR. If this cannot be done, the appropriate court can issue a 'declaration of incompatibility' (section 4). The Scotland Act 1998 also provides that it is also outwith the legislative competence of the Scottish Parliament to pass any devolved provision that is 'incompatible with any of the Convention rights' (section 29(2)(d)).

[D] IN CLOSING

This note has considered two significant Scottish Bills, one current and one promised, about children and their rights. The current Children (Scotland) Bill 2019 addresses a number of specific issues impacting upon the experience of children involved in family law court cases. The promise of a new Bill later this year to fully incorporate the UNCRC generates even greater momentum for ensuring that the current Bill is both child-centred and UNCRC-compliant. John Swinney, Scotland's Deputy First Minister, has stressed that the forthcoming incorporation Bill, to be introduced in 2020, 'represents a huge step forward for the protection of child rights in

Scotland’ (Scottish Government Announcement 2019b). It also represents a clear government commitment to turn child-centred policy into reality.

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