

**Justice Committee
Children (Scotland) Bill Stage 2
MSP Briefing**

Established by the Commissioner for Children and Young People (Scotland) Act 2003, the Commissioner is responsible for promoting and safeguarding the rights of all children and young people in Scotland, giving particular attention to the United Nations Convention on the Rights of the Child (UNCRC). The Commissioner has powers to review law, policy and practice and to take action to promote and protect rights.

The Commissioner is fully independent of the Scottish Government.

The Commissioner welcomes the introduction of this bill, which provides an important and timely opportunity to increase compliance with the UNCRC. This briefing addresses amendments which will be considered by the Justice Committee at Stage 2. For more detailed analysis, please see our Stage 1 committee evidence¹ and our response to the Scottish Government's consultation on the review of Part 1 of the Children (Scotland) Act 1995 (the 1995 Act)².

Positive presumption that a child can form a view (Sections 1-3)

We support amendments 1-14; 38; 48-50; 81-82;

We welcome the introduction of a positive presumption that all children are capable of forming a view. This supports children's right to be heard in judicial and administrative proceedings, as outlined in Article 12 of the UNCRC. We therefore support the relevant government amendments, albeit with some concern that the unnecessary addition of "unless the contrary is shown" in amendments 3, 5, 7, 9, 10 and 38 has the potential to weaken the presumption by implying an obligation to challenge the presumption of capacity. We ask members to support this amendment but call on Scottish Government to bring forward amendments at Stage 3 to remove the words "unless the contrary is shown".

Presumptions relating to other family members (Sections 1, 10,

We oppose amendments 45, 46, 76, 78, 79

In our response to the Scottish Government's consultation on the 1995 Act, we stated that children have a right to continued contact with members of their wider family, if it is safe and in their best interests for them to do so, giving due weight to their views. In this respect family should be understood to have a broad meaning and recognise the complexities of the diverse range of families in Scotland.

¹ <https://cypcs.org.uk/wp-content/uploads/2020/02/Children-Bill.pdf>

² <https://cypcs.org.uk/wp-content/uploads/2020/02/1995-Act-Final-response.pdf>

To be compatible with children's rights any presumption **must** be framed in terms of the child's rights and the paramourcy of their best interests **and** not relate to any specific category of adult, be it a parent, foster parent, grandparent or "lineal ancestor". The starting point must be the child and who is important to them – regardless of that person's legal or other status.

Introducing any presumption based on specific categories of adults necessarily removes focus from the child's best interests and moves it to those specific adults. For example, a presumption around contact with grandparents would require the court to consider contact with all living grandparents (potentially including step-grandparents) whilst if "lineal ancestors" were included, great grandparents (and potentially their parents) would also need to be considered. The court would thus be considering a list of adults rather than focussing on the child's best interests.

Vulnerable witnesses (Section 4)

We support amendments 11-14 which extend protections for vulnerable witnesses.

Child Welfare Reporters (Section 8)

We oppose amendments 65, 66, 67

We support the Scottish Government proposals to create a register of child welfare reporters, fund their work and create minimum standards for registration. However, we believe that these matters would be better addressed in the proposed regulations, rather than primary legislation.

Contact Centres (Section 9)

We support amendments 15 – 30, 52

We oppose amendment 69, 70, 71, 72, 74

We support the Scottish Government proposals for registration of contact centres and their proposed amendments, which aim to ensure equitable access to centres across the country. We believe that requirements for registration, including those related to staff training and facilities, require further consideration and are best dealt with through the proposed regulations rather than this bill.

Renaming Court Orders

We oppose amendment 75

We agree that the terms **contact** and **residence** are not child-friendly and do not necessarily reflect modern living arrangements, however this amendment does not present any alternatives. We would welcome continued discussion on this, outwith consideration of the current bill.

Sibling Contact (Section 10)

We support amendments 54, 77, 55, 31

We oppose amendments 76, 78, 79 (see above)

We welcomed the introduction of this section of the bill, which creates an explicit duty on local authorities to promote regular contact between siblings. Whilst it is not appropriate to create presumptions relating to adults, we believe it is appropriate to

do so with regard to other children, given the historic lack of importance accorded to these relationships.

We are pleased to see an amendment removing the phrase “whether of the half blood or the whole blood”, and disappointed that it has been re-introduced in a government amendment. We call for an amendment to remove this phrase entirely at Stage 3.

We are extremely disappointed to see a number of amendments to this section relating to adults and refer members to our position on these, stated above.

Alternative Dispute Resolution (Section 11)

In our evidence to Justice Committee we expressed support for the use of alternative dispute resolution including mediation and family group decision making, with the exception of cases where there is a history of domestic abuse. We agree that it is important that public funding be available to support this. Whilst we support both amendments 57 and 80 in principle, we feel that this issue is more complex than can be addressed by either amendment. We are also concerned that neither makes provision for the child’s views to be considered or to ensure the paramountcy of the child’s best interests.

We do not support the introduction of mandatory mediation information meetings and oppose amendment 58.

Factors to be considered (Section 12)

We oppose amendment 83.

This amendment has the effect of creating a presumption of equal shared care of a child, on the request of either parent. The UNCRC is clear that the state must ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child, and that a child who is separated from a parent is able to maintain personal and direct contact on a regular basis, except if it is contrary to the child’s best interest. However, this does not equate to a presumption that children should divide their time equally between two (or in some case more) parents. Rather the obligation is to support parents to focus on the best interests of the child and for decision makers to make decisions based on the paramountcy (in Scots law) of the child’s best interests.

Regular contact with both parents is generally in the best interests of children and shared care arrangements can be beneficial. However, outcomes are best where this a flexible arrangement, taking account of the child’s changing needs, best interests and views and mutually agreed without intervention by the court.

Child’s right to privacy (After Section 13)

This is a complex situation in which the ECHR Article 6 (fair trial) and Article 8 (privacy and family life) rights of the parties and the child need to be carefully balanced. One way in which this may be achieved is to ensure that specifications are tightly drawn, with the applicants stating what is sought and why. It would be appropriate to take account of the views and best interests of the child when discussing applications.

Child Advocacy Services (After Section 15)

We support amendment 84.

Putting this amendment into effect will require significant resources, however advocacy services are an important way in which children can be supported to realise their rights.

Specialist Judiciary (After Section 16)

Whilst we support, in principle, exploring the potential of extending the use specialist judiciary, implementing this requires significantly more work and we therefore believe it is not appropriate to legislate for at the present time.

Delays in Proceedings (Section 21)

We oppose amendment 85.

We support amendments 40-42

We support the proposals included in the bill, as introduced, to ensure that delays in court proceedings do not have a negative impact on children's best interests and welfare. However, setting arbitrary timescales, as proposed in amendment 85, will detract from the paramountcy of the child's best interests and could negatively impact on the child's ability to express their views.

Review of effect of Act (Before Section 22)

We support amendment 86.

We support continuing scrutiny of this area of law and, in particular, how the changes it has made with respect to children's participation have been given effect.

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