

Review of Part 1 of the Children (Scotland) Act 1995

Children and Young People's Commissioner

(Scottish Government notes of interview – 28 September 2017)

1. Introductory

Interviewed Megan Farr policy officer at the Children and Young People's Commissioner. The Commissioner's role is to promote and safeguard children's rights in Scotland. Megan leads on domestic abuse policy. She has received input from other colleagues.

2. Voice of the child and putting the child at the centre

(a) Should further steps be taken to ensure the voice of the child is heard in cases under part 1 on the 1995 Act, in line with the United Nations Convention on the Rights of the Child (UNCHR)?

Yes. Children are capable of making their voice known. Children's voices should be given due weight dependent on the age and maturity of the child. Almost all children are able to make their views known. This is not a question about legal capacity as the ability to instruct a solicitor is not the same as the ability to give views. Courts can conflate the two and it needs to clear they are not the same. Any changes to legislation should be compliant with article 12 and comment 12 of the UNCHR.

(b) Should there be greater emphasis on a child being heard directly by the judge or sheriff?

Yes but this may not be appropriate for all children. Children will need to be prepared and receive support. Judges hearing directly from children need appropriate training and this needs to be done in a safe way using the Golden Rules for Participation. A form is not the answer.

(c) How could the family justice system provide feedback to the child on decisions by the court under part 1 of the 1995 Act?

Feedback is vital. However, there is a difficulty in doing this as the courts state that a child isn't a party to proceedings. Feedback needs to be given in a child friendly way and judges require training to be able to undertake this.

(d) Should the language used by the courts be simplified and clarified to help children and other parties?

Yes simplified language will help adults as well as children

(e) Should section 11 of the 1995 Act be amended to make it clear that siblings under 16 can apply for contact?

The situation on this is unclear and there have been conflicting judgements so this needs to be clarified. Parental rights should not result from an order unless it is in the best interests of the child. Right to contact with siblings should remain separate from contact with parents

(f) Should the presumption in section 11 of the 1995 Act that children 12 or above are of sufficient age and maturity to form a view be removed?

This presumption is not compliant with general comment 12 of the UNCHR, which states there should be a presumption that all children have capacity. All children are able to form a view.

(g) What other steps could be taken to ensure that the welfare of the child is always paramount in cases under part 1 of the 1995 Act?

Guidance, training or a practice note for the judiciary could be produced. This should be coproduced and involve children who use the system. A good example is Power Up/.Power Down.

3. Domestic Abuse

(a) Should further steps be taken to protect domestic abuse victims and other vulnerable parties when a case under part 1 of the 1995 Act is being dealt with by the courts?

Yes. Children should have the same protection as other parties. Needs to be a recognition that this can be a way of perpetuating abuse.

(b) Are provisions needed to ban the personal cross-examination of domestic abuse victims by their abusers in relation to cases under part 1 of the 1995 Act?

Cross examination needs to be consistent with protection that individuals receive in other proceedings for example criminal proceedings.

(c) Are any changes needed to section 11 (7A) to (7E) of the 1995 Act on protection from abuse?

This piece of legislation is useful and currently underused. There is a fear of this being used as a red button. There needs to be more awareness raising and training.

(d) Should section 11 of the 1995 Act be amended so the courts are required, when considering if an order should be made, to take into account any relevant criminal

convictions a party may have and any relevant civil protection orders that may be in place?

Civil courts and criminal courts are not linking up. There have been cases where a father has been convicted and a non harassment order has been issued but this has been overturned by a contact order. The word "relevant" is the key term.

(e) What other steps could be taken to support domestic abuse victims and other vulnerable parties in cases under part 1 of the 1995 Act?

There needs to be greater representation of children and young people as currently there is a big gap in children's voices being heard. This is equally important in non domestic abuse cases.

(f) Is any action needed on domestic abuse risk assessments in section 11 cases?

Yes there needs to be a review to reflect current understanding of domestic abuse. The Safe and Together model is a useful model to take.

4. Parental Responsibilities and Rights (PRRs) and related matters

(a) Should PRRs be extended to all fathers, so fathers are treated in the same way as mothers?

We are comfortable with the current position. It is evident who the mother is but it is not evident in the same way who the father is. The people who have rights over children needs to be considered in relation to the best interests of the child. The rights of children mean that contact and PRRs are different. The decision on PRR should be made based on what is in the best interests of the children.

(b) Should joint birth registration be compulsory?

No as this is potentially unworkable and is also inappropriate in cases of rape where the father may be unknown or uncontactable. This may be a barrier to registration, which is a child's right under UNCRC.

(c) Should section 11 of the 1995 Act be amended so that there is a presumption in favour of both parents being involved in bringing up the child, unless this is contrary to the child's best interests?

The rights of the child are to have both parents involved in their upbringing but only if it is in their best interests and if it is safe to do so. There needs to be a robust system to assess this which takes into account the rights of the child rather than the rights of the parents. The majority of successful shared parenting arrangements are made by mutual agreement without input from the courts. Cases that reach the courts are by definition ones where there is a conflict between parents. Research suggests that over half involve domestic abuse. It is rare for shared parenting to work following a court order.

(d) *Is provision needed on unmarried fathers who jointly registered the birth overseas having PRRs in Scotland?*

This is positive as it is non discriminatory but issues may arise if the other jurisdiction doesn't have the same procedures, i.e. if there is an assumption of paternity.

(e) *Should there be more provision on the involvement of non-resident parents in health and education decisions?*

Yes, where it is in the best interests of the child. Legislation needs to reflect the impact this can have in domestic abuse cases and health and education staff need to be aware of this.

(f) *Should section 11 of the 1995 Act be amended to lay down criterion of no presumption in favour of contact?*

Children should have a right to contact if it is safe and in their best interests for them to do so. The presumption needs to be framed on the basis of the child's rights to be safe and heard.

(g) *Should section 11 of the 1995 Act be amended so the courts are required to consider whether there has been any parental alienation?*

We note that "Parental Alienation Syndrome" has been robustly discredited and it should not play any part in court proceedings.

Our research showed that many children who are experiencing domestic abuse at home don't want to see the abusing parent and we note that at least half of cases which reach the courts involve domestic abuse. There are examples of both abusing and non-abusing parents alleging parental alienation.

(h) *Should the Scottish Government take any steps to discourage parental alienation?*

There should be a focus on children's rights and they should be able to express their own views with support from relevantly qualified person. This should mitigate the influence of parents.

(i) *Should "parental responsibilities and rights" be renamed "parental responsibilities" to make it clear that they exist to promote and safeguard the welfare of the child?*

This would benefit from a broader roundtable discussion. It wouldn't be useful to remove parental rights altogether. There needs to be more emphasis on parents exercising rights on behalf of their children

(j) *Should the criminal court be able to remove a person's PRRs when that person is found guilty of a serious criminal offence?*

No the criminal court is not the appropriate forum. Decisions need to be made on the basis of children's best interests. There is a risk of impact on women accused of failure to protect or contempt in relation to contact orders.

(k) Should the terms "contact" and "residence" be removed from the legislation to be replaced by a term such as "child's order"?

No as this could cause confusion as the context and terms are understood. A child's order is not 100% clear.

5. Alternative dispute resolution/mediation

ADR is useful for cases that don't reach court and cases that don't involve domestic abuse. Face to face ADR/mediation is not helpful in domestic abuse cases as it could be used as a way to continue the abuse. ADR needs to be done by someone who is a trained mediator with training in domestic abuse and doesn't need to be face to face.

6. Grandparents and other family members

(a) Should section 11 of the 1995 Act be amended so that there is a presumption in favour of grandparents and other family members being involved in bringing up the child, unless this is contrary to the child's best interests?

We are concerned if this could extend the number of people who would have rights over a child. There is a distinction between contact and PRRs. Children have a right to see their extended family. Any change needs to be done on the basis of children's rights.

(b) Should section 11 of the 1995 Act be amended to provide that children have a right to contact with grandparents and other family members, unless this is contrary to the child's best interests?

We have concerns around the ability of the courts to decide what is in the best interests of a child due to a lack of training and awareness. There is also the issue of a parent being denied contact and the grandparents being allowed contact and how to ensure that the grandparents don't facilitate access to the parent.

(c) Should changes be made to the Charter for Grandchildren?

The charter is not child centred and should be reframed from a children's rights perspective.

(d) Should a Parental Responsibilities and Parental Rights Agreement for step-parents be established, so that the step-parents could obtain PRRs without going to court?

No on balance as there needs to be some safeguards as this could be used to acquire power over a mother in domestic abuse cases. Need to consider whether it is in the best interests of the child. There need to be safeguards in place via the courts.

7. The courts and related matters

(a) *Should part 1 of the 1995 Act be amended to make it clear that cases should be dealt with expeditiously and delays are contrary to the child's best interests?*

Yes as cases can take a disproportionate amount of time in relation to a child's life. However, courts need to be sufficiently resourced to do this as otherwise there would be a risk of appeals under article 6 of the EHR and a decision may be made that isn't in the best interests of a child.

(b) *Should time limits be placed on cases under part 1 of the 1995 Act?*

Yes but only if cases are considered thoroughly.

(c) *Should cases under part 1 of the 1995 Act be removed from the jurisdiction of the Court of Session at first instance?*

No fixed answer.

(d) *Should steps be taken to make cases under part 1 of the 1995 Act less confrontational?*

Yes, through judicial management to focus on the rights of the child and decisions being in their best interests. ADR should be used more but only if sufficiently resourced, particularly to ensure that in cases where there is Domestic Abuse the ADR process does not contribute to the abuse.

(e) *Should steps be taken to make cases under part 1 of the 1995 Act less stressful for the child and for the parties?*

Yes. Could use the Power Up/Power Down as an example – Super Listener resource. There needs to be child focussed and less stressful for the child. Communication with the child in appropriate ways.

(f) *Should a check list of factors for the courts be considered when dealing with a case be added to section 11 of the 1995 Act?*

This may be better as a practice note or guidance rather than in primary legislation..

(g) *Are changes needed to commission and diligence arrangements in relation to cases under part 1 of the 1995 Act?*

Yes. There have been issues with domestic abuse cases where an abusive partner has gained access to information.

(h) *To encourage consistency, should provision along the lines of section 4(7) of the Judicial Factors (Scotland) Act 1880 be added into family legislation?*

Encouraging consistency in the courts is good but it needs to be understandable for children.

- (i) *Can any changes be made to improve how cross-UK border cases on matters such as contact are dealt with?*

Awareness of issues where English Courts have been taking jurisdiction when they shouldn't and there is also an issue of consistency. The law is OK but the practise needs changing.

- (j) *Should there be a statutory Code of Conduct for lawyers dealing with family cases?*

Yes and this needs to be based on the rights of the child. Courts should be more focused on the rights of the child.

8. Enforcement of section 11 orders

Should imprisonment be removed as a potential penalty for failure to obtemper an order under section 11?

No but need to fix the system to avoid this happening as resident parents can be put in a difficult position when an older child is unwilling to participate in contact. The solution is that the views of the child and their best interests need to be more clearly taken into account. This could mean that children are more amenable if their views are taken into account.

Imprisonment of primary carers may not be in the best interests of the child. The best interests need to be taken into account and therefore imprisonment should be used as a last resort. This needs to be considered more broadly than this context.

9. Child welfare (bar) reporters and curators ad litem

- (a) *Should regulation of child welfare reporters be introduced so that the courts could only appoint a person who meets standards laid down in areas such as qualifications, experience and training?*

Yes. Training should be based on child's rights, domestic abuse, child's development, seeking children's views and assessing capacity of the child (to give views not just legal capacity). There should also be a complaints procedure. The child welfare reporter and curator *ad litem* doesn't have to be a lawyer or social worker.

- (b) *Should the work of child welfare reporters be centralised so that reporters are provided to the courts through a centralised service?*

Yes as this would encourage consistency. However, it may be more costly, i.e. travel to rural areas. The reporters should be funded centrally as if one parent meets the costs then there would be a question about their independence. Cost is a barrier to children's representation – based on parental income. This may result in financial savings where decisions were less likely to be challenged.

(c) If the work of child welfare reporters were centralised, would you support giving them additional functions and duties?

Yes as long as this was accompanied by specialist training. There are examples of this happening in other jurisdictions for example New Zealand.

(d) Should any regulation of child welfare reporters also cover curators ad litem appointed to children in cases under part 1 of the 1995 Act?

Yes as it is sensible for the regulation to be consistent.

10. Regulation of contact centres

Should regulation of contact centres be introduced to lay down standards centres would have to meet in areas such as accommodation and training of staff?

Yes this would help clarify what they are for. There have been cases where children have been put into danger. Contact centres should be used for short term unsupervised contact. They are often not suitable for children at risk of harm or domestic abuse.

11. Guidance for children and parties

Should there be more public facing guidance for children and parties about cases under part 1 of the 1995 Act?

Yes. This should be developed with children of all ages and experiences and should reflect their experiences. An example would be Power Up/Power Down.

12. Savings to the public purse

The public purse currently funds most child welfare reporters as they are funded through legal aid. There should be a shift of focus to children's rights and this could improve decision making and reduce the timeline for decision making. This may prevent extended litigation. Training would be required to accompany this shift.