

Children (Scotland) Bill Stage 3 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 debated at Stage 3 on 25th August 2020. 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.

Voice of the Child - Sections 1,2 and 3

We support amendments 8, 12, 13, 14, 15 and 16

We support the following related amendments in other sections: 31 (section 16),

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 continue to be concerned that the unnecessary addition of "unless the contrary is shown" in these sections has the potential to weaken the presumption by implying an obligation to challenge the presumption of capacity. We believe this should occur only rarely.

However, we support the above amendments which allow children to participate in decisions about how they give their views.

We oppose amendment 35.

This amendment risks privileging the child's views on this matter above other aspects of their lives. Whilst children's views about who is important to them should be part of the consideration, their views about how any decision would impact their lives, in the entirety, should be given equal weight.

Vulnerable Witnesses and Parties – Sections 4 & 7

We support amendments 37, 38 and 39

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>

We support these amendments which extend existing protections available in criminal courts to civil hearings. We note that the right to special measures is not automatic.

Regulation of Child Welfare Reporters – Section 8

We oppose amendment 40

We support the Scottish Government proposals to create a register of child welfare reporters and create minimum standards for registration. We are pleased that the bill as drafted retains flexibility in who can be a child welfare reporter, to allow the role to develop and appointments which respond to the specific needs of each child. We therefore oppose it being restricted to any single profession as proposed by amendment 40.

Regulation of Contact Centres – Section 9

We support amendment 20 and the minor government amendments in this section.

We support the Scottish Government proposals for registration of contact centres.

We oppose amendments 3, 4, 5, 41, 7

We believe that requirements for registration, including those related to staff training and accessibility of facilities are best dealt with through the proposed regulations and as part of the Family Justice Modernisation Strategy rather, than in this bill.

Promotion of contact between siblings – section 10

We support amendments 43, 44 and 45

These amendments remove outdated language referring to siblings “either of the whole or of the half-blood” from the bill.

We oppose amendment 22

At Stage 2 we opposed a series of amendments which sought to add presumptions relating to various categories of adults to this section, which focusses on ensuring that looked after children continue to have regular contact with their siblings if they are not able to live together.

Our opposition to amendments relating to adults does not reflect any judgement on the merits, or not, of children remaining in contact with those adults. 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). In the case of foster carers, children may have had been placed with a significant number of foster carers, for longer or shorter periods of time. The court would thus be considering a list of adults rather than focussing on the paramountcy of the child’s best interests.

It is important that the focus of this section remain on the rights of children to remain in contact with their siblings.

Mediation and ADR – Section 11

We support amendments 24 and 25.

Factors to be considered when making an order

We oppose amendment 26

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 cases 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.

Parenting disputes which reach the courts are those with the highest level of conflict – by definition those who have been unable to agree on how best to meet their child's best interests. International and Scottish research shows that domestic abuse is a factor in a large proportion of these cases. In that context, a presumption on shared parenting is at best inappropriate and at worst, could place children at risk of harm.

Duty to consider best interests when allowing access to information – section 13A

We support amendment 46

This amendment seeks to ensure that the child's right to privacy and their best interests are considered when an order is made providing access to their private information.

Alternative Dispute Resolution – after section 16

We support amendment 32.

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.

This amendment and requires Scottish Ministers to provide assistance available in meeting the costs of mediation and other forms of alternative dispute resolution, via legal aid or via another scheme. This amendment also goes some way to addressing our concerns about ensuring children's views are given at least as much regard in alternative dispute resolution as they are in the provisions of this bill.

We oppose amendment 33.

We oppose any form of compulsory mediation and are concerned that even a pilot of mandatory mediation information meetings may result in harm to children who have experienced domestic abuse. Should this amendment pass, we call on Scottish Government to ensure that appropriate safeguards are in place to ensure that no person who has experienced domestic abuse is required to attend such a meeting.

Duty to ensure a system of redress

We support amendment 47

The intention of this amendment is to provide children and young people with access to an effective remedy if their views have not been taken into account and given due weight, in accordance with their age and maturity. The United Nations Committee on the Rights of the Child, in their General Comment 12 (2009) on the Right of the Child to be Heard, states: “Legislation is needed to provide children with complaint procedures and remedies when their right to be heard and for their views to be given due weight is disregarded and violated.”³

There is currently no such a system. In order to effectively meet this obligation, Scottish Government will need to undertake further work to identify how such a system would operate. Children and young people with experience of section 11 proceedings must be involved in the design of the system.

Opportunity to participate in hearing

We support amendment 34.

The Independent Care Review Promise⁴ states that brothers and sisters should have the necessary legal rights to participate in decisions made about their siblings. This includes notification of hearings and rights of appeal. This issue is discussed in detail in Clan Childlaw’s statement of 18 August⁵.

This amendment will significantly improve the ability of brothers and sisters to participate in each other’s children’s hearings and as such we support it, however we are disappointed that it does not make provision for the right of appeal called for in the Promise.

Review of children’s ability to participate

We support amendment 48.

For further information, please contact Megan Farr, Policy Officer at megan.farr@cypcs.org.uk or 07803 874 774

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https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolNo=CRC%2fC%2fGC%2f12&Lang=en

⁴ <https://www.carereview.scot/wp-content/uploads/2020/02/The-Promise.pdf>

⁵ <https://www.clanchildlaw.org/news/klan-childlaw-calls-for-participation-rights-for-brothers-and-sisters-in-childrens-hearings-to-be-included-in-the-children-scotland-bill>