



SCRA Written Evidence for the Justice Committee

The Scottish Children's Reporter Administration – Response to the Justice Committee call for written evidence.

8th November 2019

The Children's Hearings System is Scotland's distinct statutory system, in which concerns about a child's circumstances (whether about the care or treatment of the child by adults or the behaviour of the child) are considered by Children's Reporters and then by panel members in a Children's Hearing, who make a decision about whether there needs to be compulsory professional involvement with the child and family.

In the Children's Hearings System:

- the needs of children or young people are addressed through one holistic and integrated system which considers all the circumstances of the child and the child's welfare
- the welfare of the child remains at the centre of all decision making and the child's best interests are paramount throughout
- the child's engagement and participation is crucial to good decision making
- the rights of children and families are respected

The role and purpose of SCRA is to:

1. Make effective decisions about a need to refer a child/young person to a Children's Hearing
2. Prepare for and participate in court proceedings where statement of grounds or Hearings findings are appealed and ensure the wellbeing of children and young people – particularly vulnerable witnesses – are protected throughout the court process
3. Support Panel Members (though we are not involved in making Hearing decisions) and ensure fair process in Hearings
4. Support children, young people and families to participate in Hearings
5. Disseminate information and data to influence, inform and reassure
6. Provide premises for Hearings to take place
7. Work collaboratively with partners to support and facilitate the Getting it Right For Every Child (GIRFEC) agenda

SCRA's vision of service is that: We operate within Scotland's Children's Hearings System to protect and support the country's most vulnerable and at risk children and young people identified as requiring the full protection of the law due to difficulties, challenges and risks they face.

The Committee welcomes your views on any issue relating to the Bill. This could include views on any of the following areas or questions:

1. **Voice of the child: Do you agree with the approach taken in the Bill to remove the presumption that a child aged 12 or over is of sufficient age and maturity to form a view**

SCRA are of the view that the presumption should be that all children will have a view about their situation and circumstances, regardless of their age / maturity / ability to explain what their view is. The presumption should be that the Court takes account of the child's view; and as a result of that actively seeks to determine the view(s), take account of them and respond to them





accordingly. It is the effective communication of the child's view which is critical – not the age at which the child is deemed able to have a view.

2. Do you agree that it should be left to the court to decide the most suitable way of obtaining a child's views?

SCRA think that Courts should determine the 'best' way to elicit the information they need – including a child's view. That said, the Court may well require additional information about the child – communication preferences / additional support needs etc from those involved with the child in order for this decision to be made. We are not entirely sure from the face of the Bill or the accompanying Policy Memorandum how this is to be consistently done.

3. How do you think children should be given the opportunity to express their views?

There are a number of professional disciplines in Scotland focused on 'giving views' – advocacy workers for children will increase and specialist solicitors / curators / safeguarders have gathered and communicated children's views for some time. In family court actions, however, there can be different vested interests from parties in the action, which can cloud judgement when it comes to explaining what is happening to a child, including giving a child the opportunity to give their view. This can be further exacerbated when a child has a resident and non-resident parent or carer involved in the action. SCRA thinks that an approach directly from the Court to the child should be considered – a letter or an approach in person. This approach is most likely to ascertain the level of understanding of a child and involve them in the most positive way. It also gives the Court a communication channel through which to provide feedback on what happens at Court directly to the child.

4. Are there other measures that you think should be in the Bill to ensure that the voice of the child is heard?

As outlined above SCRA think that communication between the Court and the child will be crucial and perhaps requires more thought. The Court requires to have information in order to make an assessment of a child's understanding / capacity and ability in order for a decision about when and how they should give a view to Court to be made. Similar decisions need to be made when communicating decisions made by the Court back to the children the decisions affect.

5. Child's best interests: To what extent does the Bill meet one of its key policy aims of ensuring that the best interests of the child are at the centre of contact and residence cases and Children's Hearings?

SCRA welcomes the introduction of section 1 (4) 'Paramountcy of child's welfare, and the non-intervention principle' which aligns clearly with the principles of the Children's Hearings (Scotland) Act 2011 section 25, 28 (2) and 29 (2). The primacy of the child throughout this Bill is clear – which should absolutely be the aspiration for all our work involving decisions about children.

SCRA agrees with the concept of 'deemed vulnerable witnesses' at section 4; we agree with the inclusion categories as outlined (Children's Hearings (Scotland) Act 2011 section 67 (2) grounds b, c, d, f, g, p & q) but we question why lack of parental care (a) and the child is being exposed to persons whose conduct means that it is likely the child will be abused or harmed (e) are not also included in the list. We understand that section 67 (2) b, c, d, f, g, p, q grounds have a clearly identified 'victim' of adult behaviour, which makes the provision of deemed vulnerable witness protections clear and also that there are other routes available in the Bill for section 67(2) a – lack of parental care and e, j, k, l, m, n, o grounds (which focus on a child or young person's own behaviour).

On balance, we are of the view that a clear statement in respect of children within the Children's Hearing court process, (which would capture all of the relevant adult behaviours towards children) will result in less adversarial debate about the need for protections and a more consistent application of the protective provisions in the Children's Hearing court proceedings. We discuss this in more detail at the end of this submission. If our position on children in proceedings is explored then we are satisfied with the way the Bill provisions will protect vulnerable adults in Children's Hearing court proceedings.





For Children's Hearings the changes in section (5) (2) 176A are welcome. SCRA support the additional protections introduced for vulnerable witnesses and we are pleased that a 'preliminary hearing' will be introduced prior to any evidential hearing; we think this fits with the shift across Scotland to taking evidence at the earliest opportunity and with the improved Joint Investigative Interview and with taking evidence on commission. SCRA hopes that this will result in less children being required to be personally involved in adversarial Children's Hearings Court proceedings.

The additional orders introduced through section 5, 176 B to D add to the protective measures available to the court. If parties have not lodged a child witness notice the Court can make an order in relation to the provisions of the Vulnerable Witnesses (Scotland) Act 2004. This strengthens the protections which can be afforded to children and to other vulnerable witnesses – but all the additional orders may not be required if children were considered separately and in a similar way to the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019 – we discuss this more fully at the end of this submission.

SCRA supports the section 7 introduction of the concept of 'vulnerable parties' and the use of special measures in respect of them. However, we think that it could be made explicit on the face of the Bill that this status applies to children as well as to adults within proceedings, as this is not clear. We discuss what we see as some difficulties in relation to the concept of 'vulnerable parties' at the end of this submission.

6. Child welfare reporters and curators ad litem: Do you agree that child welfare reporters and curators ad litem should be regulated?

Yes.

7. Do you have any views on how this should work in practice?

No.

8. Factors to be considered by the court when making contact and residence orders: The Bill would require the court to consider the effect of an order on the involvement of the child's parents in bringing up the child and the effect on the child's important relationships with other people. This is in addition to statutory factors relating to protecting the child from abuse and other factors appearing in case law. Do you agree with this approach?

Yes.

SCRA welcomes the changes introduced at section 12. In line with Getting it right for every child (GIRFEC) assessment it is right that the child should be considered within their own specific context whenever decisions are made about them / or which affect them. This consideration of the impact of decision making on each child will help ensure that the decision is right for every child and will encourage variation and review in order to maintain decisions that are right as children develop / mature and change.

9. Should any other factors be listed in the Bill?

SCRA thinks that the broad factors as listed on the face of the Bill are sufficient, but that accompanying notes and guidance may need to explain more fully the policy intentions behind the interpretation of the factors.

10. Other requirements on the court: Do you agree that the court should ensure that certain decisions are explained to the child?

Yes and already explained more fully at question (4).





11. Do you have any views on the provision in the Bill which would require the court to consider the risk to the child's welfare of any delay in the proceedings?

SCRA agrees that on occasion delay in proceedings can have an adverse effect on a child's welfare and/or wellbeing, and that this should be considered by the Court and Children's Hearing (as appropriate). We would ask that the accompanying notes and guidance make very clear the associated assessment requirements in respect of the link between any delay and the welfare of the child and it may be that additional training is required for social work and other professionals so that options and recommendations in these circumstances can be fully explored / clarified.

12. Vulnerable witnesses: The Bill would prevent a party from personally conducting their case in contact and residence cases and Children's Hearings in certain circumstances, for example, where the witness is a victim or complainer of domestic abuse. A solicitor could be appointed by the court to represent the party who is prevented from conducting their own case. Do you agree with this approach?

SCRA are pleased with the prohibition on personal conduct of case, we think this provides protections to all parties and will also ensure that the best evidence is heard by the Court, in the best way.

13. The Bill would also allow the court to order the use of other special measures, such as the use of a live TV link or screen, in contact and residence cases. Do you have any views on this provision?

No.

14. Contact centres: What role should child contact centres play in maintaining contact between children and family members they do not live with?

SCRA thinks the focus of this question on the role of contact centres is perhaps not helpful. Contact centres have a place, if the Court or the decision maker determines that this 'type' of public contact is the most appropriate for an individual child. In these circumstances it is right that there should be a level playing field in respect of the contact centre facility and what families should expect from their experience of using the centre. If a child's contact requires to be regulated then the experience of that should be of an accepted, consistent standard across the Country.

15. Do you agree with the proposal in the Bill to regulate child contact centres and for there to be a system of independent inspections?

Yes.

16. The Bill would only require the use of regulated contact centres where referral is made by the court, although the Family Justice Modernisation Strategy suggests solicitors could also be encouraged to refer to regulated centres. Do you agree with this approach?

Yes.

If regulated contact centres are successful then it may be that local authorities would also look at using the service they provide and that the centre would be used for contact determined by the order of a Children's Hearing.

17. Do you have any views on the practical or resource implications of the regulation of contact centres?

Yes.





SCRA thinks that the regulation of contact centres within the private sector will have an impact on local authority run contact centres. Local authority centres are not in the scope of the definition and regulations required by the Bill – but would need to keep in line with the private sector to ensure a consistency of experience for children and families.

18. Enforcement of orders: The Bill would require the court to investigate the reasons for a person's failure to comply with a court's order relating to, for example, contact. Do you have any views on this approach?

SCRA agree that failure to comply with a Court order should be investigated by the Court. Failure to comply with an order frustrates decision making and can leave a child in a situation which is not in their best interest.

19. Are there any other options which should be included in the Bill to ensure orders are enforced?

Enforcement in relation to personal relationships is a very difficult concept. The Bill approaches this area with sensitivity and creativity and the provisions should be given time to bed in. It may be that the duty to investigate a failure to comply is sufficient and effective.

20. Contact with siblings: Do you agree that local authorities should be required to promote contact between a child and any siblings or other people with whom the child has a sibling-like relationship?

Yes.

SCRA thinks that local authorities should have a duty to make an assessment of the relationships that are important to children and should seek to promote these relationships in their ongoing work with a child and their family. Section 10 promotes sibling / sibling-like relationships in a clear and effective way.

We do think that promoting sibling relationships will also mean that there may need to be different / additional views and concerns passed to decision makers (in the Court and the Children's Hearing) and decision makers should be equipped to deal with this additional information / these additional interests. These may be from other members of a child's family – not just their siblings.

21. Births registered outwith the UK: Do you have any views on the provisions in the Bill that would allow parental rights and responsibilities obtained outwith the UK to be recognised?

No.

SCRA are in agreement with the proposals in section 19.

22. Children's Hearings: Some of the Bill's provisions, for example, in relation to ensuring that the voice of the child is heard and protecting vulnerable witnesses would apply to Children's Hearings. The Bill would also make other changes relating to Children's Hearings, for example, giving the Principal Reporter the right to appeal against a sheriff's decision in relation to deemed relevant person status. Do you have any views on these changes?

In our response to the pre-bill consultation in 2018 SCRA were clear that any developments intended to:

- 1) improve the ways in which children give their views;
- 2) improve the ways in which children are communicated with;
- 3) Improve the ways in which vulnerable people are supported;





- 4) changes to rights and responsibilities;
- 5) changes to legal definitions;
- 6) changes to legal presumptions

will also have an impact across the Children's Hearings System. The Bill recognises this impact and has sought to maximise positive change for the Court and for the Children's Hearing. We welcome this across the provisions of the Bill.

We support the provisions of section 17 in relation to appeals against relevant person decisions in the Sheriff Court. SCRA thinks that in cases where it is in a child's best interest and there is a point of law to be determined that it should fall to the state to press arguments at Court. Children and families in such situations are focused on other matters and may not prioritise a Court case. As we said in our pre-bill consultation response in 2018, individuals will not challenge a decision specifically on the basis of the legal test. This means that it is difficult for specific questions about the test itself to be addressed by judicial review as and when they occur. Giving the Principal Reporter a right to appeal a Sheriff's decision about deemed relevant person status would allow clarity and consistency to develop in relation to the application by the Children's Hearing of the significant involvement test. We are pleased this section is included.

23. Practical, financial or other impacts of the Bill: Do you have any views on the practical, financial or other impacts, such as the equality impacts, of the Bill?

No.

24. Family Justice Modernisation Strategy / issues not covered by the Bill: The Family Justice Modernisation Strategy, published alongside the Bill, sets out other actions the Scottish Government intends to take to improve the operation of family justice. It also sets out the reasons why certain areas that were previously consulted on by the Government are not being taken forward. Do you have any views on the actions set out in the Family Justice Modernisation Strategy?

No. SCRA supports the principles of the Family Justice Modernisation Strategy.

SCRA would be keen to be involved in the development of materials about what it is like to go to court; we think that going to Court as a result of involvement with the Children's Hearings should be included in this guidance and we are excited that the guidance will be aimed at both adults and at children (and, we hope, younger and older children).

SCRA agree that further work on cross-border jurisdiction requires to be carried out, that the issues are complicated and at times can be contrary to best interest decision making for children. The jurisdictional issues are particularly relevant for children placed in Scotland subject to orders from the Court in England and Wales, but also relevant for children subject to Scottish Court or Children's Hearing orders residing in England, Wales and Northern Ireland. Further consideration of the jurisdictional issues for children whose nationality is not British.

SCRA is in agreement with the Scottish Government plan to amend the procedural rules to allow local authorities to receive safeguarder and other reports available to families and to the panel members in Children's Hearings.

25. Are there issues which are currently not covered by the Bill which you think should be?

Yes.

SCRA works with the [section 67 \(2\) grounds for referral](#) as set out in the Children's Hearings (Scotland) Act 2011. The section 67





grounds are the basis for referring a child to a Children’s Hearing and cover a child’s own behaviour as well as the behaviour of an adult towards the child. In order to establish the different section 67 grounds a Children’s Reporter may need to lead evidence to the civil standard of proof (on the balance of probabilities) for section 67 (2) (a) through to (q) – with the exception of Section 67 (2) (j). The (j) ground – the child has committed an offence would need to be established using the criminal standard of proof (beyond reasonable doubt).

In addition to working with the different standards of proof Children’s Reporters also use the rules of the criminal and civil courts to frame their work and for some children in some circumstances it may be that both non offence and offence section 67 grounds are relevant and require to be established. It would be beneficial for our work to have one clear approach to take – rather than a landscape which requires careful navigation – and perhaps argument in court over the approach (rather than over the substance of the concerns which lie at the heart of the matter).

In response to question 51 of the Family Law consultation in 2018 (**Should personal cross examination of vulnerable witnesses, including children, be banned in certain Childrens (Hearings) Scotland Act 2011 proceedings?**) we said that:

“A lot of work has happened in recent years in relation to the evidence of vulnerable witnesses – including the [Evidence and Procedure review](#), the [High Court Practice Note on the taking of evidence of a vulnerable witness by a commissioner](#) and the [Vulnerable Witnesses \(Criminal Evidence\) \(Scotland\) Act 2019](#). All of this work is all helping to shift the culture and practice in criminal trials, but Children’s Hearings court proceedings involve some of the most vulnerable children (and adults) in our society, and culture and practice cannot be allowed to stagnate or fall behind. Therefore, SCRA is asking for the same or similar provisions to be introduced into proof proceedings as are in the process of being introduced in criminal proceedings. In the same vein SCRA think that the same / similar provisions in relation to vulnerable witnesses need to be included within civil proceedings.”

This Bill introduces many welcome protections in relation to both vulnerable children and adults. However, we think it could be strengthened if children and adults were considered separately, and if the practicality of taking evidence from children was considered in more detail. This could be done in line with some of the provisions of the [Vulnerable Witnesses \(Criminal Evidence\) \(Scotland\) Act](#); where section (1) is clear and unequivocal; children under and over 12 are distinguished and there is a clear statement of intent about how evidence (in respect of high court trials) should be taken – section 1(3): **The court must enable all of the child witness’s evidence to be given in advance of the hearing unless the court is satisfied that an exception is justified under subsection (7) or (8).**

SCRA are of the view that such a statement of intent in relation to Children’s Hearings court proceedings could also be made: that all the evidence of children in Children’s Hearing court proceedings should be taken in advance – with the leave of the court to direct any alternate approach or exemption to this in the interest of justice.

The legislation could state that this evidence should be in the form of evidence in full by way of a pre-recorded interview; with other options such as evidence taken by a commissioner or evidence in chief in the form of a pre-recorded prior statement also possible, if exception to the full pre-record of the evidence was justified.

If the approach to the taking of evidence from children was considered then, following on from that, the specific considerations of children in relation to their ‘vulnerable witness’ status would be different. We would have a clear statement about the status of children and young people (and SCRA would argue for all children to be ‘deemed vulnerable witnesses’ across all civil proceedings) which would mean that the specific provisions in the Bill would apply to vulnerable adults in proceedings. This would make the provisions less confusing, would make the practical process clearer and would strengthen the protections available to children and vulnerable adults.

So, for example, section (7) of the Bill – Vulnerable Parties – would be clearer. All children would be vulnerable so the consideration of a vulnerable party and any special measures would then be relevant only to adult parties to the action.

If all children were deemed vulnerable in Children’s Hearing court proceedings and there was a legislated approach to the taking / presentation of their evidence then there may be no requirement for a child witness notice and no requirement in the majority





of cases¹ for extended debate about the nature of the process to take a child's evidence (which can detract from the key concerns of the case and take up court time).

If the status of children was clearer it may be that section 176B of the Bill would no longer be required - as the additional step of the child witness notice prior to considering special measures may not be needed and case management within court could move to special measure consideration more quickly.

SCRA would also like to comment on the concepts within the Bill – and Vulnerable Parties is a good example. If this concept is legislated then the legislation needs to consider the concept across all civil proceedings, not just those in the family courts. Arguably all parties to Children's Hearing Court proceedings are vulnerable – does this mean we should always consider special measures in relation to Children's Hearings court proceedings or does a way for Children's Hearing court proceedings to assess and take account of vulnerability need to be developed?

SCRA is supportive of the Children (Scotland) Bill as introduced and we agree with the protections it seeks to put in place for vulnerable children and adults. We think that the Bill could be clearer in defining the status of children and young people in proceedings and in determining what then flows from that status in terms of the way in which they will be involved in court proceedings. The Bill does not separate out children from adults which can be confusing and could make the provisions difficult for front line staff to navigate and implement. The Bill focuses on the child giving their view in proceedings and on establishing vulnerability. SCRA would ask that consideration is given to also establishing what then flows from this vulnerability in terms of the court expectations of how a vulnerable child (in particular) presents any evidence (as distinct from a view) to the court.

SCRA Practice & Policy Team, 2019.

¹ When there is no argument about the fairness of the approach being taken.