

Fairer Scotland Impact Assessment

Children (Scotland) Bill

September 2019



Scottish Government
Riaghaltas na h-Alba
gov.scot

FAIRER SCOTLAND DUTY

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| <p>Title of Policy, Strategy, Programme etc.</p> | <p>Children (Scotland) Bill</p> |
| <p>Summary of aims and expected outcomes of strategy, proposal, programme or policy</p> | <p>The Children (Scotland) Bill (the Bill) has been informed by the outcomes of a consultation on the Review of Part 1 of the Children (Scotland) Act 1995 (the 1995 Act). Part 1 of the 1995 Act covers parental responsibilities and rights and contact and residence cases relating to children when parents are separated or not together.</p> <p>The consultation ran between 15 May and 28 September 2018¹. The Scottish Government produced child friendly questions which were available via SurveyMonkey. The child friendly consultation ran for the same period.</p> <p>The key policy aims of the Bill are to:</p> <ul style="list-style-type: none"> • Ensure the best interests of the child are at the centre of any contact and residence case or Children’s Hearing; • Ensure that the views of the child are heard in contact and residence cases; • In cases involving domestic abuse, to ensure that victims and children are protected appropriately during the family court process; and • Further compliance with the principles of the United Nations Convention on the Rights of the Child in family court cases. <p>Two of the key measures in the Bill are to establish a register of Child Welfare Reporters (CWRs) and a register of curators ad litem.</p> <p>A CWR may be appointed by the court either to undertake enquiries and report to the court or to seek the views of the child and to report any views expressed by the child to the court. The Scottish Ministers recognise that CWRs can play an important role in ensuring the best interests of the child are reported to the court.</p> <p>A curator ad litem is appointed by the court to safeguard and promote the interests of a child in so far as those</p> |

¹ <https://consult.gov.scot/family-law/children-scotland-act/>

Currently CWRs (around 400) are on lists held by the Court of Session and the six sheriffs principal. The court can then appoint a CWR on the appropriate regional list to produce a report.

The Bill establishes a central register of CWRs and provides that a court may only appoint as a CWR a person who is included on the register. Individuals would be eligible to apply to be on the register if they meet the minimum standards in relation to training and qualifications or experience set down in regulations.

Currently appointment of curators ad litem varies across Scotland. In some sheriffdoms curators are appointed from the list of CWRs held by the sheriffs principal. In other areas, curators are appointed from the panel of curators ad litem held by each local authority for permanence and adoption cases. In one sheriffdom the sheriff principal maintains a separate list.

The Bill gives the Scottish Ministers the power to set the fee rates for CWRs and curators ad litem and it provides that CWRs and curators ad litem would be funded by the Scottish Ministers as opposed to by the Scottish Legal Aid Board (SLAB) or privately funded.

At present, the cost of a Child Welfare Report can vary significantly from case to case and also in different areas of the country. The fees for such reports are paid either by the parties to a case or SLAB if parties are eligible for legal aid. The Ordinary Cause Rules provide that the cost of a child welfare report should be met in equal share between all the parties².

There is no information on the cost of fees charged by curators ad litem.

The Bill gives the Scottish Ministers the power to set the fees charged by CWRs and curators ad litem in secondary legislation. This will ensure that fees are standardised both in terms of the level of fees charged and in terms of the consistency across Scotland.

Under the new arrangements, the cost of child welfare reports and curators ad litem fees would be met by the Scottish Ministers. This means that no individual will have

² <https://www.scotcourts.gov.uk/rules-and-practice/rules-of-court/sheriff-court---civil-procedure-rules/ordinary-cause-rules>

| | <p>to meet the cost of a child welfare report or curators ad litem fees.</p> <p>Funding child welfare reports and curators ad litem fees for all parties will remove any access to justice concerns. The Scottish Ministers understand from discussion with stakeholders that parties not in receipt of legal aid may have to incur considerable expenditure to meet the costs of a child welfare report.</p> | | | | | | | | | | | | | | | | |
|-----------------------------------|--|-----------------|---|-----------------|--|---------|-------|-----|-------|---------|-------|-----|-------|---------|-------|-----|-------|
| <p>Summary of evidence</p> | <p>In 2018/19 there were 3,554 family cases raised and 15,649 hearings in family cases involving children (excluding adoption and permanence). Of the 15,649 there were 6,655 child welfare hearings³. A CWR would not necessarily be appointed in every case, and statistics on the number of cases in which a CWR was appointed are not currently available.</p> <p>However, SLAB have figures on the number of reports that are funded by legal aid, and the table below shows the figures over previous years in relation to CWR costs:</p> <table border="1" data-bbox="582 1003 1331 1339"> <thead> <tr> <th>Year</th> <th>Estimated number of individual payments made for CWRs Costs</th> <th>Total cost (£m)</th> <th>Estimated average cost per report (£m)</th> </tr> </thead> <tbody> <tr> <td>2016/17</td> <td>1,711</td> <td>3.0</td> <td>0.028</td> </tr> <tr> <td>2017/18</td> <td>1,983</td> <td>3.5</td> <td>0.035</td> </tr> <tr> <td>2019/20</td> <td>2,263</td> <td>3.7</td> <td>0.027</td> </tr> </tbody> </table> <p>Currently the cost of a child welfare report can vary. Figures from a SLAB report to the Family Law Committee of the Scottish Civil Justice Council⁴ suggest that in 2016, 10% of reports cost under £500; 18% of cost between £501 - £1000; 25% cost between £1001 - £2000; 15% cost £2001 - £3000 and 16% cost more than £3000. In legal aid cases where the cost of the report is to be in excess of £3000 then permission is required from SLAB.</p> <p>The information on the number of privately funded cases is not currently collected. However, from discussions with stakeholders it is understood that this figure could be 10% of all child welfare reports.</p> | Year | Estimated number of individual payments made for CWRs Costs | Total cost (£m) | Estimated average cost per report (£m) | 2016/17 | 1,711 | 3.0 | 0.028 | 2017/18 | 1,983 | 3.5 | 0.035 | 2019/20 | 2,263 | 3.7 | 0.027 |
| Year | Estimated number of individual payments made for CWRs Costs | Total cost (£m) | Estimated average cost per report (£m) | | | | | | | | | | | | | | |
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³ Figures from Scottish Courts and Tribunals Service.

⁴ <https://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/flc-meeting-files/flc-meeting-papers-23-october-2017/paper-4-2---report-by-slab---child-welfare-reporters.pdf?sfvrsn=2>

It is also understood that reports can cost significantly more in cases where none of the parties is in receipt of Legal Aid⁵. During stakeholder events as part of the consultation on the review of the 1995 Act, the Scottish Government heard of privately funded child welfare reports costing upwards of £10,000.

The Scottish Government has no figures on the use of curators ad litem in cases under section 11 of the 1995 Act or the costs charged.

The Bill is informed by the outcomes of the consultation. The Scottish Government received approximately 250 responses to the main consultation and 300 to the child friendly questionnaire. The Scottish Government held a number of meetings with a range of stakeholders across the country during the consultation period, including with children and young people.

The responses to the main consultation have been published where the Scottish Government has permission to do so⁶. In addition an analysis report has been published⁷.

There was strong support amongst consultation respondents to amending the existing arrangements for CWRs and curators ad litem, in particular:

- SLAB supported a change to existing arrangements, stating that it is not ideal that CWR costs are met by the legal aid fund as, if a report is needed to assist the court to take a decision on the case, then its instruction should not be dependent on whether someone is eligible for legal aid funding or not. The ordering of a report should not be dependent on legal aid eligibility and the centralised provision of reports should be available without regard to the individual financial circumstances of a party to the action⁸.
- The Children and Young Person's Commissioner stated that the current funding of CWRs by the parties produces inequalities of access and can

⁵https://www.slab.org.uk/export/sites/default/common/documents/publications/leaflets/Info_for_Applicants_leaflet.pdf

⁶ https://consult.gov.scot/family-law/children-scotland-act/consultation/published_select_respondent

⁷ <https://www.gov.scot/publications/analysis-consultation-responses-consultation-review-children-scotland-act-1995/>

⁸https://consult.gov.scot/family-law/children-scotland-act/consultation/view_respondent?_b_index=120&uuld=534275284

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| | <p>result in the appearance of a lack of independence⁹.</p> <ul style="list-style-type: none"> Families need Fathers, Scottish Women’s Aid, children’s organisations, the majority of the other organisations who support parents, and family law academics were in favour of a new set of arrangements or a change to existing arrangements. <p><i>Rethinking Legal Aid, An Independent Strategic Review</i> in February 2018 set out that when CWRs are appointed by the court the outlays can be significant. The review also suggested that a centralised system for CWRs should be considered¹⁰.</p> <p>The review found that the system of civil legal aid eligibility, contributions and clawbacks is inconsistent and complicated, in particular that assessment and verification of financial eligibility in civil legal aid cases, where applicants are not in receipt of state benefits, can be complex.</p> <p>In addition the review referred to evidence that there can be added financial stress to a person in having to pay a large contribution or indeed the whole costs of a case.</p> <p>For those who are eligible for legal aid, many will still have to pay a contribution towards the cost of the case. This is means tested by assessing the person’s financial situation (disposable income and disposable capital)¹¹.</p> |
| <p>Summary of assessment findings</p> | <p>The evidence shows that although the proportion of cases in which a party privately funds a child welfare report may be relatively low, the potential costs to those affected individuals could put them under significant financial pressure.</p> <p>It is clear that requiring a person who is privately funding their case to pay a considerable sum (perhaps up to £10,000) for a child welfare report and to fund a curator ad litem could pose access to justice issues. Particularly since the decision to request a child welfare report is</p> |

⁹https://consult.gov.scot/family-law/children-scotland-act/consultation/view_respondent?_b_index=180&uuld=570240422

¹⁰ <https://www.gov.scot/binaries/content/documents/govscot/publications/factsheet/2018/02/rethinking-legal-aid-an-independent-strategic-review/documents/rethinking-legal-aid-independent-strategic-review-pdf/rethinking-legal-aid-independent-strategic-review-pdf/govscot%3Adocument/Rethinking%2BLegal%2BAid%2B-%2Ban%2BIndependent%2Bstrategic%2Breview.pdf> (see page 39)

¹¹ <https://www.slub.org.uk/public/civil/eligibility/>

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| | <p>made by the court and not the party to the case, who is the one who may ultimately have to meet the costs of it under current arrangements.</p> <p>The evidence suggests that parties can suffer financial stress due to having to pay a contribution towards their case or marginally failing the qualification test. The additional burden of having to pay for a court ordered child welfare report or a curator ad litem could add to this stress.</p> <p>The evidence supports the approach taken in the Bill to introduce a new scheme of regulation for CWRs and curators ad litem, which extends beyond the standardisation of fees, and provides that the Scottish Ministers will fund the costs of all child welfare reports and curator ad litem fees.</p> |
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