



NAGALRO BRIEFING ON STAGE 3 OF THE CHILDREN (SCOTLAND) BILL

About Nagalro

Nagalro is the professional association for children's guardians, family court advisers and independent social workers. Our members are exclusively concerned with the welfare of children who are involved with the family justice system. We have a membership drawn from across the whole of the United Kingdom and the Republic of Ireland. In addition to our social work members, Nagalro is also able to call upon the expertise of a substantial body of associate members, who are solicitors and barristers trained and specialising in the representation of children in the family courts.

Nagalro has (over the last 30 years) played a pivotal role in shaping the 'tandem model' for the representation of children in care proceedings in England and Wales, whereby the child has a solicitor to represent them together with a social worker (children's guardian) who works closely with the solicitor, advises the court as to the wishes and feelings of the child and where the best interests of the child lie. As a result of this, we have an in-depth understanding of the respective strengths of lawyers and social workers and the way in which these skills can be used to complement each other and to produce the best outcome for the future welfare of the child.

The Children (Scotland) Bill

Nagalro welcomes the improved focus which the Bill proposes on the voice of the child in court proceedings, which gives practical effect to the administration's intention to incorporate the UNCRC into the domestic law of Scotland.

Clause 1: the views of the child

We are very pleased to see that clause 1 of the Bill repeals the presumption, in s6(1) Children (Scotland) Act 1995, regarding the capacity of a child below the age of 12 years to form a view about issues relevant to their welfare and replaces it with a rebuttable presumption that all children are capable of forming views about their welfare. Our experience of working with children and exploring their wishes and feelings is that chronological age limits are of little help and may, in fact, operate to alienate younger children from the process. Some very young children have a clear understanding of their situation, sometimes with more perception than the adults. Others, including older children, may struggle to grasp the issues or feel overwhelmed by them. The decision must always be a child-specific one. The reform proposed by the Bill should give all children a feeling that, irrespective of their

age, their opinions are valued and respected by those charged with making decisions about them.

In anticipation of the points which we shall make about the role and qualifications of the child welfare reporter below, we would highlight at this point that these changes place an increased burden on the CWR to reach a reliable assessment of the capacity and understanding of the child concerned and that this reinforces our view that the qualifications and experience of those who carry out child welfare reporter's duties needs urgent review.

Clause 8: child welfare reporters

The proposal to regulate those who are to perform this crucial role within the family justice system is one which Nagalro would support. We note, however, that the Bill leaves to future regulations the issue of what qualifications (if any) a Child Welfare Reporter should possess. At present, the majority of child welfare reporter appointments are of solicitors. We understand that an amendment is to be proposed whereby the role would be confined to registered social workers. We strongly support this as a necessary reform which will both benefit and protect children who are the subject of court proceedings. The issue is sufficiently important in determining the future direction of children's justice and ensuring that the *authentic* voice of the child is heard by the court that we believe that it should be contained within primary legislation.

We do not doubt that those who currently fill this role aim to discharge the task to the best of their abilities and to help the children concerned, as far as they are able. It must, however, be acknowledged that the nature and complexity of the issues coming before the courts have increased beyond anything which could have been foreseen some twenty-five years ago. As a result, the training and experience required of those carrying out these tasks have changed. The reforms contained within this Bill will significantly add further layers to the complexity and demands of the child welfare reporter's role. We would contend that the point has now been reached where those duties can only be carried out by experienced social workers and that, without this, the intentions of the Bill are likely to be frustrated.

We would point out that, in England and Wales, the comparable role is carried out by family court advisers through Cafcass and Cafcass Cymru. It is work that many of our members are engaged in on a daily basis. Family court advisers would be expected to have at least 3-years post qualification experience as social workers in addition to undergraduate and (often) post-graduate qualifications in social work and child development. The judiciary in Scotland should, as their counterparts in England and Wales do, be able to rely upon expert, independent guidance on matters which are outside their legal training. We would contend that this need is greater where judges, such as Sheriffs, are sitting in a generalist capacity rather than being specialist judges dealing exclusively with children and family cases.

An issue which must be confronted is that the changes contained within the Children (Scotland) Bill *will* change the nature and complexity of the task which is given to the

CWR and this reform *must* move the role of the child welfare reporter forward to meet those new demands. This briefing has been prepared with input from both the social work and the legal side of Nagalro and so we would hope that we can present a balanced view based on over 30 years of tandem working between children's solicitors and social workers and informed by the most recent research.

The roles and training of solicitors and social workers are very different. The role of the solicitor is to advise and to assist lay parties to reach an informed decision. Their training is, primarily, in representing and advising adults. They are skilled at exploring the details of a client's decision with them and the implications which this may have but, ultimately, their role is to understand and to help to put into effect the instructions which their client gives to them. Social work training provides in-depth knowledge of safeguarding issues, including the harms caused by witnessing and experiencing domestic and other forms of emotional abuse. An experienced social worker should have the ability to explore behind the words which the child speaks and to look at the pressures, physical and emotional needs and other factors which may lie behind the things which a child says and offer the court expert advice about this.

The changes to section 6 of the Children (Scotland) Act 1995 will, inevitably, mean that child welfare reporters will be required to work with much younger children. Establishing the wishes and feelings of such children can be a highly skilled process which demands the skills and tools available to experienced social workers to communicate in age-appropriate ways to understand the true feelings of children which they may find difficult to express.

As an example of how the role of the child welfare reporter is going to change as a result of the Bill, we would mention clause 15(2), which inserts a new section 11E into the 1995 Act. When this is enacted, child welfare officers will have duties to explain to (often quite young) children the decision which the court has made in a way which is appropriate to that child's age and understanding.

We suggest that consideration is given by the government that the increased focus on the voice of the child may have unintended consequences in highly acrimonious proceedings between parents. Children expressing resistance to contact with a parent and allegations of parental alienation are, sadly, a commonplace feature of many family cases. Some parents will seek to 'weaponise' the child's voice against the other parent. The process of identifying where this is happening and assisting the child to express their own, often complex, views or advising the court where the child is unable to express anything other than a message they have been given to convey, is a difficult and specialised piece of work which cannot and must not be left to those lacking the necessary training and professional support. Within Cafcass, tools have been developed to assist practitioners to deal with such cases but these are tools designed to be used by experienced and properly trained social workers. They were not formulated for lay use and could easily cause harm to families if placed in the hands of those without the professional knowledge and experience to make proper use of them. The risks to children, without proper support have been subject to careful analysis by Fiona Morrison *et al* in their recently published

research paper *Manipulation and Domestic Abuse in Contested Contact – Threats to Children's Participation Rights*. Family Court Review Volume 58, Issue 2 April 2020 Pages 403-416. The authors of that research say that what is needed is:

'a system of child advocacy, that ensures independent advice, ongoing support and trusting relationships, and information, that children repeatedly tell researchers they need.'

Clause 1(4) of the Bill proposes the insertion of a new s11ZA into the 1995 Act. We note in particular subsection (3) of the new section requires the court to have regard to the following matters when considering where the best interests of the child may lie:

'(a) the need to protect the child from abuse, or the risk of abuse, which affects, or might affect, the child,
(b) the effect that abuse, or the risk of abuse, might have on the child,
(c) the ability of a person to care for, or otherwise meet the needs of, the child, where that person has carried out, or might carry out, abuse which affects, or might affect, the child,
(d) the effect that abuse, or the risk of abuse, might have on the carrying out of responsibilities in connection with the welfare of the child by a person who has (or, by virtue of an order under section 11(1), would have) those responsibilities,
(e) the effect of the fact that two or more persons would be required to co-operate with one another with regard to matters affecting the child.'

Since these are primarily forward-focussed matters there is only a limited role for the evidence-based, legal approach. The answering of these questions will require the skills of an experienced children's social worker who can look at the individuals concerned, their strengths and weaknesses and how their relationship has and will, in the future, impact on their functioning, to provide clear, expert advice to the court to enable it to discharge its responsibilities to the child. Transitional arrangements may have to be considered should the amendment be accepted.

We readily recognise the work being required under these provisions as a risk assessment. It is work which many of our members carry out on a regular basis. It is work which lies squarely within the training and experience of social workers but not within the professional training of lawyers. We have learned through our development of the tandem model that a system of working which respects each professional's areas of particular training and expertise is the one best suited to achieving the best outcome for the child. If risks are not correctly assessed then children will suffer harm, which is often significant for their long-term emotional health and development and could have been avoided.

In this context, it is salutary to reference the final report of the Ministry of Justice on "Assessing Risk of Harm to Children and Parents in Private Law Children Cases" in the family courts in England and Wales published on 25 June 2020.

'In 2019, 54,920 private law Children act cases started in the family courts. Estimates indicate that the prevalence of domestic abuse in these cases is

considerably higher than in the general population, with allegations of findings of domestic abuse in samples of child arrangements/contact cases ranging from 49% to 62%'

The court is going to have to form views about, *inter alia*, the effect on the child of the abuse of another (such as a parent) and the impact on a parent's capacity to parent of any abuse which they may have experienced. These are all issues where experienced social workers would be able to offer help to the court, based on thorough professional and academic training. Without such assistance, the court is effectively making decisions with one hand tied behind its back. We would contend that we can and should do better for the children than this.

Conclusion

There is much within this legislation which is to be commended for enhancing the status of the voice of the child within family court proceedings. However, our experience shows that, if the courts are to be properly equipped to implement these changes, they must have access to independent social work expertise. If that is omitted, the lot of many children will be made worse as they are subjected to unbearable pressures from contending parents to 'say the right thing' to a child welfare reporter who lacks the professional expertise and training to go behind the words used and to understand the processes which are taking place in the child's world. In addition, risk assessments where there has been domestic abuse will be insufficiently robust and children will not be adequately protected from future harm.

Children's protection and participation rights in the current system are sadly lacking. Child Welfare Reporters who are registered social workers and therefore have professional training and skills in child development, communicating with children, safeguarding, domestic abuse, are urgently needed to provide a robust service for children involved in private law cases that come to court. The complexity of family situations that underlie the family disputes that reach the courts demand skilled risk assessment and family-relationship-based interventions informed by a good understanding of therapeutic approaches. These skills lie within the professional field of social work.

The proposed s11ZA(3) has the capacity to make some children's lives significantly better. However, this will only happen if the judiciary can access the appropriate expertise to put these factors into a balanced decision. We believe that will only be available when the child welfare reporter's role is moved to properly trained and experienced social workers. It would be a tragedy if these inspirational reforms were to be stymied because one sector of the family justice machinery had not been given a thorough overhaul and made fit for the tasks which are now to be required of it.

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Nagalro

01372 818504

nagalro@nagalro.com