

SCOTTISH CIVIL COURTS REVIEW CONSULTATION: RESPONSE FROM SCRA

The Scottish Children's Reporter Administration (SCRA) welcomes the opportunity to provide a response to the consultation on the "Scottish Civil Courts Review". SCRA supports the Review's broad aim of improving access to justice for the people of Scotland. SCRA response is focused on those questions in the Consultation Paper that are of direct relevance to the exercise of the Principal Reporter's functions and the Principal Reporter's interface with civil courts in Scotland.

CHAPTER 1: INTRODUCTION

Question 1

SCRA supports the general proposal that the civil justice system be designed to encourage the early resolution of disputes, preferably without resort to the courts. Developing systems of alternative dispute resolution has the potential to reduce pressure on the administrative and judicial resources of the courts, allowing those cases that need to proceed through court to be resolved more swiftly.

For the most part, decisions about children in Scotland are made by Children's Hearings without the need for recourse to civil courts. This has been the case since 1971, when the Children's Hearings System was introduced as an alternative decision-making forum for children. There are, however, specific situations when proceedings arising from Children's Hearings are dealt with by a Sheriff, Sheriff Principal or the Court of Session. In particular:

- Applications for a finding in relation to grounds for referral not accepted and/or not understood pursuant to s.68 of the *Children (Scotland) Act 1995* (the "Act") ;
- Applications for review of grounds for referral previously established by a Sheriff pursuant to s.85 of the Act;
- Appeals from decisions of a Children's Hearing or a Sheriff pursuant to s.51 of the Act; and
- Applications for a warrant to continue to keep a child in a place of safety pursuant to s.67 of the Act.

In these situations proceedings are necessarily conducted pursuant to the specific provisions of the Act, which explicitly require determination by a Sheriff, or on appeals from decisions of a Sheriff, by the Sheriff Principal or the Court of Session.

Children's Hearings court proceedings are civil proceedings "sui generis". They should be determined expeditiously because of their special nature, which involves protecting and promoting the welfare of Scotland's most vulnerable children. This is reflected in the applicable statutory timescales. For example, s.68(2) of the Act provides that a proof application "...shall be heard by the Sheriff within twenty-eight days of its being lodged." Although there is provision in the *Act of Sederunt (Child Care and Maintenance Rules) 1997* (the "1997 Rules") for the proof to be adjourned (r.3.49), the clear intention of the Act is to ensure that decisions in Children's Hearings court proceedings are reached quickly. SCRA is aware that for some cases there is no prospect of the application being concluded within twenty-eight days. In some areas proof diets are assigned to ensure only that the case commences within twenty eight days. The majority of s.68 proof applications are determined without the need for evidence to be led. In cases that do proceed to hear evidence, however, SCRA is aware that pressure on judicial resources can contribute to delay in completion of the proceedings.

SCRA, therefore, welcomes reforms to the civil justice system in Scotland that are designed to divert appropriate disputes away from courts, so judicial resources can be focussed on those cases that require judicial determination and adequate priority can be given to completion of substantive hearings in certain proceedings, such as Children's Hearings proceedings.

Question 2

SCRA agrees that the principles and assumptions discussed in paragraphs 1.11 to 1.14 are a sound basis for the development of the Review's recommendations. SCRA wishes to emphasise the importance of 'other factors' to a balanced and rounded approach to giving effect to these principles. Other factors, such as protecting the welfare of children and the rights of vulnerable adults, are particularly relevant to Children's Hearings court proceedings, where what is at stake cannot be measured in monetary terms.

Question 3

SCRA believes the Review should consider the physical environment of Scotland's courts and, in particular, the facilities provided to court users, such as meeting rooms and waiting areas. The Review should determine what amenities, as a minimum, should be available to court users, irrespective of size and/or location, in order to ensure Scotland's civil justice system is more fully able to respond and accommodate the needs of court users.. From our experience of Sheriff Courts in Scotland, SCRA is aware that some Sheriff Court buildings do not have meeting/consultation rooms and advice and assistance is not dispensed in private. This impacts on the quality and efficiency of service provided to court users and their overall experience of the court process.

CHAPTER 2: ACCESS TO JUSTICE

Question 1

SCRA believes access to justice would be enhanced through public legal education designed to increase general public knowledge about the law and the civil justice system. This would assist in clarifying the the difference between civil and criminal cases and availability of legal aid or partial legal aid and other possible sources of funding for civil proceedings.

Question 3

SCRA believes that where proceedings are being conducted in court, access to justice is best facilitated by enhancing opportunities for litigants to obtain quality advice, assistance and representation. If a litigant chooses to represent themselves, however, simplified court procedure and practice will assist them to take part in the process.

Question 4

“Self-help” services and court-based advice services can make a significant contribution to improving access to justice. This is particularly true for the many court users who are not eligible for legal aid but do not have the financial means to fund the cost of court action themselves. Such services will also be of benefit to those individuals who choose to represent themselves. SCRA welcomes reform that better equips court users to represent themselves.

Question 5

Children’s Hearings court proceedings are conducted ‘in chambers’ and generally the Sheriff and any solicitors appearing in the proceedings do not wear legal dress. SCRA believes this is a significant contributing factor to the ‘informality’ of our proceedings and enhances the participation of children and parents in the process. Access to justice and the extent to which ordinary, and particularly unrepresented, citizens can participate in and understand court proceedings is determined by the many factors being considered by the Review. In addition to these factors, SCRA believes the Review should consider the impact legal dress worn by members of the judiciary and legal profession has on the experiences of litigants, particularly those representing themselves. It may be that consideration of legal dress in civil proceedings is felt to be beyond the scope of this Review; however, SCRA believes that it is relevant to a consideration of access to justice.

CHAPTER 3: THE COST AND FUNDING OF LITIGATION

Question 6

The availability of legal advice and assistance and legal aid lies at the heart of an accessible civil justice system. The cost of litigation represents the most significant barrier to accessing justice in the civil courts. The availability of legal representation to parents and children in Children's Hearings court proceedings, in most cases, is helpful to ensuring parties:

- understand the proceedings;
- are equipped to participate in the proceedings in an informed way; and
- understand the possible outcomes of the proceedings and the implications of each of these outcomes.

The availability of legal advice from a solicitor for children and parents has the potential to promote early resolution of Children's Hearings court proceedings. Indeed, as noted above, the majority of proof applications are established without the need for evidence to be led and place minimal demand on judicial resources. SCRA strongly believes the ongoing availability of legal aid to children and parents in Children's Hearings court proceedings is essential for their efficient, fair and equitable resolution.

CHAPTER 4: THE STRUCTURE AND JURISDICTION OF THE CIVIL COURTS

Question 1

SCRA accepts that the volume and growth of criminal business in Scottish courts and the priority given to criminal cases may have a detrimental effect on the management of civil business and, in particular, may result in delays in progressing civil cases.

Questions 2, 3 & 4

SCRA is generally supportive of reform that is designed to enhance the efficiency and quality of service provided by Scottish civil courts. SCRA acknowledges that separation of civil and criminal business and judicial specialisation has the potential to increase the efficiency and quality of the Scottish civil justice system. For example, it appears that civil court proceedings tend to be progressed with residual resources 'left-over' after priority criminal business has been dealt with. Separating business in Sheriff Courts into criminal and civil divisions would allow resourcing of civil court business to be considered in its own right.

In relation to Children's Hearings court proceedings in particular, SCRA recognises the potential benefits associated with judicial specialisation. Given that parties to

these proceedings are children and, very often, vulnerable adults and the sensitive nature of the issues at stake, there may be an argument that the use of specialised Sheriffs with the necessary additional skills and experience is appropriate. The reported success of specialist treatment of family cases in Glasgow Sheriff Court highlighted in the Review, has been attributed, at least in part, to judicial specialisation, which has allowed particular Sheriffs to develop specialised skills and expertise in determining cases in a discreet area of law.

Questions 6 & 11

SCRA does not seek any change to the jurisdiction and allocation of business between the Sheriff, Sheriff Principal and Court of Session in terms of Children's Hearings court proceedings.

Questions 21 & 23

Appeals in Children's Hearings court proceedings are set out and limited by statute. S.51 of the Act introduced a right of appeal from decisions of a Sheriff in Children's Hearings court proceedings to the Sheriff Principal. Prior to this, decisions of a Sheriff were only appealable to the Court of Session. S.51 of the Act, therefore, created an additional level of appeal, although an appellant may choose to appeal directly from a decision of a sheriff to the Court of Session. In the interests of access to justice, SCRA believes that a two-tier system of appeals in Children's Hearings proceedings should be retained. There is no statutory right of appeal beyond the Court of Session in Children's Hearings proceedings.

Question 22

SCRA believes the majority of statutory appeals, and in particular, appeals arising from Children's Hearings court proceedings should continue to be dealt with by the Inner House of the Court of Session.

CHAPTER 5: PRINCIPLES FOR REFORM TO CIVIL PROCEDURE AND KEY PROCEDURAL ISSUES

Question 4

For the reasons set out above¹, the use of mediation or other methods of dispute resolution is not appropriate in Children's Hearings court proceedings, which necessarily require determination by a Sheriff, Sheriff Principal or the Court of Session.

¹ See, in particular, the response to Chapter 1, Question 1.

Question 6

SCRA agrees with the general principle that greater use of modern communications and information technology has the potential to significantly improve the efficiency and accessibility of civil litigation. SCRA wishes to emphasise, however, the related concerns of confidentiality and security. Children's Hearings court proceedings characteristically address matters of the highest sensitivity about Scotland's most vulnerable children. Accordingly, Children's Hearings court proceedings are subject to statutory restrictions on attendance and publication. SCRA is concerned about the potential for loss of information and/or accidental transmission of information to an unintended recipient that arises when information is moved around electronically. SCRA seeks reassurance that reform resulting in information about Children's Hearings court proceedings being transmitted electronically will be subject to the most stringent protections to ensure its security.

Questions 7 & 8

In the small proportion of s.68 applications that proceed to proof SCRA believes there are potential benefits in courts adopting a model of judicial case management or case-flow management to ensure cases are progressed as quickly as possible and are given appropriate priority in terms of allocation of judicial resources. SCRA supports judicial continuity as a beneficial feature of a case management system in Children's Hearings court proceedings. Having the same Sheriff hear a case from start to finish is desirable in complex Children's Hearings proceedings because of their sensitive nature and the vulnerability of parties. SCRA would not, however, want judicial continuity to be a factor that contributes to delay. The overarching objective in progressing Children's Hearings proceedings through court must remain to secure an expeditious determination of the case. SCRA believes reform in this area will impact directly on how Children's Hearings court proceedings are progressed through court. SCRA, therefore, would wish to be involved in ongoing consultation, at an early stage, about the development of judicial case/case-flow management in civil proceedings generally and, more particularly, in Children's Hearings court proceedings.

CHAPTER 6: WORKING METHODS OF THE CIVIL COURTS

Question 4

With the exception of appeals from decisions of the Sheriff Principal to the Court of Session, there is no requirement for leave to be obtained in order to pursue appeals in children's hearings proceedings. SCRA does not support any extension of the requirement to obtain leave in children's hearings proceedings. SCRA believes that appeals from a decision of a children's hearing or a sheriff should be able to be pursued without needing to obtain leave. SCRA views any extension of the requirement to seek leave in children's hearings proceedings as unnecessarily restricting access to justice.

Questions 5 & 6

As stated above, children's hearings court proceedings are civil proceedings 'sui generis'. The Court of Session has repeatedly stated the ordinary codes of criminal and civil procedure do not apply. With one minor exception,² the procedural rules that apply to children's hearings court proceedings conducted before the sheriff and sheriff principal are only those contained in the Act and the 1997 Rules. Because of the special nature of children's hearings court proceedings conducted before the sheriff and the sheriff principal, SCRA believes it is appropriate for the applicable rules to be set out in a stand-alone statutory instrument. Rules governing appeals to the Court of Session are set out in the Act and the *Act of Sederunt (Rules of the Court of Session 1994) 1994*.

Question 7

The 1997 Rules include a Schedule containing the forms for use in Children's Hearings court proceedings. The initiating document for s.68 applications, for example, takes the style of Form 60 contained in the 1997 Rules. For the reasons set out for questions 5 and 6 above, it is appropriate to retain these unique forms for use in Children's Hearings court proceedings.

Question 10

SCRA, believes that even apparently procedural business in Children's Hearings proceedings should be dealt with by judges capable of dealing with the full range of Children's Hearings court business. Routine procedural matters in Children's Hearings court proceedings should not be dealt with by judges, (perhaps at a more junior level), designated for that purpose. Children's Hearings court proceedings, even those of a more procedural nature, are usually attended by parents, and often by children and the issues to be considered are sensitive and involve acting to safeguard and promote the welfare children. SCRA believes determination of appropriate judicial resources in Children's Hearings proceedings should be based on the special nature of the proceedings, rather than the classification of the particular business as procedural or substantive.

Question 12

SCRA would not be opposed to the court having a greater degree of input in allocating the length of time set aside for a hearing and notes this is in keeping with a move towards a model of case or case-flow management discussed above. SCRA believes this has the potential to enhance efficiency and is likely to result in parties considering their estimates of time required to hear a case more carefully. However, SCRA does not believe the time allocated to hear a case in Children's Hearings

² R.29.10 of the *Ordinary Cause Rules 1994* pertaining to failure of witnesses to attend applies to children's hearings proceedings conducted in the sheriff court. The application of r.29.10 to children's hearings proceedings conducted in the sheriff court is expressly preserved by r.3.24 of the 1997 Rules.

court proceedings should be limited. Rather, SCRA believes the time set aside for hearing a child's case should be sufficient to hear the case in full to ensure minimum delay in the disposal of the case.

Question 13

SCRA does not believe there should be a blanket requirement for written submissions to be lodged in Children's Hearings court proceedings. Of the relatively few s.68 applications that proceed to a substantive hearing, many will only require brief oral submissions at the conclusion of hearing evidence. A blanket requirement for written submissions may, therefore, result in delay and an inefficient use of resources for both courts and parties. SCRA does, however, acknowledge that for complex and lengthy Children's Hearings cases, written submissions can promote the expeditious disposal of the case.

Question 15

SCRA acknowledges that the largely unrestricted use of expert evidence in civil proceedings can result in inefficiency and delay. It may be that the best way to address these concerns is to allow the court some degree of control over the use of expert evidence in civil proceedings. SCRA believes the question of the extent to which the court should have control over the use of experts in civil proceedings is a complex one. Moreover, SCRA believes reform in this area has the potential to impact significantly on Children's Hearings court proceedings. SCRA therefore seeks the opportunity to be involved in ongoing consultation, at an early stage, about the development of reform in this area, particularly as it relates to Children's Hearings court proceedings. At this stage, SCRA notes:

- the "sui generis" nature of Children's Hearings court proceedings, to which ordinary rules of procedure do not apply. Because of their special nature, adopting a rigid approach to the conduct of Children's Hearings court proceedings is not appropriate;
- in Children's Hearings court proceedings the Reporter's overarching duty is not to act on the instructions of a client but to act in the best interests of the child. The Reporter in Children's Hearings cases is, therefore, bound to put all relevant information before the court, including evidence that does not assist the Reporter's case;
- expert evidence led by the Reporter in s.68 proof applications will often be the evidence of medical practitioners who, in addition to giving opinion evidence, will also be providing direct factual evidence of their involvement with/examination of a child that took place prior to the commencement of the court proceedings; and
- difficulties identifying suitable experts and constraints on their availability can contribute to delay in the determination of children's cases.

SCRA looks forward to engaging in future dialogue on this issue.

Question 18

The procedure applicable to delivery of judgments by the sheriff or sheriff principal in children's hearings court proceedings is set out in the 1997 Rules. The 1997 Rules require decisions in applications under s.68 of the Act to be given orally at the conclusion of the hearing. A sheriff may issue a note at the time the oral decision is given or within seven days thereafter. A sheriff hearing an appeal from a decision of a children's hearing, pursuant to the provisions of the 1997 Rules, may give his/her decision orally at the conclusion of the hearing or on a subsequent day appointed by the sheriff. In practice, many such decisions are given orally at the conclusion of the hearing of the appeal. A sheriff may issue a note of the reasons for his/her decision in the appeal but is required to issue a note when a successful appeal is remitted to a children's hearing for reconsideration or when a sheriff, in allowing an appeal, substitutes a disposal for that of the children's hearing. Any note issued by the sheriff in an appeal shall be issued at the time the decision is given or within seven days thereafter. The 1997 Rules permit a sheriff principal hearing an appeal to give his/her decision orally at the conclusion of the hearing or to reserve judgment. Where judgment is reserved the sheriff principal must give his/her decision within twenty eight days.

It is clear that these rules operate to ensure that decisions in children's hearings proceedings are reached expeditiously and with the minimum of delay. Although SCRA acknowledges the benefits of written judgments it does not believe it should be a blanket requirement in children's hearings court proceedings. Rather, SCRA believes any requirement for written judgments in children's hearings court proceedings should be proportionate to the issues being determined and should not compromise the expeditious disposal of the case.

Question 19

As stated above, children's hearings court proceedings are civil proceedings 'sui generis' and the ordinary codes of criminal and civil procedure do not apply. There are relatively few procedural rules pertaining to children's hearings court proceedings. Key rules of procedure for children's hearings court proceedings are those setting out timescales that apply to particular steps in the process. Timescales in relation to children's hearings court proceedings are short and are interpreted strictly. Failure to comply with a statutory timescale will normally be fatal to an application or an appeal. For example, failure on the part of SCRA to lodge a s.68 proof application within 7 days of being so directed by a children's hearing will render the application invalid. Similarly, a party aggrieved at a decision of a children's hearing must lodge an appeal with the sheriff within twenty eight days of the decision of the children's hearing or the right to appeal is lost. The Act and the 1997 Rules do not give the sheriff any discretion to extend these timescales in special circumstances.

SCRA believes short timescales and lack of judicial discretion to allow extensions is appropriate in children's hearings court proceedings because they promote certainty and the expeditious disposal of a case. SCRA also notes that short timescales and a lack of judicial discretion to extend them represents a significant sanction already

in place for failure to comply with procedural rules in children's hearings court proceedings. SCRA does not support the imposition of additional sanctions for non-compliance with procedural rules in children's hearings court proceedings and believes that flexibility should be retained where possible. The Court of Session has stated that, because of their special nature, a rigid application of the rules of evidence and procedure, appropriate in other proceedings, is not appropriate in children's hearings court proceedings.³

Question 21

There is specific provision in the Act relating to vexatious or "frivolous" appeals from a decision of a children's hearing. Section 51(7) of the Act relates to "frivolous" appeals from decisions of children's hearings. More particularly, s.51(7) provides that where an appeal against a decision of a children's hearing reviewing a supervision requirement is unsuccessful, a sheriff may, where he/she is satisfied that the appeal was "frivolous", prohibit for a period of 12 months any subsequent appeal of a decision to review the supervision requirement. This provision has not been widely used by sheriffs; possibly because an order made pursuant to this subsection prevents an appeal by anyone, including the child, even if he/she did not join in the frivolous appeal. SCRA does not support extension of the law relating to vexatious or frivolous litigation applicable to children's hearings court proceedings.

Question 22

In s.68 proof applications, parents and children, without prejudice to their right to be legally represented, may also be represented by a person other than a legally qualified person of their choice. Again, given the nature of children's hearings proceedings, SCRA supports giving children and parents flexibility and choice in relation to representation, not just in proof applications, but in all children's hearings court proceedings.

Scottish Children's Reporter Administration

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³ *WW v Kennedy* 1988 SCLR 236 at 239.