

LEGAL SOLUTIONS FOR CHILDREN: COMPARING SCOTS LAW WITH OTHER JURISDICTIONS

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Almost every area of law could provide legal solutions or protections for children: negligence law allows them to recover from those who injure them; environmental and planning laws set health and safety standards for their surroundings; the law of social security affects their standard of living. There are, however, four major areas of law concerned particularly with children, rather than regarding children as just one potential client group. These are: juvenile justice; public child care and protection law; custody and access cases within family law; and education law.

Education law is the least developed of these areas. It is not yet taught to law students on undergraduate courses, or in the diploma in legal practice. Understandably, therefore, few solicitors in Scotland have expertise in this field. The situation is, however, being considered by the Law Society of Scotland as part of a Legal Education and Training Review, and the development of this area of law may best be considered at another time.

I would like to consider the three other areas, discuss developments in thinking and practice both in Scotland and abroad, and highlight some issues which may be of particular importance.

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RECENT DEVELOPMENTS IN SCOTLAND

Events since 1990 have been particularly interesting for those in Scotland concerned with how the law affects children. Before then, it would have seemed reasonable to assume that no major reform of the law was required. Family law dealing with custody and access disputes before the courts had long been based on the principle that the best interests of the child was the paramount consideration. That law had been restated in the Law Reform (Parent & Child) (Scotland) Act 1986.

Scots child care law was of even longer standing. Child care law in Scotland deals with young people who offend, and those who have been abused or neglected. The children's hearing system established by the Social Work (Scotland) Act 1968 deals with these cases, and came into operation in 1971. The philosophy behind children's hearings is that whether a young person is the victim of abuse or neglect, or has committed offences him or herself, s/he should be dealt with on the basis of what is in his or her best interests. Although it is possible that a child under sixteen could be sent to a criminal court if charged with an offence, the Social Work (Scotland) Act 1968 ensures that most children go instead to a children's hearing. Although new regulations and guidance have appeared, child care law in Scotland has not changed radically since 1971.

1990 saw the publication of the **Review of Child Care Law in Scotland**, the first of a series of reports and inquiries which suggested that substantial reform of child law in Scotland was required. This Review suggested, among other things, that a Child Welfare Commission should be considered, to oversee and develop standards for children in care. This was the first serious suggestion that an independent body might be required to monitor the standard of care given to children looked after by the state in Scotland. The Review also suggested that, for young people committing offences age 16 to 21, the children's hearing system might need to adapt to provide more useful solutions. Again, this was the first 'official' recognition that placing some young people who offend under supervision - even in conjunction with conditions which the hearing could impose - might not be the best way of getting them to change their behaviour.

In 1992, four major documents considered what further changes might be needed. The Scottish Law Commission's **Family Law Report** recommended a move away from the practice of courts awarding 'custody' and 'access' as if children were objects to be possessed and passed between adults. The Commission wanted the law to contain a new statement of parental

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responsibilities, emphasising that rights over children exist only so that parents and carers are able to do their best for the children. The present system, concentrating as it does on adult rights - usually those of the parents - allows little or no room for a child's perspective on the dispute to be heard by the courts. This denies children the right to express their views on matters which profoundly affect their lives.

Sheriff Kearney's **Inquiry into child care policies in Fife** (1992) raised serious concerns about measures needed to avoid dogmatic social work department management policies which left some children without the placements they needed to safeguard their best interests. Some children's hearings in Fife were reaching decisions about suitable placements for children, only to find that no such placements existed. Children's lives were badly affected by managers' decisions, and the problems described in the Fife Inquiry underlined the need for an independent monitoring mechanism to check on the care given to children.

Lord Clyde's **Inquiry into the removal of children from Orkney in February 1991** (1992) was particularly concerned with the use of and procedures around places of safety in Scotland. Where a child is believed to be in danger, police and social workers may obtain a place of safety order to take a child to safety in advance of a full hearing of the case. The Orkney Inquiry recommended tightening of these procedures, and was also concerned that the system required an independent person who could protect the child's interests more fully than at present (Recommendation 80). Many concerns came to light during Lord Clyde's Inquiry about the way protection procedures could gather a momentum of their own, forgetting the fear, confusion, and utter misery of children caught in the police and social work investigations. Questions were raised about the way interviews with the children were conducted. Practices which failed to explain what was happening and to try to reassure the children were seen as inappropriate.

The **Review of Residential Child Care** (1992) identified many necessary changes to policies and practices in children's homes, to improve the quality of care for those young people. Recommendations dealt with the rights of children and young people to be respected, to have a say in the running of the homes, to have privacy and to have access to confidential complaints procedures. The Review also pointed out that the child care system was still failing children and young people by neglecting their educational well-being when they came into care.

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In 1993, the government published a white paper **Scotland's Children** which attempted to take account of the many concerns and recommendations which had gone before. The issues addressed in the paper were diverse. Early on, the paper recognised the need for a new set of principles, reflecting the importance of respect for children and young people's rights. New arrangements for emergency protection of children were proposed, putting more emphasis on the role of the Sheriff Court. The problems children have in telling members of children's panels what is happening to them, when parents are present at the hearings, were acknowledged by suggesting a new power for hearings to exclude parents to allow children to speak. The government also proposed strengthening hearings' powers in relation to dealing with young offenders.

Looking at the reports and inquiries since 1990, and their recommendations, a number of issues emerge. First, legal processes, whether Sheriff Courts dealing with family cases or with child protection proofs, or children's hearings, concentrate too much on adult rights and adult agendas; they frequently fail to take account of children's views and experiences. Second, policy and practice affecting children - especially those in social work care - still appear to be operating to the detriment of some children, and the need for ongoing monitoring to improve standards is clear. Third, the welfare-based supervision system provided for young people who offend may not be adequate to meet the challenges presented by some particularly difficult young people. Fourth, there is growing recognition of the inadequacy of some decisions, supposedly taken on the basis of children's 'best interests', and this raises questions about whether independent representatives for children's best interests should be more widely available in courts and children's hearings.

On 24 November 1994, the Children (Scotland) Bill was introduced into Parliament. The long-awaited Bill did address some of the issues identified above. Part I of the Bill deals with parents, children and guardians, and begins with a statement of parental responsibilities and rights. This moves Scots law away from an emphasis on adult rights over children, stressing, as the Scottish Law Commission had recommended, that rights only exist to enable adults to promote children's welfare.

Throughout the Bill, a serious attempt is made to encourage courts and children's hearings to take account of children's views. Clause 11(5) states that in making decisions in family law - including decisions about the new 'residence' (custody) and 'contact' (access) orders - the court shall have regard to the child's views; clause 16(2) states that children's hearings and courts, in making supervision orders, the new Child Protection Orders and other orders

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under the Bill, must have regard to the child's wishes. Local authorities, adoption agencies and courts dealing with adoption are also under a duty to consider children's views (clauses 17, 83).

The Bill fulfilled expectations raised by the white paper, in terms of powers to hearings to exclude parents to allow children to speak: 'relevant persons', including parents and their representatives, can be excluded from the hearing, where they are causing or are likely to cause distress to the child, or where the exclusion is felt necessary to obtain the child's views.

The Bill deals less successfully with the monitoring of standards. There is no mention of a body akin to a Child Welfare Commission, or even a complaints procedure, such as was introduced by the Children Act 1989 for England and Wales. Clause 18 does place local authorities under a new duty to prepare and publish children's service plans, but with no timetables for the plans, and no monitoring mechanism, their potential for improving services may be limited.

Changes to the children's hearings in the Bill are largely concentrated on new, sheriff court based processes for emergency protection of children, replacing place of safety orders which the hearing had some jurisdiction over. There has been no fundamental change in the way young offenders are to be dealt with.

Safeguarders are the independent representatives of children's best interests in child care cases, before hearings and the sheriff. The Bill acknowledges that their input should be extended, by providing at clause 35 that hearings and sheriffs in all child care cases, with the exception of Child Protection Orders, should consider if it is necessary to appoint a person to safeguard the interests of the child.

The new Children (Scotland) Bill has begun to address some of the problems highlighted in earlier reports, but the question is whether experience from abroad suggests there may be further lessons to be learned.

THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

Any new integrated children's legislation should be based on clear principles. The UN **Convention on the Rights of the Child** may be regarded as providing these principles.

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The Convention is the result of 10 years of debate within the United Nations. It was adopted by the UN in 1989, and sets out the rights children and young people up to eighteen should expect in countries who are parties to it. The UK government ratified the Convention on 16 December 1991, thereby committing itself to bringing UK law, policy and practice into line with the Convention's principles. The government must report to the UN Committee periodically on what steps it has taken towards implementing the Convention; the government's first report to the Committee was published in February 1994.

The UN Convention is the first international declaration to state unequivocally that children and young people up to 18 are citizens of our society, with the same human rights as adults expect to enjoy. The Convention is a balanced document. It states children's rights to be protected from abuse, exploitation and other forms of maltreatment (Article 19), and to have their best interests as a primary consideration in all decisions affecting them (Article 3). At the same time, it emphasises the importance of children's rights to express views and have those views taken into account, before any decisions about them are taken (Article 12).

It is the Convention's recognition of the need to balance welfare and participation that makes it such a useful document. It should be noted that the right to be protected, and to have best interests as a primary consideration, are not qualified rights. These apply to all children and young people. The right to participation is, however, minimally qualified by the child's ability to understand. The Convention does not say that children should be final arbiters of decisions, but that they must be involved in those decisions.

Many of the recent Scottish reports and inquiries have used the Convention as a framework for their conclusions: the first recommendation of the Orkney Inquiry was that reform in the field of child law should proceed under reference to the United Nations **Convention on the Rights of the Child**, as well as the European **Convention on Human Rights**.

The new Children (Scotland) Bill does not begin with a checklist of principles, but the participation principle (Article 12) and the welfare principle (Article 3) can be seen throughout the Bill. As indicated above, the child's views are a relevant consideration for courts and children's hearings. It is also significant that, for the first time in Scots law, parents and others with parental responsibility are to have regard to children's views before reaching major decisions affecting them.

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Clause I of the Bill makes clear that parental rights are subject to the interests of the child, and courts making decisions about family law (clause 11(5)), child care cases (clause 16) and adoption (clause 83) must regard the welfare of the child as paramount. Previously, children's welfare was only the 'first' consideration in adoption law. Local authorities (clause 17) and children's hearings (clause 16) must also regard welfare as paramount.

JUVENILE JUSTICE

In recent years, many jurisdictions have been reviewing their approaches to young people who offend. The UN Convention's Article 40 requires children's welfare to be a primary consideration in the administration of justice, and states that systems should encourage young people to take a constructive role in society, by providing a variety of disposals, including care, supervision and training programmes. However, some governments have had to tackle growing public hostility towards young people who break the law, and a perception, despite sometimes contrary statistics, that juvenile crime is on the increase.

Approaches have varied, but most jurisdictions have moved away from a purely 'welfare' based model of juvenile justice, where the offence itself is not important, and the primary focus is the child's needs. In Australia, there are six states and two self-governing territories, therefore in effect eight separate legal systems in operations.

In the state of Victoria, the Children & Young Persons Act 1989 established the children's court, which has a family division and a criminal division. The criminal division deals with all charges (except murder) against children over age 10 and under age 17. Legal representation is available through the Legal Aid Commission's lawyers, who undertake almost all the work in children's court (both divisions) and have considerable expertise.

Options available to the Victoria children's court include: dismissal on an undertaking, good behaviour bonds, fines, probation, youth supervision orders, youth attendance orders involving attendance at certain projects, and detention. There is also a new diversionary tactic for non-violent minor offenders being piloted. Such young people will be referred by the police to a juvenile mediation programme, to make restitution by working, repairing damage, etc.

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In the 1980s in New South Wales, reflecting the move away from the welfare approach, responsibility for young offenders was moved from the Department of Family and Community Services to a new Department of Juvenile Justice. Under New South Wales Children (Criminal Proceedings) Act 1987, the age of criminal responsibility is 10. Although youth justice was court based, diversions were available in an established police cautioning scheme and community aid panels.

There are existing proposals for reform in New South Wales, recognising that there are still very many young people becoming involved in the criminal justice process whose behaviour is not being changed at all by such involvement. The proposals are for community children's conferences to be held, where the police consider it appropriate for young people committing relatively minor offences. The victim, the offender's family, the police and a convener would attend such a conference to reach agreement on a suitable penalty.

The idea of the children's community conference came from New Zealand. The Children, Young Persons & Their Families Act 1989 introduced a new system of youth justice in New Zealand. While disputed and very serious matters would be dealt with by a youth court, the basis of the new system was a decision-making forum called the Family Group Conference. Again, as in several states in Australia, the age of criminal responsibility is 10, although, in New Zealand, most young people under fourteen would not become involved in the juvenile justice system.

Family group conferences are attended by the young person, his or her family group and extended family, the victim, a youth justice co-ordinator, and perhaps someone to support the victim. The purpose of the conferences is to make the young people accountable for their actions, to accept responsibility for them, and to make restitution. They should do this supported by their family. The most recent research into youth justice in New Zealand, by Maxwell and Morris (1993), noted that only 5% of juveniles in the research sample were on court orders, less than 2% were subject to residential or custodial orders and, at the same time, young people were being held accountable for their offending through the imposition of sanctions. The research authors do, however, note their considerable concern at the lack of resources and support services which can undermine family group conference decisions.

In contrast to more creative approaches - particularly in New Zealand - England, Western Australia, and the USA have adopted more punitive

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approaches. The UK government's proposals for England, contained in the Criminal Justice and Public Order Bill 1993, are to introduce secure training orders, to extend powers of the courts to order young people aged 10 to 13 to be detained for long periods, and to extend categories of offences attracting long term indefinite detention. Similarly, the Juvenile Crime (Serious and Repeat Offenders) Sentencing Act 1992 in Western Australia provides for mandatory sentencing of imprisonment or detention for eighteen months in certain circumstances for young people.

The climate of hostility towards young people in conflict with the law is most apparent in the United States. A major federal crime bill being debated earlier this year contained a provision requiring that, for some violent offences, juveniles thirteen years or older should be prosecuted as adults in federal courts. Campaigners on behalf of children in the USA believe such an approach is fuelling calls in many states to 'get tough' on youth crime. While I was visiting, several state legislators were moving to introduce laws for young offenders known as 'three strikes and you're out'. Most states have 'waivable' offences - serious crimes, for which juveniles can be waived to adult court for sentencing. The new laws would ensure that if a juvenile had three waivable offences (strikes) against him, he would go automatically to the adult court. Many lawyers for children believe there is no commitment on behalf of the legislators to support a separate system of juvenile justice in America.

Developments abroad suggest three challenges which the children's hearing system will have to face:

- increasing public pressure to make children 'accountable' and to introduce sanctions;
- a growing recognition of victims' needs which challenges the concentration only on offenders' welfare;
- the awareness that changing the behaviour of young people who offend is a complex task.

The children's hearing system in Scotland must be able to adapt, to accommodate these demands. The government appears to have made a useful start in its white paper **Scotland's Children** (1993), recognising the strength of the system in being able to look beyond the offence itself, to assess causes, and what action may be necessary. The Paper states that panel members who sit on children's hearings are to be given more training, the hearing's powers are to be strengthened, and for the most difficult offenders, 'the development

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of a wider and more imaginative range of residential and community provision' (paragraph 7.20).

The Children (Scotland) Bill does not introduce any new powers for hearings designed specifically for young people who offend. It does, however, give sheriffs dealing with appeals from hearings the power to substitute their own decision for that of the hearing (clause 44(5)), which is a significant shift of power. It is not clear how this will be used.

In clause 17(5) there is a provision which may be designed to deal with persistent young offenders: a local authority, by their own decision or under direction from the Secretary of State, can exercise their powers in relation to a child they are 'looking after' in a manner which does not put the child's welfare first, if this seems necessary 'for the purpose of protecting members of the public from serious harm'. This is the first significant move away from the welfare principle and it would appear to be aimed at young offenders, or at least those outwith the control of those caring for them.

The Bill does not change procedures in relation to young offenders at hearings, and it may be that a consideration of how victims can be more directly involved in the Hearing system would be helpful. This does not necessarily mean that victims have to attend Hearings which decide what action should be taken in relation to young people, but they should be informed of the decisions that Hearings are able to take, and understand what measures society is taking on their behalf to change the young people's behaviour. It is essential that the Hearings system is able to explain to the public that a primarily welfare-based approach, with appropriate resources in place to work intensively with young people, is the best investment society can make in ensuring that these young offenders do not continue in the offending pattern.

CHILD PROTECTION

Protecting children from abuse and neglect has emerged as one of the greatest challenges facing our communities and our law. Systems have been put in place to try to ensure children can be removed from dangerous homes, or can be protected and supported within their own homes. In Scotland, a child may be referred to a children's hearing because of lack of parental care, or because he or she may be the victim of a sexual offence. The alleged abusers, if parents, can deny the grounds of referral, and the matter goes to a Sheriff for

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proof - on the balance of probability. It is the Hearing which decides what action needs to be taken to protect the child.

There is a growing recognition that decisions about what might be the best course of action for an abused or neglected child are very complex, with many variables. Courts, set up for adversarial contests, and even children's hearings, reliant as they are on those appearing before them feeling able to discuss the full facts of cases, need to be able to adopt an almost inquisitorial style in these cases, to get to the true facts.

The agency primarily assigned the task of helping Scottish Courts and Hearings find out where the welfare of an abused child lies is the social work department. However, in difficult cases, there is provision for a safeguarder to be appointed. Safeguarders can be lawyers or social workers. Their task is to provide an independent assessment to decision-makers, having carried out investigations, of where the best interests of the child are likely to lie.

It is of vital importance that those making decisions about children have such independent assessments. There are, however, many severe limitations in the safeguarder system. Under the terms of Section 34A of the Social Work (Scotland) Act 1968, the safeguarder is to be appointed 'where there is or may be a conflict between the interests of the parent and those of the child'. Although it might be assumed this would apply to almost every case, safeguarders are appointed in around only 2% of child protection cases. This leaves a large number of cases with no independent assessment of where the child's welfare may lie. It is not suggested that the absence of a safeguarder always leads to bad decisions. It is suggested that the appointment of a safeguarder could help make much better decisions.

As mentioned above, clause 35 of the Children (Scotland) Bill does provide for courts and hearings to consider appointment of safeguarders. Given the limited use which has so far been made of them, it is disappointing that the Bill does not adopt the Children Act 1989 approach, and require appointment unless the court or children's hearing is satisfied that it is not necessary in the child's interests.

The child protection system is looking to safeguarders for guidance on some of the more complex and potentially dangerous situations the law needs to tackle, yet remuneration, training and guidance for them has been extremely limited. The new Bill (clause 35 (3), (4)) provides for rules to be made covering appointment, qualifications, training and management of

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safeguarders and their remuneration. It is hoped resources will be available to carry through these improvements.

Child protection systems abroad have developed similar roles to that of the safeguarder in interesting ways. In England and Wales, the Children Act 1989 provides that a court dealing with a child protection case must appoint a *guardian ad litem*, to safeguard the interests of the child in the matter, unless satisfied this would serve no useful purpose. *Guardians ad litem* (GALs) are usually social workers with many years of experience and almost all child care cases would contain a report from a GAL, to help decision-making.

GALs are also found in many states in America. Federal law requires appointment of a GAL in abuse and neglect proceedings for states to qualify for federal dollars for their child protection programmes. These GALs need not be lawyers, and some states have 'court appointed special advocates' or lay GALs.

The role of these GALs is to investigate the circumstances of the case, and to make recommendations in respect of the child's best interests to the court. In the USA, it is expected that GALs will have knowledge of child development, family dynamics, and definitions and diagnosis of child abuse. Several states have guidelines for guardians, often very detailed, suggesting, for example, regular contact with the child, review of relevant mental health, medical and social records, and interviews with case workers, teachers, parents, foster parents, children and other relevant personnel.

In the USA, there is also much literature for GALs, on the wider 'child advocacy' role that they should attempt to fulfil. Child advocacy, as exemplified in Professor Donald Duquette's writing (1990), is about trying to get the best for the child, in whatever process he or she is involved. So in relation to child protection, a child advocate might mediate between the child's family and social service providers, gather information about support programmes and other help available for families and the child, intervene to prevent too many medical examinations of the child, and be ready to object to adjournments and delays which might be detrimental to the child's interests.

Recognising that the welfare of children and young people can get lost in systems designed to help them, the state of South Australia, in 1983 established the Children's Interests Bureau. The Bureau raises public awareness of the rights and welfare of children, and conducts monitoring and evaluation of state welfare services - especially child protection services. In 1988, the Bureau was given the power to give advice to the minister

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responsible for public care of children, and to attend the reviews of children in care.

It was this power to attend reviews which led the Bureau's staff to crucial advocacy work before and after the court cases, to try to get the best decisions for the children involved. Far-reaching decisions about placement and support services are made at reviews, and Bureau staff felt they had a chance to speak up for the child when it really mattered. Their presence at reviews could help to ensure decision-making was not overly influenced by resources or administrative convenience.

Ensuring that the best interests of the child is a primary consideration, as required by Article 3 of the UN Convention, is clearly a multi-faceted problem. In New Zealand, in 1989, a Commissioner for Children was appointed, whose remit was to monitor and review New Zealand's child protection and youth justice proceedings, and to act more generally as an advocate for children.

The Commissioner for Children is a useful model for Scotland, since New Zealand also has a form of children's tribunal (the Family Group Conference), which deals with both child protection and juvenile justice matters. Under the Children, Young Person and their Families Act 1989, the Commissioner has powers to monitor and assess the Department of Social Welfare's policies intended to promote children's welfare, to carry out inquiries into law, procedures and practices for children, and to make recommendations about required changes.

The **Review of Child Care Law in Scotland** (1990) recommended that the establishment of a Child Welfare Commission be considered, to ensure some independent monitoring of the Scottish child care system. The 1993 white paper **Scotland's Children** made no mention of such a Commission, and the Children (Scotland) Bill contains no complaints or monitoring procedure. This is a major weakness in the Bill, since, to raise standards for child care policy and practice, there must be a mechanism for highlighting issues of concern.

So far, this section has been concerned with initiatives to promote children's welfare. What about their right to be heard in child protection matters? The document **Scotland's Children: Speaking Out** (1994) records the views of some Scottish young people about the child care system expressed during consultations with ChildLine Scotland, Who Cares? Scotland (the organisation for young people in care), and the Scottish Child Law Centre. In

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relation to representation, children were quite clear that safeguarders were part of the system, and that they wanted to choose their own representative: 'I want someone specially for me'.

This is a difficult issue which must be tackled head-on. Safeguarders in Scotland, GALs in America and England, and child advocates in Australia all have guidance requiring that they find out what children want, and ensure the courts or tribunals know those views. We must not, however, delude ourselves that this amounts to representation for a child's views. New legislation requires, in terms of Article 12 of the UN Convention, to provide for children to be separately represented in proceedings, and to make it clear that any court appointed GAL/safeguarder fulfils a different role from that of a separate representative.

The question of a separate representative for a child is not adequately dealt with by the new Bill. Indeed, the Bill does not state the right of a child or parent to have a representative at a children's hearing, but says this right is one of the procedural matters to be dealt with by rules made under clause 36. This is very disappointing. The 1989 Children Act, in dealing with appointment of *guardians ad litem* (equivalent of safeguarders) makes it clear that a child may instruct a legal representative to present his/her views, notwithstanding the GAL appointment.

In the sheriff court, the child may, of course, be represented by a solicitor, but the new Bill should emphasise, as the 1989 Act does, that this is a separate role from the safeguarder's. Legal aid is currently not available for solicitors to accompany children to hearings. It is not essential for a representative to be legally qualified, but it should be clear from the rules that the representative has a distinct function, and funds must be available to allow that function to be developed.

FAMILY LAW CUSTODY AND ACCESS DISPUTES

In child protection cases, no-one disputes the view that children's welfare can be profoundly affected, not only by the issues under discussion, but by the decision-making processes taking place in the tribunals themselves. Hence the provision of some independent person to promote the child's welfare.

The view that children's welfare may be just as much at risk in custody or access cases is only now being seriously considered. For many years, the law has regarded such cases as merely disputes between adults. Although the

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formal legal criteria for decision-making is 'the best interests of the child', there are few mechanisms in place to allow the judge, faced with two sides locked in an adversarial process, to explore the welfare issues in any depth. There will, in Scottish cases, be a matrimonial proceedings report prepared by a social worker. In rare cases, a *curator ad litem* could be appointed by the court to represent the child's interests.

Scottish courts have little scope to assess the wider implications for the child of separation of parents, access arrangements and the hundreds of other changes to a child's life which occur on separation and divorce. Following the Scottish Law Commission's **Family Law Report** (1992), the new Children (Scotland) Bill moves away from the notion of parental rights only, to a statutory statement of parental responsibilities. Rather than talking only about 'rights', clause 1 of the Bill begins by placing on parents a duty to 'safeguard and promote the child's health, development and welfare'. The right of access becomes, in clause 2, the duty 'to maintain personal relations and contact with the child on a regular basis'. This is likely to remind courts that matters of 'residence' (custody) and 'contact' (access) are not merely disputes about adult rights. However, there are presently no proposals for expansion of the use of *curators ad litem* within family law cases, to ensure an independent and more detailed assessment of the child's welfare.

Scotland is not alone in failing to appreciate fully the complexity of child welfare issues in divorce. Residence (custody) and contact (access) matters in England, despite being dealt with under the same legislation which mandates GALs in child care cases, do not require input from any independent representative of the child's interests.

Very few states in the USA require a GAL to be appointed in such cases, and then usually only where there is an allegation of abuse by one party in respect of the other. In those less common cases, however, it is interesting to note that, again, literature envisages the court-appointed GALs operating at very sophisticated levels of knowledge about child development, bonding and identity issues, separation and loss, and medical diagnosis of different types of physical, sexual and emotional abuse.

Australia and New Zealand make some provision for safeguarding children's best interests in these cases. The Australian Family Law Act 1975 provides that the court may appoint a separate representative for a child in any proceedings in which the welfare of the child is relevant. This separate representative would tend to be appointed in protracted access disputes, or where there were allegations of abuse. Case law has made it clear that the

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role is not to speak directly on behalf of a child: 'We think that the role of the separate representative is broadly analogous to that of counsel assisting a royal commission in the sense that his or her duty is to act impartially...' (Bennett and Bennett 1991).

Counsel for the child in New Zealand family law cases has a similar role of safeguarding the child's interests during the custody/access case, but guidelines to Counsel from the Chief Justice of the family court envisage a 'best interests' role outwith the court process too, by mediating in settlements, and avoiding court delays and intrusive psychological testing which may damage the child.

In all jurisdictions, independent assessors of children's interests are used far less in custody/access cases than in child protection. Family court processes seem unable to adapt to the needs of children in what are essentially disputes between adults. While roles such as safeguarders and GALs should continue to be developed, it may be time to rethink the legal processes around divorce and separation involving children.

Perhaps a specialised family court, with increased provision of mediation and counselling services, would be a better way forward? In recent years, there have also been some suggestions that the children's hearing system should begin to consider custody/access disputes.

Certainly a different forum, beginning with a focus on children, might be able to evolve procedures which were less adversarial, more able to consider independent information about children's best interests.

Such a new forum could build on the considerable developments in family mediation which have taken place in Scotland in recent years. It does seem that a consensus model is more likely to offer children workable solutions. Since the new Children (Scotland) Bill contains no such radical changes in processes, it may be some time before Scotland is ready to move away from existing court structures for family law cases. Indeed, it would be sensible to see how the new emphasis on children's rights improves children's experience. The Bill (clause 47) provides for courts dealing with divorce, separation and some other family law issues to refer the child involved to the Principal Reporter to the children's panel. While this does not take divorce out of the courts, it does provide an opportunity for hearings to consider welfare issues for children affected by divorce. The hearings approach will be of great interest.

CONCLUSION

In all jurisdictions, the difficulty of finding effective solutions for children is apparent. Children do not fit easily into existing adult-based legal processes, and when legislation attempts to force them, the result can be decisions which do not have the best interests of the children as a primary consideration, as required by the UN **Convention on the Rights of the Child**.

By ratifying the UN Convention, our government has made a commitment to its implementation in the UK. Giving parliamentary time for children's issues is one of the clearest signs a government can give that it values its young citizens who cannot vote, and who therefore have no direct voice in parliament. The government has now published the Children (Scotland) Bill, which deals with private and public law and which gives priority to the principles of the child's best interests, and of hearing the child's views. The Bill had its second reading in the Scottish Grand Committee in Edinburgh on 5th December 1994. At that debate, the hope was expressed that when evidence in relation to the Bill is taken in the special standing committee (as a result of the government's 'taking stock' exercise), young people themselves will be able to express their views. That would be a very encouraging development.

Despite the Bill's useful provisions, the government may, in the light of developments in legal solutions for children abroad, wish to address some of the following issues.

The government may, in the light of developments in legal solutions for children abroad, wished to address some of the following issues.

Adaption of the children's hearing system

There has been a shift away from 'welfare based' models of juvenile justice in several countries. Some countries have taken more punitive measures; some have tried to be more imaginative in approaches to change young people's behaviour. It could be that the children's hearing system could come under pressure from both schools of thought - for not being harsh enough, and therefore failing to protect the public, and for not being imaginative enough, thereby failing to help young people to avoid the adult court system. The children's hearing system of the future must be able to show that it has adequate powers to deal effectively with young people who offend. Resources must be committed to intensive work with young people, and children's hearings need more powers to ensure young people have access to

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such help. The potentially draconian powers given by the Bill to local authorities to act to protect the public from young people do not deal with the issue of what is required from children's hearings.

Independent representation of children's interests

Other jurisdictions have developed sometimes quite elaborate roles for those charged with representing children's interests in matters of child protection and also occasionally family law. These representatives are often highly trained, involved in complex assessments of physical and psychological well-being. In Scotland at present, courts and children's hearings rarely have access to such professional analyses from such a person. It could be that the time has come to put money into improving and extending existing safeguarder and *curator ad litem* roles, to try to ensure better decision-making for children. The new Bill begins to deal with enhancement of the safeguarder system, although the clauses require strengthening amendments. If the new law is right, it becomes a question of resources, and of training.

Listening to children

Even with a newly extended safeguarder/curator system, the person representing a child's best interests need not advocate for his/her wishes. Most jurisdictions seem to have a problem with recognising children's rights to be separately represented by their own advocate. This will continue to be a problem, but, at least in relation to family law cases, one way of attempting to listen to children might be to consider moving away from a court-based system altogether. It is clear that such formal processes create almost insurmountable barriers to children contributing to the process.

Commissioner for children

Even with new legislation, and new more child-centred procedures, there will always be examples of children who are very badly served by the legal processes around them. It is essential that a new independent body is set up, to monitor law, policy and practice in Scotland. We can learn from the Commissioner for Children in New Zealand, and from the Children's Interests Bureau in Australia. The fact that the Children (Scotland) Bill contains no provision for monitoring of policy and practice affecting children's interests is perhaps its greatest shortcoming. There is already an existing proposal for a Commissioner in the UK, and the government and policy makers in Scotland must begin to give serious consideration to how such a proposal can

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be adapted to provide the best service to children and young people in Scotland.

REFERENCES

- Bennett and Bennett (1991) FLC 92-191
- Children and Young Persons Act (1989) Victoria, Act No. 56/1989
- Children, Young Persons and their Families Act (1989) New Zealand No. 24
- Criminal Justice Act 1991
- Duquette, et al (1990) **Advocating for the Child in Protection Proceedings: A Handbook for Lawyers and Court Appointed Special Advocates**, Lexington Books
- Juvenile Crime (Serious and Repeat Offenders) Sentencing Act 1992
- Law Reform (Parent and Child) (Scotland) Act 1986, Section 3
- G M Maxwell and A Morris (1993) **Family, Victims and Culture: Youth Justice in New Zealand** - Social Policy Agency and Victoria University of Wellington
- Scottish Office (1990) **Review of Child Care Law in Scotland**, Edinburgh: HMSO
- Scottish Law Commission (1992) **Report on Family Law**, Edinburgh: HMSO
- Scottish Office (1992) **Inquiry into Child Care Policies in Fife**, Edinburgh: HMSO
- Scottish Office (1992) **The Report of the Inquiry into the Removal of Children from Orkney in February 1991**, Edinburgh: HMSO
- Scottish Office (1994) **Scotland's Children: Speaking Out, Young People's Views on Child Care Law in Scotland**, Edinburgh: HMSO
- Scottish Office, Social Work Services Inspector for Scotland (1992) **Another Kind of Home: A Review of Residential Care**, Edinburgh: HMSO
- Scottish Office, Social Work Services Group, Cm 2286 (1993) **Scotland's Children: Proposals for Child Care Policy and Law**, Edinburgh: HMSO
- Social Work (Scotland) Act (1968).
- United Nations (1989) **Convention on the Rights of the Child**
- UK Government (1994) **First Report to the UN Committee on the Rights of the Child**, London: HMSO

August 1994