

To:

List of addressees in Annex A

Our ref: A 13769970
22 March 2016

Dear Colleague

COMMISSION AND DILIGENCE IN FAMILY ACTIONS IN THE CIVIL COURTS

Introduction

1. This letter seeks your views on commission and diligence in family actions in the civil courts. This letter is being sent to the bodies listed at Annex A. Please feel free to pass this letter to any other bodies that may be interested. Any such bodies are welcome to respond to this letter as well.
2. Commission and diligence is about recovering documents or other material relevant to a court case.
3. A discussion of the issues, with four questions, is at Annex B.
4. A note of a round table discussion held on 4 December 2015 is attached at Annex C.

Potential next steps

5. If, following responses to this letter, the Scottish Government concludes that legislation or changes to procedures or both is required, the Scottish Government would intend to carry out a full public consultation, in line with usual practice. Any full public consultation would be accompanied by Impact Assessments:

- An Equality Impact Assessment
- A Child Rights and Wellbeing Impact Assessment
- A Privacy Impact Assessment
- A Business and Regulatory Impact Assessment

The Scottish Government does not consider that a Strategic Environmental Assessment would be required.

Responding to this letter

6. Please provide any response to this letter by **5PM on Wednesday 11 May 2016**. Please send responses by email to family.law@gov.scot or by hard copy to:

Simon Stockwell
Family and Property Law
GW15
St Andrew's House
Regent Road
EDINBURGH
EH1 3DG

7. The Scottish Government would intend to publish responses to this letter, in the interests of transparency, and would also intend to prepare and publish an analysis of the responses. In line with our usual practice, we will not publish any material that may be considered offensive or defamatory

8. If you wish part or all of your response to remain confidential, please indicate this in your response accordingly. The Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the 2002 Act for information relating to responses made to this letter.

Inquiries about this letter

9. Any inquiries about this letter should be addressed to me at the postal address above or by emailing simon.stockwell@gov.scot or phoning 0131 244 3322.

Yours faithfully

SIMON STOCKWELL
Family and Property Law

ANNEX A: LIST OF ADDRESSEES

Aberlour
Barnardo's Scotland
Dr Lesley-Anne Barnes Macfarlane
Child Law Centre
Children and Young People's Commissioner in Scotland
Children 1st
ClanChildLaw
Convention of Scottish Local Authorities
Equality and Human Rights Commission Scotland
Faculty of Advocates
Families Need Fathers
Family Law Association
Information Commissioner (UK)
Law Society of Scotland
Professor Jane Mair
NHS National Services Scotland
Professor Kenneth Norrie
NSPCC Scotland
Parenting across Scotland
Relationships Scotland
Scottish Children's Reporter Administration
Scottish Courts and Tribunals Service
Scottish Legal Aid Board
Scottish Women's Aid
Scottish Youth Parliament
Social Work Scotland
Society of Local Authority Lawyers and Administrators in Scotland
Society of Messengers-at-Arms and Sheriff Officers
Professor Elaine Sutherland
Together
Who cares? Scotland

ANNEX B: DISCUSSION AND QUESTIONS

The current law and practice in Scotland in relation to commission and diligence in family actions in the civil courts

The law

1.01 Commission and diligence is the common law procedure in Scotland for recovering and preserving documents or other material for use in a court case. (It also covers taking of evidence). The common law powers of the court to order recovery are supplemented by legislation. There is a variety of existing legislation, both primary legislation and rules of court. Provisions the Scottish Government is aware of are:

- The Administration of Justice (Scotland) Act 1972. This made provision on the Court of Session and the Sheriff Court being able to order the recovery of documents which are relevant to an existing case or a likely forthcoming case. The 1972 Act was without prejudice to the existing powers of the Court of Session and the Sheriff Court in this area.
- Section 10 of the Court of Session Act 1988 made some provision on the Outer House of the Court of Session granting commission and diligence.
- Chapter 28 of the Sheriff Court Ordinary Cause Rules makes provision on procedures in the sheriff court for recovery of evidence. The Ordinary Cause Rules also make provision on forms to be used for this purpose.
- Chapter 35 of the Court of Session Rules make provision on the recovery of evidence in the course of on-going court proceedings.
- Chapter 64 of the Court of Session Rules makes provision on applications for an order under section 1 of the 1972 Act where an action has not already started.

1.02 In this paper, references to “commission and diligence” include applications for an order under section 1 of the 1972 Act.

The practice

1.03 The Scottish Government’s understanding is that, in the case of on-going proceedings, a motion for commission and diligence is intimated to every other party to the case, as well as to any third party “haver” (the person holding the relevant documents). At the time the motion is lodged at court, a specification of the documents being sought also has to be lodged setting out the relevance to the case of the documents being sought. The motion may be opposed.

1.04 If the motion is granted, the haver is required to comply with the order. Under the “optional procedure”, the haver is requested to produce the documents detailed in the specification of documents. The haver may sometimes wish to argue that the documents are confidential but, depending on the circumstances, will often not be in a position to do so until after he or she has been ordered to produce them. In these situations, the documents can be sent in a sealed packet to the court. Motions may then be lodged to open up the sealed packet. These motions may be opposed by the other party and/or the haver. A Commissioner may be appointed by the court to assist the process.

Question 1. Do you consider this is an accurate description of the law and practice in this area? If not, please say why not.

The issue

1.05 Local authorities and other organisations – including the NHS and the voluntary sector – provide confidential services to children. Such services can provide vital support for a child’s mental and physical wellbeing at a difficult time, such as around a parental separation. In some cases a child will have experienced domestic abuse. Information held by local authorities and others can, in theory, be recovered and led as evidence in a civil court case relating to the child. For example, if a child’s parents have asked the court to decide which parent a child should live with, one parent may ask the court to look at information held by a psychologist about the child which the child provided in confidence.

1.06 Detailed concerns are:

- Children and young people accessing services may reveal personal, private information that they do not wish to be shared with anyone other than their support worker.
- If services cannot guarantee a reasonable level of appropriate confidentiality there is a danger that children and young people will not want to use the service and would not feel comfortable in revealing information that could otherwise assist with their recovery and help keep them safe.
- It may be a breach of children’s rights for information to be shared without their consent.
- If information is shared with a third party, such as someone who is alleged to have abused the child or the child’s parent, that may put children in danger either physically or in terms of their emotional health and wellbeing.

1.07 There could be good reasons why information relating to services provided to children may need to be recovered by the court:

- The court needs all relevant information and evidence to enable it to come to an informed decision in relation to the case it is deciding. Clearly, this requirement does just relate to relevant information and evidence. Irrelevant information and evidence should not be recovered.
- Article 6 of the European Convention on Human Rights provides a right to a fair trial. In particular, Article 6 provides that “In the determination of his civil rights and obligations.... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”.¹ Article 8 of the Convention (right to respect for private and family life) may also be relevant.
- It is not possible to guarantee absolute confidentiality in relation to services provided to children. For example, a service provider must report any allegations of criminal offences.

1.08 A relevant court case (*In the matter of A (A Child)*) has been determined by the UK Supreme Court².

¹ See, for example, paragraphs 175 and 176 of this guidance document:

http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf

² The judgement by the UK Supreme Court is at https://www.supremecourt.uk/decided-cases/docs/UKSC_2012_0193_Judgment.pdf

A change to the law?

1.09 The law could be changed. The law could make more provision on the confidentiality of services provided to children when applications are made for commission and diligence.

1.10 Any changes are likely to require primary legislation and amendments to the Administration of Justice (Scotland) Act 1972. Any changes could just apply to applications for commission and diligence in family proceedings (covering, for example, cases relating to Parental Responsibilities and Rights, contact, residence, permanence and adoption) rather than to commission and diligence more generally.

1.11 Any changes could relate to where a child receives, or has received, care and support through a service designed to meet the child's wellbeing needs and provide that when considering an application for commission and diligence in relation to any such service, the court:

- must regard the wellbeing of the child concerned as its paramount consideration; and
- should only order the disclosure of the documentation if the likely benefit to the wellbeing of the child as a consequence of disclosing the documentation outweighs any likely adverse effect on that wellbeing from doing so; and
- should only order the disclosure of the documentation if this is in the child's best interests.

1.12. Any change in the law could also provide that when considering an application for commission and diligence in relation to any such service the court must, taking account of the child's age and maturity, and so far as practicable:

- give the child an opportunity to indicate whether they wish to express their views regarding disclosure of the information; and
- if the child does so wish, give the child an opportunity to express them; and
- have regard to such views as the child may express.

1.13 Arguments for and against this potential change in the law are outlined at paragraphs 1.05 to 1.08 above.

Question 2: Do you consider that the law should be changed in this area? If so, what changes would you like to see?

Question 3: Do you consider that any changes to practice and procedures should be made in this area? If so, what changes would you like to see?

General considerations

1.14 The Scottish Government would note generally that:

- the key test in family proceedings involving children is that the welfare and wellbeing of the child is paramount. There is no intention of moving away from that.

- the Family Law Committee of the Scottish Civil Justice Council has begun some work on how the voice of the child is heard in family actions.
- the Scottish Government has begun to prepare a Family Justice Modernisation Strategy, aimed at improving how family cases are dealt with in the courts.
- data protection is a reserved matter under the Scotland Act 1998.
- there has been a recent Court of Session case which related to the recovery of documents in criminal proceedings³.

Information relating to third parties

1.15 Another potential issue is that the application for commission and diligence may relate to confidential services provided to another person rather than to the child at the centre of the case (eg the services may have been provided to a sibling). In some instances, it may be possible to argue that the information is not relevant and so should not be disclosed. In other instances, it may be possible to argue that the information should not be disclosed on confidentiality and/or data protection grounds. However, these arguments against disclosing the information may not apply in all cases.

Breach of confidence

1.16 In considering the issues raised by this letter, the Scottish Government is aware that there is a relevant report from 1984 by the Scottish Law Commission, on Breach of Confidence, which has not been implemented⁴.

1.17 Paragraphs 4.51 and 4.52 of the Scottish Law Commission report dealt with documents relevant to judicial proceedings. Recommendation 20 (at paragraph 4.57 of the report) was:

“ Any party to any civil proceedings who has obtained information from a document or production (other than written pleadings) lodged in process, or from a document or other thing inspected or recovered under a commission and diligence or under an order under section 1 of the Administration of Justice (Scotland) Act 1972, should be under an obligation of confidence.”

1.18 The report was not implemented. Paragraph 3.10 of the report noted that

“ The practical choice, therefore, lies between not to legislate at all, or to seek to supplement the common law. We have reached no concluded view on which of these courses is the more desirable.”

Other comments from those receiving this letter.

1.19 You may have other comments

Question 4. If you wish, please provide any other comments you may have.
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³ The recent Court of Session case is at: <https://www.scotcourts.gov.uk/search-judgments/judgment?id=2af906a7-8980-69d2-b500-ff0000d74aa7>

⁴ The Scottish Law Commission report on Breach of Confidence is at http://www.scotlawcom.gov.uk/files/5712/8015/1448/26-07-2010_1437_886.pdf

Responding

1.20 Details of how to reply to this letter are at paragraph 6 of the covering letter.

**Justice Directorate
Scottish Government
March 2016**

ANNEX C: MINUTES OF ROUND TABLE HELD ON 4 DECEMBER 2015

MEETING ABOUT CONFIDENTIALITY OF INFORMATION HELD BY CHILDREN'S SERVICES IN CIVIL CASES

4 December 2015

Children 1st offices at 83 Whitehouse Loan, Edinburgh.

Present:

Simon Stockwell (Scottish Government) (Chair)
Nicola Kerr (Brodies)
Linda MacDonald (Children and Young People's Commissioner Scotland)
Chloe Riddell (Children 1st)
Anna O'Reilly (Children 1st)
Fiona Jones (Clan Childlaw)
Kate Dowdalls (Faculty of Advocates)
Ian Maxwell (Families Need Fathers)
Susan Oswald (Family Law Association)
Maureen Falconer (Information Commissioner's Office)
Katie Hay (Law Society of Scotland)
Neill Mitchell (Scottish Children's Reporter Administration)
Nicola Anderson (Scottish Courts and Tribunals Service)
Louise Johnson (Scottish Women's Aid)

Introductions

1. Those present introduced themselves.

Presentation by Children 1st

2. Chloe Riddell and Anna O'Reilly spoke briefly about the potential difficulties which Children 1st have encountered. Children 1st provide a variety of services to vulnerable children, including work with children who have experienced abuse. They therefore hold personal data about children, some of which is very sensitive.
3. Children 1st regularly provide written or oral evidence to courts in Scotland about their work with children. In some cases, they have been asked by the courts to provide case files and information on services provided to individuals. This has created concerns.
4. The primary concerns are:
 - Protecting the rights of the child
 - Hearing the voice of the child in relation to information held about the child
 - Safeguarding and promoting the child's welfare and wellbeing
 - The confidentiality of the service provided, and the risk of undermining the service if they cannot undertake to keep it confidential
 - The effect on a child, their safety and, potentially, the safety of the other parent and on a child's family relationships, if a parent can see records a service provider holds

- The potential for domestic abuse to be perpetrated through requesting personal information about a child
- The wider implications for information held by other services in the third sector and beyond e.g. child counselling services.

Discussion

5. Simon Stockwell noted that there are a number of options. These include:
 - Primary legislation - Children 1st had provided a suggested amendment. (The meeting noted any potential amendment to the primary legislation might be to the Administration of Justice (Scotland) Act 1972)
 - Changes to court rules
 - A public consultation, issued by the Scottish Government

6. The meeting noted the following points:
 - In some other cases, such as adoption cases, an entire social work file could be provided to the parties.
 - Children 1st do not tell children that information will be completely confidential. Children 1st are clear about their responsibilities to report possible crimes and to keep the child and others safe from harm.
 - The Supreme Court recently made a relevant decision.⁵
 - When the court is asked to order specification of documents, parties may dispute in court the terms of the specification. However, it is not clear that parties are aware this route is available to them.
 - The role of the Children (Scotland) Act 1995 and of the Children and Young People (Scotland) Act 2014 in terms of how “child’s best interests” and “wellbeing” are factored into court’s decision making
 - However, a child may not be represented (nor the child’s interests) and again, parties may not be clear that this option is available. .
 - It is important to hear the child’s views about the possible disclosure of information held about the child. [The meeting noted that the Family Law Committee of the Scottish Civil Justice Council are currently considering issues in relation to the voice of the child in family cases.]
 - It is open to the court, when asked to order specification of documents to be given to the court, to appoint a commissioner. The commissioner is responsible for determining which documents meet the specification. The sheriff or judge may, where appropriate, be the commissioner. Commissioners are appointed regularly in other areas of law e.g. personal injury cases.
 - The information sought could relate to someone who is not a party to the case (eg the child; another child; or an adult).
 - The role of the sheriff (or judge) is to take account of and properly balance everyone’s rights in an individual case. Options to support the sheriff in this role include the appointment of a curator *ad litem*, to represent the child’s interests, or an *amicus curiae*, to help the court.
 - If the Government consulted, the Government should engage the judiciary and the Sheriffs’ Association in the consultation.
 - It might also be possible to feed in to judicial training.

⁵ <https://www.supremecourt.uk/cases/docs/uksc-2012-0193-judgment.pdf>

7. The chair thanked everyone for their contributions.

Family and Property Law
Scottish Government
December 2015