



FACULTY OF ADVOCATES

Response from the Faculty of Advocates

to

the Consultation on

Registers of child welfare reporters, curators ad litem and solicitors appointed when a person is prohibited from conducting their own case

Introduction

The Faculty of Advocates is grateful for the opportunity to respond to the consultation on the registers of child welfare reporters, curators ad litem and solicitors appointed when a person is prohibited from conducting their own case.

There are a number of points which we consider might be helpful to note at the outset in relation to child welfare reporters.

The purpose of appointment of a child welfare reporter is to assist decision makers in making good decisions in the interests of children, and that should be clearly borne in mind throughout. The creation and implementation of new processes should therefore be directed towards the requirements of decision makers. In that regard the purpose is not to replace the decision making of sheriffs and judges but to assist them.

Further, decision makers, whether sheriffs or judges, will direct the task of child welfare reporters. The enquiries to be made are not free-standing or necessarily wide ranging. The reporter may be asked to ascertain the child's views, or to carry out further inquiries, in which case the decision-maker will specify the visits or interviews to be undertaken. The instructions are currently issued on forms prescribed by the court rules (Form F44 or CP38 in the sheriff court and 49.22 in the Court of Session).

Child welfare reporters who regularly provide reports in a particular court will be familiar with the format and information that the judge or sheriff finds helpful. This aspect of practice is liable to be lost under the new regime for child welfare reporters. Some consideration will require to be given as to how this particular loss is to be addressed, in order to preserve the quality of the reporting and the resulting decisions.

The other loss which will require to be considered relates to the confidence of the decision-maker in the quality of the information provided in the report. This should be covered by the selection and training process, but it may be desirable to leave some scope for decision-makers to select particular child welfare reporters for cases of a particularly unusual or sensitive nature.

Child welfare reports are confidential documents produced for the court. The reports should not be used for purposes other than those intended. It is our understanding that the report of a child welfare reporter appointed by the court belongs to the court and that only the judge or sheriff can permit it to be shared.

Child welfare reporters, curators ad litem and solicitors appointed by the court are not employees. Care should be taken over the drafting of the recruitment, appointment and removal provisions to ensure that no employment relationship is created. We suggest that specialist employment advice is taken.

Part 2: Register of Child Welfare Reporters

Question 1 - Who should provide the operation and management of the register of child welfare reporters?

We note that the Scottish Government considers that a centralised national register of child welfare reporters is the best way to ensure that there is consistency across Scotland in terms of appointment process, complaints procedure and training requirements, and that contracting out the operation and management of such a register might be preferred.

We consider that a more appropriate option would be to delegate responsibility to the Sheriffs Principal and the Lord President. We suggest that the management of the register might be effectively carried out by the Lord President's private office. We note that our experience of the body which runs the safeguarding panel register does not fill us with confidence that such a set up, or a similar set up, would be effective in relation to child welfare reporters, given the need for the body concerned to be familiar with the court process and the operation of the particular sheriff courts, which inevitably vary between small rural courts and large courts with specialised family sheriffs.

If, contrary to our view, the operation and management of the register is to be contracted out, we consider that it would be necessary for any third party to be properly informed about the current systems in place, the background to the proposed reforms, and any new system. There is real concern that such a set up (i.e. one that is contracted out) could be less responsive to the needs of the decision maker than the system is at the moment. Such a body/third party would require to have a realistic understanding of the workings of the courts in Scotland. There would likely be significant increased cost involved in creating such a system, the majority of the current costs being absorbed in court clerking costs.

Question 2 - Do you agree/disagree with the proposed process for including an individual on the register of child welfare reporters?

We note that it is proposed that individuals would need to complete an application form which would be sifted on an anonymous basis and that individuals who pass the sift may then be interviewed to assess their suitability for inclusion on the register. We note that the application form would seek evidence of how candidates meet the requirements and ask individuals to indicate the areas of the country in which they would be available to work.

To be in a position to comment on the proposed process, we would require to have an understanding of what it would involve, for example, the form of the application, the sift process and how and by whom it would be conducted, and the format and style of interviews. The background is the importance of making decisions about children. The issue can be focused on who selects the successful applicants and on what basis. Consideration should be given to whether the process of application will result in the appointment of appropriate candidates upon whom the court would wish to rely, and whether it might discourage/identify people upon whom the court would not wish to rely. A helpful starting point in relation to the process might be to consult with sheriffs and judges to see if they consider that the proposed process is going to produce reporters who are likely to assist them. If the purpose of child welfare reports is to assist the judiciary that needs to be very clear. Consultation with the judiciary at the outset and along the way seems sensible. The system should be as helpful as it can be to the judiciary.

We reiterate the point made in the introduction that care should be taken that an employment relationship is not created with child welfare reporters. Some of the suggestions for recruitment, appointment and removal provisions in the consultation document appear to come quite close to an employment relationship. As we understand it, the persons appointed to the register will not become employees. Care should be taken over the drafting of the recruitment, appointment and removal provisions to ensure that no employment relationship is created.

Question 3 - Do you agree/disagree that child welfare reporters should be included on the register for a three year period?

We agree that child welfare reporters should be included on the register for a three year period, but see comments below.

Question 4 - Do you agree/disagree with the proposed reappointment process for child welfare reporters?

While it is important that individuals unsuitable for the work do not remain on the list, we have reservations about whether a full reappointment process for existing child welfare reporters is necessary every three years. Those on the list may not be willing to undergo a full reappointment and skilled individuals could be lost. It seems administratively heavy and would come at a cost.

We do, however, agree with annual appraisal, which would involve discussion about the performance of the individual, and any relevant complaints. Some care would however be required, given the confidential nature of each individual child welfare report.

Instead of a three yearly full reappointment process, we propose that a three yearly scheme of revalidation, in light of annual appraisals and whether the person wishes to remain on the list, might be more appropriate. This would provide a check and a review. In considering whether an individual should remain on the register the outcome of the annual appraisals would be taken into account. It would also allow removal from the list of the names of people who had not completed a report for three years or who have had a series of complaints.

Question 5 - For each of the following categories of people, should they be ineligible for inclusion on the register of child welfare reporters?

- a) an individual directly involved in the establishment, maintenance, operation or management of the register of child welfare reporters**
- b) an individual employed by the SCTS**
- c) a member of the judiciary**
- d) a member of the Scottish Government or junior Scottish Minister**
- e) an individual barred from regulated work with children by virtue of the Protection of Vulnerable Groups (Scotland) Act 2007**

We agree that those individuals falling into the above categories should not in general be eligible to be included on the register of child welfare reporters. We do, however, consider that b) and c) require further clarity. In relation to c) it would be helpful to define what is meant by a member of the judiciary. For example, would a solicitor or advocate who is a part-time sheriff, or tribunal member be disqualified? If part-time sheriffs were to be excluded for appointment in cases in the sheriff courts, would the exclusion extend to cases in the Court of Session? Would Children's Panel members be excluded? In relation to b) would being a legal assistant to a judge result in disqualification? Would doing paid work for SCTS exclude a person? Clarification of these matters would be helpful.

Question 6 - Is there anyone else who should be ineligible for inclusion on the register of child welfare reporters?

No other specific categories of ineligibility come to mind.

Question 7 - Do you agree/disagree with the approach proposed when an individual is removed from the register of child welfare reporters?

We agree that it would be appropriate to remove a person from the register of child welfare reporters if they do not meet the required standards. Maintaining quality and a high standard is important.

We note the proposal that the body appointed to operate and manage the register may receive complaints about the conduct of a reporter or the quality of the reports, that this would be investigated, and that if the body considers that the conduct is serious enough or the quality is low enough to merit the individual's removal from the register then the person could be removed.

We have several concerns about this. The first relates to the ownership and control of the report. It is our understanding that the report of a child welfare reporter appointed by the court belongs to the court and that permission of the judge or sheriff would be required for it to be shared. A second concern is that child welfare reports contain private and highly confidential information and that such reports should not be used for any purpose other than that for which they are

written. Using reports for any other purpose will raise issues under both article 8 of the European Convention on Human Rights and the data protection regime. A third concern relates to the “required standard” and who is to say if a report is of poor quality. Assuming that a report is available for consideration in relation to its quality, the criteria to be met would require to be set out. It would need to be established in what circumstances a report would be deemed to meet or not meet the criteria. There would need to be a right of reply. We are, of course, conscious that these reports are often prepared in highly contentious cases, and an adverse comment about a party in a report may well give rise to a complaint, whether justified or not.

Question 8 - Do you agree/disagree with the proposed requirements that a person must satisfy in order to be included on the register of child welfare reporters?

The Faculty has concerns that the recommendations in this area do not acknowledge that the decision maker is the sheriff or the judge. The point of the child welfare report is to equip, not replace, the decision maker.

The second area of difficulty is that if a case calls for expert evidence, that is evidence arising from particular knowledge or experience, then an expert should be instructed. The role of a child welfare reporter is not to supplant an expert witness. One useful role a child welfare reporter may play is to identify when an expert is required. Only an expert witness may express an opinion. A child welfare reporter sets out matters of fact.

The purpose of providing some training and requiring a level of skill and experience is to ensure that child welfare reporters can fulfil the function of providing helpful reports. At the most basic reporters must be able to communicate with children and obtain the views of children. They must be able to engage with adults and take an accurate history. They must be able to set out findings clearly in a report.

Child welfare reporters must have enough basic knowledge or experience to indicate where there is potential domestic abuse, and in particular coercive control. They must be alert to the possibility of adults influencing a child, and the effect on a child of family conflict. A basic awareness of child development and learning disabilities will be material, as will an awareness of child protection issues and the child protection system. The point of equipping child welfare

reporters in these areas would be so that they can draw attention to the issues and the possibility that expert evidence may be required.

It would however be potentially dangerous to hold out child welfare reporters as experts in these areas. It is unlikely that all child welfare reporters will have the skills to give opinions in difficult and contentious areas where experts are generally instructed. An expression of opinion by a child welfare reporter may be positively misleading. The Faculty is aware that this has been a source of concern in relation to some child welfare reports. The answer is not that every child welfare reporter will be an expert, but that child welfare reporters will be equipped to indicate where an expert opinion is required.

Question 9 - Are there any other requirements that a person must satisfy in order to be included on the register of child welfare reporters?

One of the benefits of the current system is that the court may select a child welfare reporter with a genuine area of expertise, where this is necessary and appropriate. The usual example is a remit to a psychologist where, for example, there is particular sensitivity in relation to the child's views, or the child has a learning disability.

A decision will be required as to whether such a remit to an expert reporter should remain as part of the system for child welfare reporters. If that is to form part of the system, then it will have to be possible for the judge or sheriff to specify that they require a person with particular expertise as the child welfare reporter. The alternative is that parties will seek expert reports based on their own agenda, without necessary regard for the questions the decision maker might wish to see addressed.

Question 10 - Do you agree/disagree that existing child welfare reporters having to apply to be on the new register?

We agree with the suggestion that existing child welfare reporters, if they wish to be on the new register, would have to apply, to ensure that everyone meets the same minimum standards.

Question 11 - Do you agree/disagree with the proposed training requirements for child welfare reporters?

We agree that anyone who is included on the register of child welfare reporters should have the benefit of regular training. We have no issue with the proposed areas for training, subject to the points we make above. The areas in which training is provided should be updated as developments and needs arise. The quality of the training would be important. Liaison with the judiciary in relation to training requirements for child welfare reporters will be essential.

We suggest that four days of “in person” training is excessive. Taking four days out away from other professional responsibilities may be impracticable and deter potential applicants. There are satisfactory alternatives in the form of online training, using video presentations, written presentations, questions and feedback (similar to the Judicial Institute training for sheriffs in relation to domestic abuse, for example)

A number of child welfare reporters are also curators ad litem and safeguarders in the Children’s Hearings system and we agree that any training requirements that overlap between these roles should be taken into account to avoid duplication.

Question 12 - Is four days of paid training per year for child welfare reporters appropriate?

See above. There might be other ways of dealing with some of the training. Four days away from other professional work may not be necessary when online courses can be completed in own time. A mixture of two days direct training (online direct tutorials with options for dates) and two days pre-recorded online might be a sensible combination.

We consider that training in the key areas could be provided by those accredited to provide it by the body appointed to manage the register. This would allow use to be made of existing resources and training providers, including Faculty and the Law Society.

Question 13 - How should fee rates for child welfare reporters be applied?

We note the two options of how the fee rate could be established - an hourly rate or a per page rate for the report to be published.

We would suggest that the appropriate rate would be an hourly rate. This would allow for travel time as well as time taken meeting individuals and writing the report. Every case is different. There should be an over rider of reasonable time taken. Work unreasonably undertaken, or an unreasonable time taken to complete the work may result in the fee being discounted (see *Aberdeenshire Council Petitioners*, 2006 Fam LR 22 where an excessive fee was submitted by a curator *ad litem*).

The Faculty is keen to remain of service to the judges in the Court of Session in particular and will encourage members to apply to be on the register of child welfare reporters. It will however assist if the work is paid at a rate that bears some relation to the fees payable to counsel for other work. The SLAB rate for junior counsel for a day of proof is £973.35 and for senior counsel is £1,460.03. Preparation carries a fee of 2/3 these sums, ie £648.90 and £973.35. While most child welfare reporters in the Court of Session are junior counsel, on occasion the court has appointed Queen's Counsel, where the case has particular complexities or when the protagonists are members of Faculty. We anticipate that the Court will wish to retain the possibility of appointing senior counsel in such cases in the future.

Where there is a dispute about fees, we have concerns about individuals' private data being put out before an official in order to determine whether a child welfare reporter should be paid. See our comments in answer to question 7 above in relation to ownership and sharing of reports.

Question 14 - Do you have any comments on the proposed policy in relation to expenses for child welfare reporters?

We note the proposals for expenses. Our only comment is that we suggest there should be provision for exceptional expenses to be paid. For example, it is not always possible to secure accommodation for £75 a night and child welfare reporters should not be required to subsidise this work themselves.

Question 15 - When a child welfare reporter is selected should this be a) the next person on the register, (b) a person with specific areas of expertise requested by the court, or c) through another system?

We note the proposed preferred approach that when a court orders a child welfare reporter to be appointed, the clerk of the court will contact the body appointed to operate and manage the register and the body would then select the next child welfare reporter from the register who is willing to work in the specific geographic location. We also note the alternative approach mentioned that, should a child welfare reporter be appointed, the court could also, if it wished, specify areas in which it would expect the child welfare reporter to have expertise.

We consider that the court has to be able to make a request for what is needed to assist it. For example, a judge might prefer to have a legally qualified person appointed for a particular case, or to have senior counsel, or to have a person with particular expertise in a particular area. The whole purpose of having a child welfare reporter is to assist the judicial decision maker, so it is appropriate that the decision maker should specify whether the individual who may be proposed is appropriate for the case in hand. We would suggest a rolling list where the person at the top of the list should be appointed unless there is a reason not to appoint them, such as when one of the above reasons applies. In that circumstance, the next again person who fulfills the particular requirements would be appointed. The person who was not appointed would remain at the top of the list for the next case. If an individual comes up at the top on the list and the sheriff or judge is aware of a reason why that individual might be inappropriate for the particular case, they ought to be able to put them back in the list and for the next person to be selected. Again, the person not selected would remain at the top of the list for the next case.

Question 16 - Should a child welfare reporter provide recommendations on what is in the best interests of the child in their report?

A child welfare reporter should provide recommendations on what is in the best interests of the child in their report if the sheriff or judge has asked them to do that. The court will tell the child welfare reporter, on the relevant form (see above), if they want recommendations. If a child welfare reporter is asked to ascertain a child's views only for example and recommendations are not called for, recommendations should not be provided. The function of a child welfare

reporter is to assist the decision maker. The decision maker sets out in the form what the child welfare reporter is asked to do to assist the court and that should be complied with. Sometimes recommendations will be called for by the decision maker, sometimes they will not be. Where recommendations are called for, these are not determinative but to assist the court. We suggest that where recommendations are asked for, it should be made clear that these are not decisions but recommendations to assist the court.

Question 17- Do you have any comments on the proposed procedure for complaints from individuals who are unsuccessful when applying to be on the register of child welfare reporters or are removed from the register?

We have no comments.

Question 18 - Where a child welfare reporter has a grievance about fees or expenses or comments on their appraisal should this be dealt with by the body appointed to operate and manage the register?

We note that it is envisaged that any such complaint would initially be handled by the team which led on the appointment process and then, if necessary, by another team who had no role in the original decision-making process. Before commenting we would require more information about what is involved in the appointment process (see our comments to question 2 above) and similar information about the proposed complaints process. We do note that disputes about fees are a matter that has in the past been susceptible to a referral to the Auditor (see *Aberdeenshire Council Petitioners*, 2006 Fam LR 22).

Question 19 - Do you have any comments on the proposed procedure for complaints about child welfare reporters?

We note the proposal that if a child or adult wishes to complain about the conduct of a child welfare reporter they should contact the body appointed to operate and manage the register. It is recognised that it would not be appropriate to share the full content of the report with an individual who is not a party to the case as it may contain personal information. We have

commented on the ownership and sharing of child welfare reports in answer to question 7 above.

Decisions to remove an individual from the register are to be made by the Scottish Ministers based on evidence provided to them. We suggest that any complaints procedure would require to be very carefully thought out. We note the potential for challenges by way of judicial review.

Part 3: Register of Curators ad litem

Question 20 – Do you agree/disagree with the proposed requirements that a person must satisfy in order to be included on the register of curators ad litem?

Please refer to the answer to question 8 above. The role of a curator ad litem is not a representative role in the true sense. It should be noted that a curator is entitled to enter the process in order to look after the interests of a child. The curator would then be required to instruct their own representation. It has to be borne in mind that the consultation is only dealing with section 11 applications. It should be noted that it is incoherent to have a register for curators ad litem in relation to section 11 applications, when separately curators ad litem are instructed on statutory bases, for instance, in adoption and mental health proceedings. Curators ad litem are also appointed by the court when an adult party has a legal disability.

Question 21 – Should there be any other requirements that a person should satisfy in order to be included in the register of curators ad litem?

Please refer to the answer to question 9 above.

Question 22 – Do you have any comments on the proposed training requirements for curators ad litem?

Please refer to the answer to question 11 above.

Question 23 – Do you agree that four days of paid training per year for curators ad litem is appropriate?

Please refer to the answer to question 12 above. However, regularly those instructed as curators are also appointed as child welfare reporters. It is not clear whether training for a curator ad

litem would be separate to training for a reporter or whether the training for both aspects would fall within a single annual requirement.

Question 24 – Do you have any comments on the proposed process for appointing a curator ad litem in a case under section 11 of the 1995 Act?

Please refer to the answer to question 15 above.

Question 25 – How should fee rates for curators ad litem be paid?

Please refer to the answer to question 13 above.

Question 26 – Do you have any comments on the proposed approach in relation to expenses for curators ad litem?

Please refer to the answer to question 14 above.

Question 27 – Do you have any comments on the proposed procedure for complaints by or about curators ad litem?

We have no comments.

Part 4: Register of solicitors

Question 28): Do you agree/disagree with the proposed requirements that a person must satisfy in order to be included on the register of solicitors?

Agree

Disagree

Don't know

Why did you select your answer?

The Faculty of Advocates disagrees to the extent that there should be no reason why a part-time member of the judiciary (such as a part-time sheriff or part-time tribunal chair) should not be on the register of solicitors who may be called on to act under section 22B. Such a person may have skills to offer. There are restrictions on part-time sheriffs, who may not sit in their

“home” court. They are likely regularly to appear as solicitors in that court, and could contribute to the register.

The Faculty also considers that the register requires to be subdivided. Family law is not a homogenous area. Persons who regularly practise in child law with reference to children’s hearings may not have skills to equip them to appear in a divorce action where issues arising under section 11 of the Children (Scotland) Act 1995 may be litigated in a proof which also concerns financial provision under the Family Law (Scotland) Act 1985. Our members regularly appear in cases concerning both children and money, including those where there are allegations of domestic abuse.

While the requirement for skills and experience in relation to family law, domestic abuse and proofs is reasonably clear, we do not entirely understand the requirement to be able to demonstrate skills and experience in relation to “family conflict”. On one view every litigated family law case is an example of family conflict. Is something more required? And if so what is it? Unless this question can be clearly answered we would suggest this express requirement is omitted.

An annual appraisal is impractical. The work carried out will be confidential to the client. The solicitor could not disclose it for the purposes of appraisal. Many of the proof hearings will be private. In any event, the call for this kind of representation may not produce a case in any particular year.

Question 29): Are there any other requirements that a person must satisfy in order to be included on the register of solicitors?

Yes

No

Don’t know

Please give the additional requirements you feel are necessary and why you feel they are important.

As stated above the Faculty proposes that a solicitor should identify the area(s) of family law in which they have relevant experience, including financial issues, given these may not be

separated from issues relating to children. Solicitors should only be appointed to act in cases where they have the appropriate experience.

Question 30) Do solicitors on this register require fewer days training each year than child welfare reporters and curators ad litem, on the basis that they are likely to receive fewer appointments?

Yes

No

Don't know

Why did you select your answer?

The Faculty respectfully suggests that the Government first decide on the areas in which solicitors on the register require training, beyond the areas in which they already have skills and experience by virtue of their qualifications and practice as family lawyers. There should be little additional training required, as these are solicitors who will be engaged in similar work as part of their day-to-day practice.

The only areas where additional training may be required are:

- In relation to the nature of any appointment under section 22B and the particular nature of the duties, when the person represented gives no instructions or gives instructions that are inadequate or perverse; and
- On the topic of domestic abuse and coercive control.

These areas could be covered by online training in the form of video clips, papers and questionnaires for completion and self-checking. The Judicial Institute has an excellent model for this, the “Domestic Abuse Resource Kit”.

Requiring separate “training days” may be impractical. Skilled practitioners will be busy. They may not be available for training days. Were they to commit to such days they would require to be paid.

Question 31): Are there any other training requirements that you think should

be included?

Yes

No

Please give the additional requirements you feel are necessary and why you feel they are important.

Question 32): Do you have any comments on the proposed process for the court appointing a solicitor from the register?

Yes

No

Why did you select your answer?

As explained above, it will be important to select a solicitor with skills in the area in which they are being asked to act. It would be unjust to impose on a party in a divorce a person whose skills are confined to children's hearing cases and equally unjust to impose a divorce lawyer on a party in a children's hearing case.

The Faculty has serious concerns about selection of a solicitor by a third sector organisation who has limited direct contact with courts. The only organisation that could realistically deal with this choice would be the Law Society of Scotland. Failing that, the choice should be a matter for the sheriff or Lord Ordinary.

Question 33): Do you agree/disagree with the proposed procedure for expenses for individuals appointed to this register?

Agree

Disagree

Don't know

Why did you select your answer?

In our experience there are unrepresented parties in the Court of Session, including in cases to which section 22B potentially applies. Counsel are also regularly instructed in sheriff court

cases where there may be similar problems. How are counsel's fees to be determined? Who will adjudicate in the event of a dispute?

Consideration also requires to be given to the fees of relevant experts. These may relate to the issues relating to children, or financial matters in a proof covering both children and money. A competent solicitor may well require to instruct an expert in order to provide proper representation.

An instructing solicitor generally bears primary responsibility for the fees of counsel and experts. It will therefore be important to resolve these issues before implementing provisions for the register.

Question 34): Do you have any comments on the proposed procedure for complaints by or about solicitors on this register?

Yes

No

Please provide your comments.

Complaints by the solicitor should be subject to clear and rapid internal procedures. Beyond that there will be scope for judicial review.

Complaints about the solicitor should be directed to the SLCC, as for any other services or conduct complaint. The person responsible for maintaining the register should be able to take account of the SLCC decision in relation to whether the person remains on the list after a complaint has been determined. It would be unjust and unfair to require a person on the register to face two disciplinary inquiries, one from the SLCC and the other from the person operating the register. One inquiry should suffice for all purposes. A person aggrieved by removal may seek judicial review.

There should be no approach to the sheriff in relation to a complaint. The sheriff is bound by a duty of confidentiality. The sheriff should not discuss the case with someone who is effectively a third party