

Barnardo's Scotland response to the Scottish Government consultation on:

## **COMMISSION AND DILIGENCE IN FAMILY ACTIONS IN THE CIVIL COURTS**

Barnardo's Scotland is the largest children's charity in Scotland; we work with some of the most vulnerable and disadvantaged children in Scotland. We run over 120 services and work with over 26,000 children, young people and their families every year throughout Scotland, many of these services provide essential support to children and families who have suffered domestic, physical, sexual and emotional abuse. We have services which work with children who have been victims of abuse, children who have been through severe trauma, and children and families who have suffered domestic abuse.

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

As far as we can see, the process this seems broadly accurate. We have been involved in civil cases where the Court has requested confidential documents and case notes from us in relation to children we are working with in our trauma recovery and other specialist services.

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

Yes, we believe a change in law is necessary.

Barnardo's Scotland have been involved in several criminal cases where the solicitor of an alleged abuser has requested copies of notes and art work of children working in our therapeutic services. There are safeguards in place for these cases, covered in the guidelines on therapeutic work with vulnerable witnesses. In particular, we have often used a Section 28 Order which enables an impartial, independent commissioner to review the requested materials and decide whether or not they would add weight to the case on either side.

We believe that there is a huge discrepancy between civil and criminal cases where children are concerned. Too often the default is that parental rights must take precedence because they are not the subject of a criminal investigation and have therefore 'done no wrong' in the eyes of the law. Whilst we understand the need to ensure innocent parties are not penalised and everyone receives a fair trial, the balance is currently tipped too far in favour of parental rights, and children's rights are more often than not completely lost in a system which essentially treats children as unavoidable collateral damage in parental disputes.

Current thresholds in civil cases prevent information being shared if it would cause 'significant harm', however the direction of travel in Scotland since the Children and Young People (Scotland) Act 2014 is towards protecting and safeguarding children's broader wellbeing. We believe this threshold for sharing information should be brought into line with provisions in the CYP Act and documentation should only be required to be shared if it will not be detrimental to that child's wellbeing.

We therefore support the suggested changes to the law as outlined in section 1.11 and 1.12 of the consultation document. These proposals take into account the principles of GIRFEC which were cemented in legislation through the CYP Act and the framework around information

sharing, only when it is proportionate and relevant. As noted by the response submitted by Children 1<sup>st</sup>, these proposals would not prevent information being shared in civil cases (potentially leading to an unfair trial), rather they would put in place safeguards to ensure children's wellbeing is considered before any information is shared.

It is important that any change in law which requires courts to assess and take into account a child's wellbeing is accompanied by comprehensive training (this point is expanded in question 3). Any service working with the child may well be better placed to provide an assessment of wellbeing and enable the child to express their views. There may also be a role for the Named Person to play in these circumstances or an independent advocacy service such as our Barnardo's Hear 4 U service which operates in Renfrewshire, South Ayrshire and Dumfries and Galloway.

**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?**

In our experience of civil cases, Sheriffs are often required to make decisions about issues of which they appear to have little background information. In one particular case, a child we were working with who had disclosed several incidences of abuse at the hands of a parent was embroiled in a civil dispute whereby the parent was alleging the abuse was fabricated and seeking custody. The Court requested the child's confidential case files from Barnardo's. Despite all evidence to the contrary from experts working with that child, the Sheriff's final decision was that the child was indeed lying and the parent was successful in their pursuit of joint custody of that child. In addition, a judgement was granted (on behalf of the parent) that the child should have no more contact with our Barnardo's service. This child had no legal representation; no-one advocating for their rights or wishes, every safeguard for that child was removed, including the support of Barnardo's. Non-abusing parents often have professionals advocating on their behalf and can prevent their own records being handed over in civil cases, but no such safeguards are in place for children.

This is an unacceptable situation. All Sheriffs and Judges in civil cases should receive sufficient training so they are aware of the issues and complexities of child abuse, familial abuse, domestic abuse, coercion and control. Just because no crime has been alleged does not mean these family dynamics are not present. Often the third sector is best placed to recognise abuse, as we deal directly with children and families on a daily basis. We have witnessed abusive parents use the legal system to their advantage, to continue to control, coerce and threaten their partners and their children, safeguards must be in place to ensure this does not happen.

In particular we would like to see specific practices and procedures for cases involving domestic abuse, or where domestic abuse has been alleged. The Scottish Government is moving towards a specific offence for coercive control and this should be reflected in any change in common law. It is now accepted that domestic abuse has many facets, not just physical violence but emotional abuse and psychological control. Abusive partners should not be allowed to use loopholes in common law to extend the reach of their coercive control. In some cases, children's case files may include third party information about a non-abusing parent which could compromise their safety if shared with the court. Safeguards must be put in place to ensure abusive partners do not use the civil courts, and in particular their children to manipulate, control and emotionally abuse.

**Question 4 – If you wish, please provide any other comments you may have.**

We hope that this consultation, along with the other activities taking place such as the Family Justice Modernisation Strategy and the work of the Scottish Civil Justice Council will help to instigate a wider conversation about how children are treated in court cases, both civil and criminal. Too often, and even in cases of alleged or proven abuse, parent's rights are still taking precedence over children's rights. We are aware of situations where female victims of domestic abuse are being court ordered to take their children to contact centres for visits with their father even though the children are so terrified of going they are making themselves physically ill and refusing to enter the centre.

GIRFEC is for every child and all bodies and professionals who work with children and young people; this does not exclude the legal profession. GIRFEC puts children at the centre of the process, in the context of this issue, first and foremost the question should be:

*'Will sharing this child's confidential information with the court and their parent damage or impact negatively on their wellbeing?'*

Most importantly the views of the child should be sought. We support the view of Children 1<sup>st</sup> that sharing children and young people's personal case files without seeking their views first is a violation of their rights under the ECHR and UNCRC.

A child who has disclosed personal and sensitive information to a trusted project worker in a Barnardo's service would likely be extremely anxious at the thought of this information being handed over to the courts and their parents. Children need safe, confidential spaces in order to disclose and in order for us to work with them to help them recover from trauma. If this assurance of confidentiality is taken away it becomes very difficult for us to work with children and encourage them to open up and therefore start the process of recovery. We have had instances where trust has been completely lost with a child and recovery set back months because we have had to hand over or discuss a child's confidential information.

We look forward to working with the Scottish Government on these issues to ensure that children's rights are upheld and their wellbeing protected in court cases which affect them.

**For more information contact:**

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