

Probing Compliance with Children's Human Rights: Children's Participation in Family Actions



Interim Research Findings

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This briefing provides interim findings, presented at the event 'Reforming Children (Scotland) Act 1995' (October 2019). The discussions at the event will help to develop these findings further.

1. Background to the research

Children's involvement in family law proceedings is currently subject to policy and legislative scrutiny. Despite the strong provisions in the Children (Scotland) Act 1995 regarding children's views being given due weight in decisions about parental responsibilities, children's rights to participate have been inconsistently and inadequately realised. Empirical evidence and case law points to notions of children's competency, their manipulation and their distress (caused by participation) as potential 'blocks' to children's participation rights.

The research has been funded by Justice Analytical Services, Scottish Government. It began in October 2018 and is due to conclude in October 2019.

2. Aims of the research

1. To interrogate the current challenges and barriers to realising and implementing children's participation rights in family actions and the implications these have for compliance with children's human rights.
2. To identify empirical evidence on potential solutions to these issues from Scotland and from other jurisdictions (England and Wales, New Zealand, Australia and Canada) who have positively evidenced developments, from judicial interviewing to children's advocacy.

3. Methods for the research

Children's Expert Group The research has been guided by children who have experience of participating in family actions. The group met with the research team at the beginning of the project to share their priorities for the project and will meet again to discuss the findings of the research.

Phase 1 involved a review of reported case law on children's participation in family actions in Scotland.

Phase 2 focused on the perspectives of legal and advocacy professionals in Scotland. Interviews were carried out with: judiciary (n=6), solicitors (n=8), advocacy specialists (n=3¹). These interviews focussed on the perceived challenges and barriers to children's participation and any solutions there may be to these.

Phase 3 investigated what learning there may be from other jurisdictions' approaches to children's participation in family law and other parts of the justice system. The searches focussed on the jurisdictions of: England and Wales; Australia; New Zealand; and Canada. These jurisdictions were selected because of their recent and on-going attempts to improve children's participation in family actions. Follow up qualitative interviews (n=15) were carried out with key academics from the jurisdictions identified.

¹ Further interviews are planned with advocacy specialists.

4. Key findings

Section 11 of the 1995 Act was set up with the UNCRC requirements in mind, seeking to address the requirements of Article 12 in contested parental responsibilities cases in front of the court. A number of mechanisms support this, from the Form F9, to court reports containing children's views. Yet, research and other evidence continue to show that children's participation rights are often not met.

The General Comment from the UN Committee on the Rights of the Child (2009) requires that children's participation rights are considered throughout legal processes. This includes: preparation; an enabling and encouraging environment for any hearing; assessing the capacity of the child, so as to guide the weight to be given to these views in the decision; feedback to the child on the outcome and how the child's views were considered; and the child should have access to complaints, remedies and redress should their right be disregarded or violated (para 40-47).

The research has found that current Scottish law, policy and practice does not fully and consistently meet these requirements. Key gaps include:

- Children are not given options for participation; rather a court decides if and how a child shall participate
- Children's participation in family actions is largely indirect and their views are mediated by adults
- A strong sense by those working in courts that children's increased participation in court processes may be detrimental to children's welfare
- Adult concern that participation risks exposing children to parental influence and 'adult concerns' e.g. parental relationship breakdown, domestic abuse
- There is an absence of an infrastructure (e.g. service or professional with responsibility) to prepare and support children to participate in family actions
- There are no routine mechanisms to feedback decisions or explain the influence their views had to children. Nor are there accessible ways for children to seek redress

5. Implications of the Children (Scotland) Bill

While the Children (Scotland) Bill has the potential to address some of these gaps, areas of concern remain, including:

- Support for children throughout the legal process
- The threshold of 'capability'
- Opportunities for children's views to be expressed *directly* to the court
- The extent to which expanded mechanisms for participation will be realised
- The adequacy of information provided to children to make clarified decisions
- Accessible complaints and redress for children

6. Next steps

The research is due to conclude in October 2019. For further information, please contact f.morrison@stir.ac.uk