# The Child's Participation in Court Proceedings

## Adoption and Fostering Alliance Scotland Legal Conference

## Double Tree by Hilton, Dundee; 14 June 2019[1]

**Introduction**

Long before Scotland had it first statute regulating the adoption of children,[2] Scottish courts were asking themselves questions such as:

> "whether it is consistent with the welfare and interests of the child, and particularly with its health and chances of life, that it be given over to its natural and legal custodier or not."[3]

The use of the neuter gender is not significant. In the late 19th and early 20th centuries, this type of issue would tend to come before the court in cases in which a mother had voluntarily given an illegitimate child over to a married couple shortly after birth, before some years later seeking the return of the child.[4] The sheriff[5] or, in the Court of Session, an appointed advocate,[6] would seek the views of children in private, usually at home, both in and outwith the presence of the relevant adults,[7] to assist in deciding whether he or she should be

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[1] I am grateful to my law clerk, Neil Deacon, for preparing the first draft of this talk.

[2] Adoption of Children (Scotland) Act 1930.

[3] *Sutherland* v *Taylor* (1887) 15 R 224, LP (Inglis) at 228.

[4] Between *Sutherland* v *Taylor* and the other cases, the Custody of Children Act 1891 entered into force, but (s 1) the court enjoyed a wide discretion as to what to do in these situations; *Mackenzie* v *Keillor* (1892) 19 R 963; *Campbell* v *Croall* (1895) 22 R 869; *Mitchell* v *Wright* (1905) 7 F 568.

[5] *Mackenzie* v *Keillor* (1892) 19 R 963; *Mitchell* v *Wright* (1905) 7 F 568.

[6] *Campbell* v *Croall* (1895) 22 R 869.

[7] In *Mackenzie* v *Keillor* (1892) 19 R 963, the sheriff-substitute reported "I beg to report that I have seen the parties to the action, and have conversed privately with them, and with the child."; in *Campbell* v *Croall* (1895) 22 R 869, the advocate reported "I also saw Miss Croall and the two children. In Miss Croall's presence, the children shewed that they regarded her with affection and confidence, and

returned to the natural parent. In contrast to the rather dehumanising, proprietorial language which the courts tended to use towards children in these times, not just the use of the neuter gender but words such as "legal title to the custody of the child"[8], utmost regard seems to have been paid to the child's views on with whom they wanted to live. One sheriff reported that a 6-year old was "well educated" and showed a clear preference to remain with the couple who had taken her in when she was a month old.[9] An advocate reported in relation to 10 and 11-year old siblings that it "… The children are frank and intelligent, … they say they are comfortable and happy."[10] Finally, a different sheriff reported that a 7-year old child "answered all my questions readily, and altogether she struck me as being decidedly above the average for her years in intelligence".[11] The Custody of Children Act 1891 arrived nearly 40 years before the first adoption statute. It made it clear that the court had power to "consult the wishes of the child in considering what order ought to be made" and that the Act did not diminish the right of a child to exercise his or her own free choice.[12]

This shows that the willingness of courts to listen to a child, when making an important decision about his or her future, or where the child's account of some event may constitute valuable evidence, is more long-standing than intuition might suggest. Much of the early days of my own career as an advocate was spent in the divorce courts, dealing mostly not with the divorce itself, but with the financial arrangements and those surrounding the future care of the children. Some of the judges, or at least those whom I

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when I saw them alone they professed the same feelings."; in *Mitchell* v *Wright* (1905) 7 F 568, the sheriff reported "I saw and spoke to the child in private."

[8] *Sutherland* v *Taylor* (1887) 15 R 224.

[9] *Mackenzie* v *Keillor* (1892) 19 R 963, 965.

[10] *Campbell* v *Croall* (1895) 22 R 869, 871.

[11] *Mitchell* v *Wright* (1905) 7 F 568, 571.

[12] Custody of Children Act 1891, s 4.

regarded, probably wrongly, as of the ill-advised avuncular type, were happy to speak with children in the Court of Session outwith the presence of the parties. They would generally abide by their wishes. Others, of a more legalistic nature, would not talk to the children, but would decide their future in an entirely objective manner based on the testimony of others led in court.

The therapeutic benefits to the child in speaking directly to the decision-maker were not recognised by everyone. These days, rather than sheriffs or advocates interviewing the child, there is what many consider to be the gold standard for obtaining the views of a child, at least in adoption and permanence cases; the appointment of a curator *ad litem*[13] who has a duty to ascertain from the child whether he or she wishes to express a view and to ascertain what that view is.[14] The curator must communicate that view to the court. In family actions, there are many options.[15] The Form F9 procedure will soon be improved by greater judicial oversight.[16] Filling in the form is not to be regarded as the default option for ascertaining the child's views; the sole consideration is practicability of method.[17] The more difficult issue now is not whether, but how a judge should speak directly with, or hear evidence from, a child.

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[13] Act of Sederunt (Sheriff Court Rules Amendment) (Adoption and Children (Scotland) Act 2007) 2009, rr 11(1) and 32(1).

[14] Act of Sederunt (Sheriff Court Rules Amendment) (Adoption and Children (Scotland) Act 2007) 2009, rr 12(3(u) and 44(3)(f).

[15] Such as Form F9, "a private individual who is well known to the child", through a child psychologist, an expert reporter or a solicitor; see *Shields* v *Shields* 2002 SC 246, Lord Marnoch at para [11] and Barnes: *"Moral actors in their own right": consideration of the views of children in family proceedings*, 2008 SLT (news), 21, 139.

[16] Act of Sederunt (Rules of the Court of Session 1994 and Ordinary Cause Rules 1993 Amendment) (Views of the Child) 2019, in force 24 June 2019; see Scottish Civil Justice Council, "Views of the child in Family and Civil Partnership actions", 2 April 2019.

[17] *Shields* v *Shields* 2002 SC 246, Lord Marnoch at para [11].

There may be a more proactive approach in England and Wales. There, in both private family actions and adoption proceedings, judges are expected to be told by the child's solicitor whether the child wishes to meet with the judge.[18] Non-lawyers, who have read Ian McEwan's *The Children Act*, will be familiar with this. The approach is not without its problems, however. These meetings are not designed to inform the judge's decision, apparently because the child's views cannot be tested in open court.[19] They are designed to allow the child to feel involved. In Scotland, the court rules do allow for the sheriff to hear the views of the child alone and possibly in confidence.[20] This happens rarely in adoption cases because of the often very young age of the child.[21] Both in the adoption and permanence and family contexts, regard must be had to the child's views as expressed directly to the sheriff.[22] The issue of confidentiality[23] may arise. In some cases there may be particular reasons for the child's views to be kept a secret, at least where there is a request to that effect from the child.

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[18] Guidelines for Judges Meeting Children who are subject to Family Proceedings, para 1(i).

[19] Guidelines for Judges Meeting Children who are subject to Family Proceedings, para 5; *Re KP (Abduction: Child's Objections)* [2014] 1 WLR 4326 (judgment of the court: Moore-Bick, Black, McFarlane LJJ), para 50; cf. Case, *When the judge met P: the rules of engagement in the Court of Protection and the parallel universe of children meeting judges in the Family Court, 2019 Legal Studies*, 39, 302, at 307 and 308.

[20] In adoption and permanence, Act of Sederunt (Sheriff Court Rules Amendment) (Adoption and Children (Scotland) Act 2007) 2009, rr 17 and 46; Jack: *Adoption of Children in Scotland*, (5th ed), para 8.35. In family actions, Children (Scotland) Act 1995, s 11(7)(b) and *Shields* v *Shields* 2002 SC 246, Lord Marnoch at para [11].

[21] Jack: *Adoption of Children in Scotland*, (5th ed), para 8.36.

[22] Adoption and Children (Scotland) Act 2007, ss 14(4)(b) (adoption) 84(5) (permanence); Children (Scotland) Act 1995, s 11(7)(b).

[23] In adoption and permanence, see Act of Sederunt (Sheriff Court Rules Amendment) (Adoption and Children (Scotland) Act 2007) 2009, rr 17(2) and 21 and the discussion in Jack: *Adoption of Children in Scotland*, (5th ed), para 8.35. In family actions, see *Dosoo* v *Dosoo (No 1)* 1999 SLT (Sh Ct) 86, *McGrath* v *McGrath* 1999 SLT (Sh Ct) 90, *Re D* [1996] AC 593, Lord Mustill at 615; and Barnes: *"Moral actors in their own right": consideration of the views of children in family proceedings*, 2008 SLT (news), 21, 139.

The conference is focused on how courts can hear from the child in the adoption and permanence process, but this is only one area in which judges and sheriffs may require to speak with children, to establish their views and sometimes to hear oral evidence from them. New thinking in other areas of the law will help to inform how this can be done in the adoption and permanence context. Some areas of law and government move more quickly than others. The most innovative area at present is not adoption, permanence, child protection or family law, but criminal justice, where both the Government and the Scottish Courts and Tribunals Service have recently been concentrating their attention.

The Vulnerable Witnesses (Criminal Evidence) (Scotland) Act was passed last month and is awaiting royal assent. Following a speech which I made on the subject 5 years ago, it was the SCTS's Evidence and Procedure Review that gave birth to this procedural innovation by encouraging the greater use, in the criminal process, of pre-recorded evidence and evidence on commission. It recommended radical change. The current situation will be greatly improved by the new dedicated vulnerable witness facility in central Glasgow, which opens this year. It will have flexible hearing and vulnerable witness suites with a direct video link to court, a private evidence room with one-way glass for observation and a sensory room with furnishings and quiet spaces.[24] There is no reason why new thinking in the criminal justice context cannot be rolled out, with any necessary modification, across what might loosely be called the whole spectrum of children's justice. This discussion will hopefully provide some knowledge of the work that is being done in this area and spark further debate about how these developing methods, of attaining the most valuable views and evidence from children, may be adapted in other fields.

[24] SCTS News, New Hearings Facility for Children and Vulnerable Witnesses, 29 October 2018.

**The Problem of the Child in Court**

It is important to set out the reasons for this is being done. The emphasis in the Scots law of evidence has traditionally been in allowing the court to hear as much relevant evidence as possible, and to take decisions on the basis of a witness's evidence, only once he or she has been heard in court.[25] That remains the default position. Unless there is express legislation to the contrary, a witness is compellable; that is he or she must attend court.[26] In relation to decisions about the welfare of children, if it is the court's duty is to establish what is best for the child, the court must be furnished with as much information as is reasonably possible.[27] Should that, as some continue to argue, include the child's reaction when asked searching, difficult questions about traumatic experiences? There is one important factor left out of that argument, and there is one myth underlying it.

What it leaves out of account is the paradoxical harm that may be done to children during legal processes that are supposed to promote their best interests or, in criminal cases, the wider interests of society. These processes should not require the most vulnerable of the next generation to recount, months or years later, their traumatic experiences, thus potentially transforming temporary suffering into permanent damage. When the court is concerned with harm to a child, the uncertainty of the extent of his or her involvement in court proceedings, and the time taken for it to be arranged, can, in some circumstances, be seen as re-traumatisation.[28] The passage of time is particularly critical in adoption and permanence cases. A child's age is the most important factor affecting a child's chances of

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[25] Walker and Walker: *The Law of Evidence in Scotland* (4th edn), p 234, para 13.1.2.
[26] *McDonnell* v *McShane* 1967 SLT (Sh Ct) 61, Sir Allan Walker at 63.
[27] Walker and Walker: *The Law of Evidence in Scotland* (4th edn), p 234, para 13.1.5.
[28] Lord President Carloway: *"The mouths of babes", Justice for Children: Getting it Right for Child Witnesses Conference (Children 1st)*, 12 October 2016.

being adopted,[29] reducing by almost 20% for each year.[30] A child's age when joining a new family, not when first entering care, is what has the most impact on adoption outcomes, including placement disruption.[31] The courts have recognised these realities. Lord Reed, the senior Scottish justice in the UK Supreme Court, said this:

> "The damaging consequences of delay in the determination of adoption proceedings have long been well-known. The longer the proceedings unfold, the stronger the attachments which the child is likely to form with the prospective adopters, and they with the child. The child may identify wholly with the new family. It may be profoundly damaging to the child if the court does not endorse that new identity. The protracted uncertainty may itself be damaging and distressing."[32]

In other words, the court process itself is not likely to be good for the child.

The myth is that the traditional approach is beneficial for the fact finder, whether judge or jury. Adversarial examination and cross-examination of children in the intimidating forum of a civil proof or a criminal trial is not the best way of eliciting truth. In the Evidence and Procedure Review, it was noted that:

> "Thirty-plus years of empirical research in the UK and other common law jurisdictions has shown again and again that conventional cross-examination is more likely to confuse and mislead the very vulnerable than to draw out accurate and reliable evidence."[33]

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[29] Thomas, Adoption for looked after children: messages from research: An overview of the Adoption Research Initiative, (British Association of Adoption and Fostering; 2013), p 22.

[30] Selwyn, Sturgess, Quinton, and Baxter: *Cost and outcomes of non-infant adoptions,* (British Association of Adoption and Fostering; 2006), cited in SCRA, Permanence, Planning and Decision Making for Looked After Children in Scotland: Adoption and Children (Scotland) Act 2007, (SCRA; 3 December 2015), p 94.

[31] Boddy: *Understanding Permanence for Looked After Children: a review of research for the Care Inquiry*, (The Care Inquiry; 2013), p 11.

[32] *S* v *L* 2013 SC (UKSC) 20, para 52; see also *City of Edinburgh Council* v *GD* 2019 SC 1, LP (Carloway) at para [107].

[33] Scottish Court Service, Evidence and Procedure Review Report (March 2015), para 2.3, citing Henderson, Reforming the cross-examination of children: the need for a new commission on the testimony of vulnerable witnesses, 2013 *Arch Rev*, 10, 6-9.

This is backed up by recent research in Scotland,[34] which showed that a large proportion of the questions posed to children by lawyers were closed-ended and suggestive.[35] Such questions anticipate predicted responses, to which children acquiesced 70% of the time; doing so more in response to the suggestive, that is leading, questions posed by defence lawyers.[36] Questions were found to be overly complex linguistically, heavily repetitious, and focused to an unnecessary degree on peripheral matters. Long sentences with multiple clauses are difficult for children, particularly those aged 12 years and under, to understand and answer accurately.[37]

Delay in hearing a child's evidence is also unhelpful. If children, especially young children, are asked to recall events months or even a year after the event, their evidence may prove to be of little value. In a case that came before the High Court in 2015,[38] evidence had been taken on commission a year after Joint Investigative Interviews with children aged 3 and 5. The children could not even remember the alleged perpetrator or the nursery where the relevant events were said to have taken place. For young children, the passage of time will usually have an adverse effect on their ability to answer questions. The same may also be true for older children. In other words, waiting until the start of a proof or trial before hearing a child is not a good idea from justice's perspective.

This shows only that the traditional adversarial process and its timeframes are not, in the modern era, entirely appropriate in order to achieve safe, valuable communication

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[34] Andrews and Lamb: *Cross-examining young alleged complainers in Scottish criminal cases*, 2018 *Crim LR* 34.

[35] Andrews and Lamb (*supra*), at 37.

[36] Andrews and Lamb (*supra*), at 39.

[37] Andrews and Lamb (*supra*), at 40, citing Walker, Kenniston and Inada (eds): *Handbook on questioning children: A linguistic perspective* (2013).

[38] *MacLennan* v *HM Advocate* 2016 JC 117.

between children and decision-makers. It does not diminish the worth of a child's account; only the method of eliciting it. Plain speaking and honesty are both traits which we associate with children. They can, as every parent knows, occasionally be embarrassing, especially when in polite company. Scots law has long recognised that these qualities enable even a very young child to give a truthful and accurate account of past events. That is why there are no bright lines addressing the competency of a child to give an account because of his or her youth. The only requirement is that the child has an understanding of the nature of truth.[39]

Why must the child enter the courtroom for the purpose of giving his or her account? There are, and have always been, other ways to admit testimony as proof of fact without the physical presence of the witness in court. Until the early part of the 20th Century, the rules of evidence permitted the account of a child, which had been told to another person very shortly after an event, to be treated as proof of what had occurred, and thus to corroborate other evidence.[40] This was an exception to the rule excluding hearsay; that is, the telling of events second hand. The court continues to try to accommodate the vulnerabilities of children, when it can do so within legal bounds. For example, proceedings before a sheriff when establishing grounds of referral are unique.[41] Normal adversarial techniques are inappropriate.[42] A greater degree of informality is involved.[43]

More fundamentally, technology should have ended the need to have children present in court at all. The problem is that judges are not empowered, solely at least, to

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[39] Walker and Walker: *The Law of Evidence in Scotland* (4th edn), p 234, para 13.2.1

[40] *Dickson on the Law of Evidence in Scotland*, (Grierson, ed): I, § 263 and II, § 1544.

[41] *McGregor* v *D* 1977 SC 330, LP (Emslie) at 336.

[42] *F* v *Kennedy (No 2)* 1993 SLT 1284, LJC (Ross) at 1288.

[43] *Kennedy* v *B* 1972 SC 128, LJC (Grant) at 133.

develop and implement solutions to the problems. In the adoption and permanence context, where a child has indicated a wish to express a view, the sheriff can arrange for "such procedural steps … appropriate to ascertain the views of that child", and may not make an order unless the child has had such an opportunity.[44] Court procedure generally does not automatically permit such an inquiry.

Legislatively, matters of procedure and evidence tend to be addressed along with the development of other discrete areas of substantive policy, such as mental health or criminal justice. The problem is one of fragmentation. The views of children are sought by courts in numerous different kinds of legal or quasi-legal proceedings, both inside and outside the courtroom, by social workers, safeguarders, child welfare reporters, curators *ad litem*, solicitors and sheriffs. Legal proceedings fall into three broadly-stated categories: criminal prosecutions; child protection proceedings; and private family law actions. Children may be more or less protected in the different kinds of proceedings, but in different ways. An example is that, whereas in criminal proceedings an accused is prevented from personally questioning any witness against whom they are alleged to have committed a sexual offence[45] and from questioning any child witness under 12 in relation to certain other serious crimes,[46] there are no equivalent provisions designed to protect witnesses who are giving evidence in child protection cases, such as those under the Children's Hearings (Scotland) Act 2011 to establish the grounds of referral[47] or in appeals to the sheriff against Hearing decisions.[48]

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[44] Act of Sederunt (Sheriff Court Rules Amendment) (Adoption and Children (Scotland) Act 2007) 2009, rr 17 and 46.

[45] Criminal Procedure (Scotland) Act 1995, s 288C.

[46] Criminal Procedure (Scotland) Act 1995, s 288D.

[47] Children's Hearing (Scotland) Act 2011, s 93.

[48] Children's Hearing (Scotland) Act 2011, ss 155(4) and (5).

This is notwithstanding that the court, in these cases, is commonly concerned with the conduct of a criminal nature by a party towards the child. It is, theoretically at least, competent for such a party personally to examine a child against whom they are said to have committed offences of a sexual or violent nature.[49] The Scottish Government has consulted on changing this position in its review of Part 1 of the Children (Scotland) Act 1995. What the existing statutory provisions show is that different spheres of the law treat children differently.

The object of listening to a child's account, whether in a Children's Hearing or before a judge, is to obtain the child's best evidence, or most candid view, while protecting him or her from harm. The decision-maker is always trying to ascertain one or both of two things when communicating with a child. The first is the child's subjective view of the world, in terms of what he or she wants to happen in the future. The second is the child's objective view of the world; that is what has happened to the child or what he or she saw. These are two different things.[50] The child's subjective view of the world should be established as close as possible in time to when a decision about the future is made.[51] His or her objective view of the world is most valuably taken as soon as possible after the relevant events.

Where, for example, a child has been abused by a close friend of his or her father, the child's understanding of what happened may have to be ascertained in the criminal prosecution, in the child protection proceedings[52] and, potentially, in the judicial resolution

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[49] Scottish Government, Review of Part 1 of the Children (Scotland) Act 1995 and creation of a Family Justice Modernisation Strategy: A Consultation, May 2018, para 13.21.

[50] See, in the English context, *Re KP (Abduction: Child's Objections)* [2014] 1 WLR 4326, judgment of the court: Moore-Bick, Black, McFarlane LJJ at para 50.

[51] *Re G (TJ) (An Infant)* [1963] 2 QB 73, Donovan LJ at 97.

[52] Cf. Children's Hearing (Scotland) Act 2011, s 63.

of custody and/or contact between the father and mother in divorce proceedings. The emotional and psychological impact of giving evidence and recalling traumatic events will not differ for the child across the different legal processes. There ought to be a consistency in approach. Where the court is trying to establish the facts, it ought to be able to capture the account of the child only once and as soon as possible. If a reliable recording of the child can be made early in the course of the criminal proceedings, that recording ought to be capable of use in any subsequent child protection hearing and any family action, if the need for proof arises. It is with that message that some of the recent thinking in relation to how the court communicates with children can be analysed.

**Evidence and Procedure Review: New Thinking**

The level of sophistication created by modern technology ought to eliminate any necessity for children or vulnerable persons to attend court. In time, that technology should mean that very few people are ever required to do so. The fundamental proposition in the Evidence and Procedure Review Report of 2015 was that there should be widespread use of pre-recorded evidence in place of testimony in court for children and vulnerable witnesses. The 2015 Report, and the Next Steps paper which followed it, instigated a whole programme of work that is gradually transforming the landscape for children and other vulnerable witnesses.

Part of that work was to look at what happens when a child first reports that he or she has been the victim of, or has witnessed, abusive behaviour. A child in such a situation will be interviewed by a police officer and a social worker, in a Joint Investigative Interview. It is possible, under the current legislation, for the recording of a Joint Investigative

Interview to be used in court as the child's evidence in chief[53]. This has increasingly been the practice over the past few years, although concerns have been raised about whether the quality of some of the interviews was sufficient to be used as evidence in court. A working group consisting of experienced legal, child welfare and third sector practitioners was set up to develop recommendations for the improvement of the way in which these JIIs are prepared for and conducted. This group reported in the Autumn of 2017[54]. This report has produced Scottish Government support and funding for a new approach to the training, equipment and facilities for their conduct.

The JII is a procedure that occurs before criminal proceedings are commenced, although it can, as I have said, be used later as the witness' evidence in chief if a prosecution ensues. The second part of the Evidence and Procedure work programme looked at the experience of the child once criminal proceedings have started. It looked at how best to conduct any further examination and the cross-examination, and whether this too could be pre-recorded in advance of the trial.

The working group considering this topic, which was chaired by the Lord Justice Clerk, Lady Dorrian, produced a report in 2017 that promoted two broad approaches[55]. First, in order to deliver progress in the short term, the group made recommendations designed to expand and improve the use of existing procedures that facilitate the pre-recording of a child's evidence. Second, the group also set out a much longer term and

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[53] Criminal Procedure (Scotland) Act 1995, s 271M

[54] Scottish Courts and Tribunals Service, Joint Investigative Interviews Workstream Report Sep 2017

[55] Scottish Courts and Tribunals Service, Report of the Pre-Recorded Further Evidence Work-Stream Sep 2017

ambitious vision for the future; removing the child even further from the adversarial arena of the criminal trial.

The first strand, which enhances the use of existing procedures, has already borne considerable fruit. This is known as taking evidence on commission[56]. Here the child's evidence can either be taken in full; thus replicating examination-in-chief, cross-examination and re-examination, or, if there is already a suitable JII recording available, the hearing will focus on the cross-examination and re-examination. The evidence must be video recorded and it is that recording which will later form part of the evidence. The accused will not be present, but will be entitled to watch the proceedings by video link. A Practice Note was issued by the court in March 2017 encouraging greater and better use of evidence on commission, with the result that last year there were more than double the number of applications than previously.[57] The Practice Note advocates the use of a "ground rules hearing", which ensures that the particular needs and vulnerabilities of the child are considered in advance. This can regulate the phrasing of questions, communication aids, the need for breaks and anything else that would give the child the best chance of being able to tell his or her story completely and reliably, while minimising any trauma.

This procedure and approach has been enhanced by the recently passed Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill, which creates a presumption that child witnesses will benefit from this procedure. This also requires that a ground rules hearing will take place prior to a commission.

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[56] Criminal Procedure (Scotland) Act 1995, s 271I

[57] Scottish Courts and Tribunals Service, Evaluation Report No. 2: Practice Note 1 of 2017 (Evidence by Commissioner) – Quantifying the end outcomes for the applications lodged in 2017, p 4.

The second strand of Lady Dorrian's work, which set out some long term aims, was more ambitious. It included the adoption of a model that takes its inspiration from the Scandinavian Barnahus or Child's House model. This model brings together child protection, health care, social work and forensic interviewing services into a single facility for children who are the victims of, or have witnessed, violent or sexual abuse. It originated in Iceland about twenty years ago, and it is now in place throughout the Nordic and Baltic States and is being developed in many other European countries.

Its primary purpose is to facilitate recorded interviews which become the child's evidence in a criminal trial. It acts as a one-stop shop, away from the court building, to meet the child's needs in the longer term, with immediate access to medical, child protection and welfare services. Because the Barnahus is a witness-centred facility, its environment is usually specifically designed as non-threatening and reassuring, unlike the traditional court or government building. Of critical importance is that the questioning is done by a highly trained forensic interviewer. The prosecution and defence lawyers may suggest lines of questioning to the interviewer, but they do not question the child directly.

In the model envisaged by Lady Dorrian's working group, the whole of a child's evidence would be given in such a facility. It would bring together the currently separate procedures of the JII and the subsequent commission. Like the Barnahus, it would be a one-stop shop. All questioning, favourable to the crown or favourable to the defence, would be mediated through a trained forensic interviewer in circumstances where the child will not come to court at all.

Adopting this system would represent a radical and historic change in culture, but it is worth observing that it already operates within systems where, as in Scotland, criminal

trials are based on oral proceedings, and evidence must be heard in court.[58] Because it is so far-reaching, it is not something that is achievable overnight. It requires revisiting some of the principles that have been at the heart of our legal system and our jurisprudence for decades, if not longer. It will be crucial to ensure that any changes proposed improve the quality of justice, support the fairness of the trial for all concerned and maintain public confidence in the system. That will take time. Progress is already being made to provide a Barnahus-style facility in Scotland for the conduct of JIIs; a facility where all the medical, therapeutic and other support services are in place, as well as police and social workers trained in forensic interviewing.

How might such innovations be applied in other contexts? A facility such as the Barnahus may provide a suitable location for the assessment of the child pursuant to a Child Assessment Order,[59] with the evidence to be used in support of a child protection order[60] or establishing grounds of referral. The taking of such evidence at an early stage could end the child's duty to attend the hearing before the sheriff[61] and any need to have to repeat an account already given at first interview. This would go some way to preventing temporary suffering becoming prolonged. In the adoption and permanence context, a Barnahus-style facility may assist the work of the curator *ad litem* or even be used for a meeting with the sheriff.[62] In family actions, the child may find a meeting with the sheriff an easier, or supplementary, way of communicating his or her views when a Form F9 has been

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[58] Scottish Court Service, Evidence and Procedure Review Report (March 2015), para 2.49, citing Straffeprosessloven (Norwegian Criminal Procedure Act) 1981, as amended.

[59] Children's Hearing (Scotland) Act 2011, s 35(2).

[60] Children's Hearing (Scotland) Act 2011, s 37(5)(d).

[61] Children's Hearing (Scotland) Act 2011, s 103.

[62] Act of Sederunt (Sheriff Court Rules Amendment) (Adoption and Children (Scotland) Act 2007) 2009, rr 17 and 46; Jack: *Adoption of Children in Scotland*, (5th ed), para 8.35.

completed. In England and Wales, meetings between judges and children are for the "primary purpose"[63] of benefiting children by involving them in decisions and assuring them that their wishes and feelings have been taken into account.[64] The Barnahus may provide an appropriate setting for such meetings in Scotland.

**Conclusion**

Regardless of the exact methods by which the courts and others are eventually able to treat children more humanely within our judicial system, it is now recognised that there is no conflict between protecting children and securing just and lawful outcomes. By explaining recent developments in relation to achieving both of these aims in the sphere of criminal justice, those involved in children's justice may have a better understanding of the direction of the judicial thought process.

**Lord Carloway**
Lord President
14 June 2019

[63] Guidelines for Judges Meeting Children who are subject to Family Proceedings, Preamble.
[64] Guidelines for Judges Meeting Children who are subject to Family Proceedings, Purpose.