PE1589/C

Petitioner Letter of 14 January 2016

Dear Sigrid,

Many thanks for sending me this response from the Scottish Government which contains many possible ways of improving things in this complex area. I have copied the letter and have included some comments along the way as I feel there are some areas which could be explored further and improved upon. I would be more than willing to engage further with the Public Petitions Committee / Government in relation to their strategies and to provide further comments. **(My comments are in bold)**.

Stewart Currie

January 2016

CONSIDERATION OF PETITION PE1589

Calling on the Scottish Parliament to urge the Scottish Government to carry out an independent review of all the processes involved in arranging post-separation child contact and financial provision

Introduction

1. Thank you for the letter of 9 December sent by Sigrid Robinson, the Assistant Clerk to the Committee. I am replying for the Scottish Government as the Minister with portfolio responsibility for family law, although I wish to record that the Minister for Children and Young People also has a portfolio interest in the welfare of children affected. I apologise for not meeting your original deadline: these are serious issues and I wished to ensure that the Scottish Government had given them full consideration.

2. At the Committee's meeting on 9 December, the Committee noted the emergence of a number of petitions dealing with related issues and agreed to write to the Scottish Government seeking its view on the petition and whether the Scottish Government is minded to look at the issue in the round in such a way as called for by the petition.

Looking at issues in the round

3. The Scottish Government has decided to prepare a Family Justice Modernisation Strategy for Scotland. Some more details are contained in the Programme for Government (see page 52, right hand column). The aim of the Strategy is to improve procedures in relation to family cases involving children to ensure they work efficiently and effectively and to ensure that the voice of the child is heard in such cases.

4. Part of the aim of the Strategy is to outline recent and current work in this most sensitive area; to highlight areas that require further work and to identify work that is

already planned. This should ensure that a consistent narrative is available to all and work in a specific area can be put in a wider context. In addition, the Scottish Government will, when working on the Strategy, seek views on what more can realistically be done.

5. The Scottish Government would be happy to receive any views from the Public Petitions Committee on issues which could be included in the Strategy.

- **Am I able to be involved in this process or will it be left to Committee Members to provide input?**

6. As Petition PE 1589 is wide ranging, it may be helpful if I also comment briefly on specific points contained in the petition.

Cases not proceeding to court unless there are specific circumstances arising

7. The Petitioner suggests that cases should not proceed directly to court unless there are specific circumstances arising. Where possible, the Scottish Government would encourage separating couples to reach an agreement where arrangements are consensual or resolve disputes in relation to children without going to court. We support bodies such as Relationships Scotland to provide family mediation services. It is also possible in Scotland to draw up legally binding agreements (known as Minutes of Agreement) outwith court. There is a recent research on these agreements. This research concludes, amongst other points, that the use of minutes of agreement in family cases has almost doubled in the last 20 years and children were mentioned in 46% of family minutes of agreements (other family minutes of agreement would just deal with property and other assets). The Family Justice Modernisation Strategy will seek views on what further steps could be taken to encourage cases to be settled out of court. However, some cases will have to go to court.

Timescales for cases

8. The Petitioner also suggests that cases should be subject to realistic timeframes, to ensure that they are dealt with timeously. The Scottish Government agrees and this is an area that we are keen to see a focus on. A key part of the Family Justice Modernisation Strategy is to consider what further measures could be taken to deal with family cases as expeditiously as possible. It is already the case that judges and sheriffs should deal as expeditiously as possible with cases involving children. In addition, section 27 of the Courts Reform (Scotland) Act 2014 provides that sheriffs principal are responsible for the efficient disposal of business in their Sheriffdom. This replicates a previous provision (section 15) of the Sheriff Courts (Scotland) Act 1971.

- **Whilst cases should be getting dealt with as speedily as possible for the sake of all concerned, cases often can last in excess of a year. I am aware that services have a lot to consider, however, this is far too long.**

Non-resident parents

9. The Petitioner suggests that caring and attentive non-resident parents should have a fairer share of contact with their child facilitated within a reasonable time. The Government agrees that both parents should be fully involved in their child's life, as long as this is in the child's best interests. The Scottish Government supports the fundamental principle that in contact cases the welfare of the child is paramount.

- **Regrettably, as has been highlighted, some parents make it difficult for the other to see their children when there is no child welfare reason for them not doing so and it is in the interest of the child to see both parents. This can be anxiety provoking for the children and can be detrimental to their current and future relationships with their parents. Whilst it can be difficult for all parties, including Sheriffs, to engage with difficult people who are needlessly holding up progress, marginalised parents who are pursuing more time with their children should not feel they have to engage in a 'fight' or continually feel they have to prove their worth in order to see their children.**

Reasons for decisions

10. The Petitioner suggests that if a request for contact/residence has not been granted, court records should give reasons. In Scotland, court decisions are set out in interlocutors. Chapter 12 of the Ordinary Cause Rules (which apply in the sheriff courts, where the vast majority of contact/residence disputes are litigated) makes provision about this. In particular, rules 12.2 and 12.3 provide that the sheriff may, and in certain circumstances must, when requested by a party, append to the interlocutor a note setting out the reasons for the decision.

- **I am unaware of this. There are guidelines on the Scottish Courts Service website, however, perhaps some simpler ways of providing information through brief fact sheets detailing what to expect at court as well as any entitlement a person has. This would avoid ambiguity and would enable parties to have a clearer pathway in order to address issues they have. Attending court is often a difficult and traumatic experience for people not entered into lightly so aspects of the process which can be made simpler should be.**

Advice services

11. The Petitioner notes that there should be more signposting and information to advice services. We agree that signposting is important and this is one reason that we provide funding support to Families need Fathers Scotland. In addition, we have made funding available to support a grant-funding programme administered by the Scottish Legal Aid Board. This is made up of a number of projects across Scotland which provide early and effective advice at a very local level to help people deal with complex issues. The Petitioner also mentions the Parenting Agreement for Scotland We are currently reviewing this and would welcome any views, from the Committee or stakeholders, on how the revised version could be better publicised.

- **These are positive steps highlighted above, however, I am unaware of the work being done through the Scottish Legal Aid Board and would like to be provided with further information. I remain of the opinion that more information should be available at a local level at the places where people attend within their local community and invaluable help-lines should be better resourced in order to provide practical and emotional support. If more resources were available in these areas then there could be quicker resolution and a reduction on the strain and use of the Legal Aid Service.**

Costs of cases

12. On costs of family cases, solicitors are required in civil legal aid cases to provide an estimate of the cost of the case at the outset and to update that estimate as the case proceeds. The Scottish Legal Aid Board (SLAB) sets a case cost limit on each case where civil legal aid has been granted and this cannot be exceeded without SLAB's approval.

- **Whilst this is the case, not all cases are entirely supported through SLAB and family cases are generally expensive, particularly when parties are not eligible to apply for legal aid. Costs incurred pursuing a case can pose unreasonable financial / emotional strain on parties and the extent of this cannot be underestimated or ignored.**

13. The petitioner also raised "clawback" of legal aid. Clawback only applies when property, such as a family home, has been at issue in a case. The rules on clawback do not apply in relation to a case dealing only with contact with children. However, a person receiving legal aid may also be required to pay a contribution from their disposable income and/or disposable capital, and they may have to pay their opponent's expenses.

More involvement of parties in civil cases

14. The Petitioner notes that there should be more involvement between sheriffs and parties in civil cases. The petition is focussed on contact and residence cases. Rule 33.22A of the Ordinary Cause Rules applies to those, and makes provision for a Child Welfare Hearing at which "all parties (including a child who has indicated his wish to attend) shall, except on cause shown, attend". This is intended to provide an opportunity for the sheriff to "seek to secure the expeditious resolution of disputes in relation to the child by ascertaining from the parties the matters in dispute and any information relevant to that dispute".

- **It is recognised that not all Sheriffs demonstrate a desire to engage with parties or facilitate active participation, even when parties are willing to be involved in the process. Addressing this could save on court time and assist in reaching resolution more quickly.**

Specialisation

15. Under section 34 of the Courts Reform (Scotland) Act 2014, it is for the Lord

President of the Court of Session to determine categories of sheriff court case which the Lord President considers suited to be heard by specialist judiciary. The Scottish Government will discuss this issue with the Lord President, as appropriate.

Education

16. On the involvement of parents in education, the Cabinet Secretary for Education and Lifelong Learning has just announced a review of the impact and success of the legislation on the involvement of parents in their children's education. The review will be led by the National Parent Forum of Scotland. There is existing guidance on the Scottish Schools (Parental Involvement) Act 2006 and the involvement of non-resident parents and other parents/carers (please see paragraphs 18 to 20 of section C of the guidance). In relation to contacting parents through letters,

- **I am aware that most local authorities use a computerised system to contact parents via text, however, only one parent can receive these texts despite the case previously being that both would receive the information this way. Schools obviously have to find alternative ways of contacting both parents when they are separated. Given there are separated families in Scotland with both parents involved in their child's education, it would make sense for information to be provide to both parents in this way when they are involved.**

Enforcement of contact orders

17. I am aware that this petition has been conjoined with PE 1570, which raises issues about the enforcement of contact orders. The then Lord Justice Clerk, Lord Carloway, has responded in this area, with some very informative comments. The Scottish Government is aware that some other jurisdictions in the EU have legislated to provide more ways in which contact orders can be enforced. For examples of alternative approaches, other jurisdictions deploy one or more measures such as criminal offences, civil penalties, requiring parents to attend parenting programmes and requiring one parent to compensate another if a parent can show that a breach has led to an economic loss (e.g. cancellation of a holiday).Enforcement in this area is never going to be straightforward, as there is an overriding need to do what is best for the child and there could be a claim that mitigating circumstances explain a breach of a contact order or legal agreement. The Scottish Government will keep this area under review and intends to invite key bodies to a round table to discuss the issues further.

- **This is indeed a positive move and I appreciate it is difficult to manage, however, some penalty, albeit small, may serve to curb parties being unnecessarily difficult or dishonest.**

Child benefit and child maintenance
18. Child benefit and the statutory child maintenance system are reserved to the UK Government. The UK Government have provided us with some comments, which I attach as an annex for the Committee's information.

PAUL WHEELHOUSE

ANNEX

Comments by the UK Government

Child benefit

1. Child Benefit provides an element of support to the vast majority of families for their children. The law provides for it to be paid to one parent, although this is not necessarily the child's mother. However, where more than one person is responsible for a child and each satisfies the entitlement conditions, only one of them can be entitled.

2. Where, following separation, both parents have care of their child, provision is made for them to make a joint election as to who should receive Child Benefit. However, where they cannot reach any agreement the law allows HM Revenue & Customs (HMRC), to decide, at their discretion, who shall be entitled. This is undertaken by the Child Benefit Office (CBO). There are no hard and fast rules governing these discretionary decisions, as every case is different and many factors, that have a bearing on the care arrangements, need to be considered. It is often difficult to decide in whose favour discretion should be exercised and there can be no guarantee that both parties will be satisfied with the outcome. It is for this reason that, ideally, parents should reach agreement between themselves.

3. In every instance where the care of a child is shared by both parents, both can meet the conditions of entitlement for Child Benefit. What is at issue is who has the greater degree of responsibility. To decide this' issue, many aspects of parental responsibility and care have to be taken into consideration, not just the amount of time spent with each parent. As Child Benefit is intended to assist with the financial cost of bringing up a child, the actual costs incurred by both parents are considered. Apart from the cost of providing food and accommodation, a wide range of other expenses are taken into account, such as clothing, footwear, school uniform, pocket money, holidays, books/toys/gifts and other wide ranging activities. This list is not exhaustive as circumstances can vary widely in different cases and the facts are considered in relation to a person's individual circumstances.

4. So, as already outlined, the most effective outcome is for both parents to agree between themselves who should claim Child Benefit. However, in the absence of such an agreement, and taking into account a" the evidence available, HMRC will need to make a discretionary decision as to who should receive Child Benefit.
5. The view of the UK Government continues to be, therefore, that Child Benefit should be paid to one person - the person with the main responsibility for a child.

Comments by the UK Government - child maintenance

6. Child Maintenance has undergone significant reforms over the last three years, including the introduction of a completely new scheme of statutory maintenance, the 2012 scheme. The legal provisions for equal day-to-care within that scheme are not the same as for the older schemes of maintenance.

7. In cases where the evidence points to day-to-day care of the child being shared exactly equally, the caseworker may conclude that neither parent should be treated as the paying parent. Therefore neither parent would be liable to pay statutory child maintenance.

8. For cases where payments are flowing, and in respect of how the maintenance received is spent, the current policy is based on the assumption that as child maintenance is paid to the parent with the main day-to-day care of the qualifying child or children, it is therefore controlled by the person best placed to determine that child's needs. It would not be appropriate or practical for the Child Maintenance Service to intrude into the lives of its clients to the extent which would be needed if it was to require them to account for their expenditure of payments that have been received.

- **I am aware that there is still a calculator to establish this payment, even when parents have a 50/50 split of care. If there were clearer guidelines then it would remove this being yet another area to cause issues. Possibly the law should be reviewed in this area.**

- **Appropriate legal training and guidance should be provided to staff working within education, particularly managers and administrative staff. This would ensure they are fully aware of how best to exercise their duties within a legal framework and would avoid unlawful and inappropriate exclusion of parents upon separation.**

Evaluation

- **Evaluating services is now commonplace in order to make positive changes. I propose that the Scottish Courts Service actively pursues introducing a process of service evaluation from those who have attended court. This should be a routine procedure and findings analysed in order to address any shortfalls in the provision.**

Addendum of 30 January 2016

Hi Sigrid,

Please include this info in my response –

Family Justice Modernisation Strategy

Respect for family life is enshrined in Article 8 of the European Convention on Human Rights so, with this in mind, it is important that my petition remains open whilst the Family Justice Modernisation Strategy is being prepared in order that the impact of my petition can be assessed and monitored in light of this strategy once it is published.

Courts

As previously highlighted, the involvement of parties at court is inconsistent. Chapter 4 of the document 'Understanding Child Contact Cases in Scottish Family Courts' provides a useful insight into the wide range of experiences of those attending court. This document demonstrates that guidelines are required in order to ensure full involvement of parties takes place as appropriate.

In relation to contempt of court proceedings, perhaps the Committee could write back to the Lord Justice Clerk to ask for any statistics the court service can gather on the number of contempt proceedings concerning child contact orders there have been in the Court of Session and the Sheriff Court and for the outcome of these cases

Legal Aid

The Law Society of Scotland has published a discussion paper on legal assistance in Scotland which highlights many areas for improvement. In its Introduction the following statement is made:

"Significant amounts of secondary legislation and guidance have created a complex system which even expert practitioners find difficult to navigate. The existing system lacks clarity, is inefficient, and is administratively burdensome. It leads to unnecessary time and resources being spent by SLAB and solicitors at every stage of the process"

This clearly demonstrates there are significant issues that require to be addressed. The link below provides access to Civil Legal Assistance information, however, this is intended mainly for solicitors. There is a lack of clear guidelines for parties involved.

http://www.slab.org.uk/handbooks/Civil%20handbook/wwhelp/wwhimpl/js/html/wwhelp.htm

Could you please draw the Committee's attention to the relevant parts of the documents above?

Regards,

Stewart Currie