



# UNCRC

# Gaps in Legislation

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# Clan Childlaw

- **Improve children and young people's life chances**
- **Use legal skills and expert knowledge**
- **Help take part in decisions**
- **Children's rights are realised in Scots Law**

# Background

- **Scottish Government – C&YP Bill**  
**Opportunity to “make rights more real”**
- **What is in legislation and where are the gaps?**
- **Practical point of view**

# Background

- **No point in having rights without being able to enforce them**

“for rights to have meaning, effective remedies must be available to redress violations.”

UN Committee on the Rights of the Child, General Comment 5, CRC/CG/2003/5, 2003

- **Legal framework, practice, enforcement**

# UNCRC

- 1. The use of UNCRC in Court**
- 2. Articles 3(best interests) & 12(views)**
- 3. Other Articles – 16(privacy), 19(equal protection), 37(restraint), 40(juvenile justice)**

# UNCRC in Court

- **If contrary to domestic law then domestic law is likely to prevail if clear and unambiguous** (*Salomon v Commissioners of Customs and Excise [1967] 2QB 116*)
- **Benefits Cap Case** (*R (on the application of SG) v Secretary of State for Work and Pensions [2015 UKSC16]*)
- **Proper to look to international instruments as aids to interpretation of ECHR** (*Christian Institute v Lord Advocate [2015] UKSC 0216*)



# Article 3 – best interests

## Best interests - a primary consideration

- **Children's Hearings – paramount**
- **Contact & Residence – paramount**
- **Adoption – paramount (through life)**
- **Other areas of law?**

# Article 12 – Children’s Hearings

## Hearings

- child at centre, papers, attendance
- advocacy provisions delay

## Court

- environment
- role of solicitors, safeguarders

## Better Hearings - Review



Form F9 Form of intimation in an action which includes a crave for a section 11 order

Rule Court Ref. No.

33.7(1)(h) PART A

This part must be completed by the Pursuer's solicitor in language a child is capable of understanding

To (1) The Sheriff (the person who has to decide about your future) has been asked by (2) to decide:-

(a) (3) and (4)

(b) (5)

(c) (6)

If you want to tell the Sheriff what you think about the things your (2) has asked the Sheriff to decide about your future you should complete Part B of this form and send it to the Sheriff Clerk at (7) by (8). An envelope which does not need a postage stamp is enclosed for you to use to return the form.

IF YOU DO NOT UNDERSTAND THIS FORM OR IF YOU WANT HELP TO COMPLETE IT you may get free help from a SOLICITOR or contact the SCOTTISH CHILD LAW CENTRE ON the FREE ADVICE TELEPHONE LINE ON 0800 328 8970.

If you return the form it will be given to the Sheriff. The Sheriff may wish to speak with you and may ask you to come and see him or her.

NOTES FOR COMPLETION

- (1) Insert name and address of child. (2) Insert relationship to the child of party making the application to court. (3) Insert appropriate wording for residence order sought. (4) Insert address. (5) Insert appropriate wording for contact order sought. (6) Insert appropriate wording for any other order sought. (7) Insert address of sheriff clerk. (8) Insert the date occurring 21 days after the date on which intimation is given. N.B. Rule 5.3(2) relating to intimation and service. (9) Insert court reference number. (10) Insert name and address of parties to the action.

PART B IF YOU WISH THE SHERIFF TO KNOW YOUR VIEWS ABOUT YOUR FUTURE YOU SHOULD COMPLETE THIS PART OF THE FORM To the Sheriff Clerk, (7)

Court Ref. No. (9) (10).....

QUESTION (1): DO YOU WISH THE SHERIFF TO KNOW WHAT YOUR VIEWS ARE ABOUT YOUR FUTURE?

(PLEASE TICK BOX)

YES [ ] NO [ ]

If you have ticked YES please also answer Question (2) or (3)

QUESTION (2): WOULD YOU LIKE A FRIEND, RELATIVE OR OTHER PERSON TO TELL THE SHERIFF YOUR VIEWS ABOUT YOUR FUTURE?

(PLEASE TICK BOX)

YES [ ] NO [ ]

If you have ticked YES please write the name and address of the person you wish to tell the Sheriff your views in Box (A) below. You should also tell that person what your views are about your future.

BOX A:

(NAME) ..... (ADDRESS) ..... Is this person - A friend? [ ] A teacher? [ ] A relative? [ ] Other? [ ]

OR

QUESTION (3): WOULD YOU LIKE TO WRITE TO THE SHERIFF AND TELL HIM WHAT YOUR VIEWS ARE ABOUT YOUR FUTURE?

(PLEASE TICK BOX)

YES [ ] NO [ ]

If you decide that you wish to write to the Sheriff you can write what your views are about your future in Box (B) below or on a separate piece of paper. If you decide to write your views on a separate piece of paper you should send it along with this form to the Sheriff Clerk in the envelope provided.

[ ]

## What I Think

Name ... Sheriff Court

Address Case Ref:

Email Address

Mobile Number

You can put this What I Think form in the envelope and send it back to the sheriff. You don't need a stamp.

How do you feel about [seeing your Dad] just now?



Good



In the middle



Not good

If you would like to tell the sheriff more about this, use the box below

Is there anything else you would like to happen?

Would you prefer to say what you think in a different way?

Yes

No

What different way would you like to say what you think?

In the letter with this form, there are Freephone numbers for the Scottish Child Law Centre and Clan Childlaw, if you want some other ideas.

If an adult has helped you with this What I Think form, please write their name and how you know them here: \_\_\_\_\_

Thank you.

The sheriff will decide what happens next.

# The experience of Children



# Article 12 – Contact & Residence

- **Different approaches – West Lothian, Avenue (Aberdeen)**
- **Recent Court Case – *SM v CM* [2017] CSIH 1**
- **Civil Justice Council Family Law Committee Review**

# Article 12 – Access to Justice

- **Views to be given due weight**
- **“Accessing justice is an essential pre-requisite for promotion & protection of all the rights of the child.”**

Flavia Pansieri, UN Deputy High Commissioner for Human Rights, 13 March 2014



# Article 12 – Access to Justice

- **Right to instruct a solicitor**
- **Changes to legal aid to require parents' resources to be considered**
- **Lack of confidential and independent advice**
- **Optional Protocol 3 – Complaint mechanism**

# Article 16 – Right to Privacy

- ***Christian Institute v Lord Advocate***  
**(Named Person case)**

<https://www.supremecourt.uk/cases/docs/uksc-2015-0216-judgment.pdf>

- **Balance between privacy and information sharing – Article 8 ECHR**



# Article 19 – Equal Protection

- “justifiable assault” –incompatible with Article 19
- Practice – “Equally Protected”  
<https://www.nspcc.org.uk/globalassets/documents/research-reports/equally-protected.pdf>
- Scottish Government
- Member’s Bill – John Finnie MSP
- Challenge – under Article 3 & 8 ECHR?





# Article 37 - Restraint

- Not subject to cruel, inhuman or degrading treatment or punishment
- Concerned that used excessively and not as last resort
- Robust and comprehensive recording system
- Assault; Residential Establishments Regs 1996; Prisons & Young Offenders Institutions Rules 2006; Article 3 & 8 ECHR

# Article 40- Juvenile Justice

- **Minimum Age of Criminal Responsibility**
- **Fair procedures and treatment of charges on children**
- **Supreme Court case - *AB v HMA UKSC 2016/0083* – relied on ECHR Articles 6,8,14**

# Conclusion

## Legal Framework

- piecemeal transposition

## Practice

- Areas where practices do not follow law

## Enforcement

- Must be mechanisms in place
- More effective if applicable like ECHR

# Thank you

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