Adversarialism in informal, collaborative, and 'soft' inquisitorial settings: lawyer roles in child welfare legal environments

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Abstract

This article explores the challenges and benefits of increased legal representation in child welfare hearings, with reference to the Scottish Children's Hearings System. We look at the role and impact of adversarial behaviours within legal environments intended to follow an informal, collaborative approach. We analyse the views of 66 individuals involved in the Hearings System, including reporters, social workers, panel members and lawyers, collected through four focus groups and 12 interviews held in 2015. We place this analysis in the context of previous research. Our findings identify concern about adversarialism, inter-professional tensions and various challenges associated with burgeoning legal representation. Difficulties stem from disparate professional values and perceived threats to the ethos of hearings. We conclude it is difficult, but possible, to incorporate an adversarial element into such forums. Doing so may help to protect rights and potentially improve decision-making for children and families. The article concludes by considering implications for the practice of lawyers and others.

Key words

Decision-making; lawyers; rights; best interests; adversarialism; social work.

Adversarialism in informal, collaborative, and 'soft' inquisitorial settings: new roles for lawyers in child welfare legal environments

Decisions about intervening in family life are inherently challenging; assessing past harms and the nature of future risks is fraught with complexity. Family members may be facing extreme stresses that make it difficult for them to engage with services or take part in decision-making (Broadhurst, 2003, Forrester *et al.*, 2012). Interventions can have life-long implications for children and their families, and the evidence base indicates that well intended interventions can sometimes have unintended consequences (Mansell *et al.*, 2011, Cross *et al.*, 2012).

This paper considers the challenges and benefits of increased legal representation in child welfare hearings, with reference to the Scottish Children's Hearings System. In particular, we consider whether increased emphasis on the right to legal representation introduces greater adversarialism - challenging central tenets of children's hearings including their aim to be more collaborative, inclusive, and informal. We question whether adversarialism can usefully support the examination of rights, including parental rights that may have to be curtailed, and examine other potential merits and challenges of legal representation.

In court contexts, previous studies have recognised tensions between the approaches of social work and legal professions using an adversarial approach (see for example Dickens, 2005, Kisthardt, 2006, Dickens, 2007, Masson *et al.*, 2011, Masson, 2012, Thomson *et al.*, 2017). We explore similar tensions, but within the context of a non-court, child welfare decision-making tribunal. Our work is situated in the Scottish Children's Hearings System, but it has resonance with legal environments in other jurisdictions, including other child-welfare contexts and problem-solving and similar courts (e.g. family drug and alcohol courts) that

assume a facilitative, collaborative, or therapeutic approach (Rudes and Portillo, 2012, Harwin *et al.*, 2013, Wiener and Georges, 2013, Winick, 2014, Broadhurst and Mason, 2017, Harwin *et al.*, 2018).

Before describing the methods used in our study and moving on to our own findings, we discuss existing literature in a number of pertinent areas; namely, adversarialism, the Scottish Children's Hearings system, legal representation of parents in non-adversarial legal environments, the role of lawyers in non-adversarial contexts, and lawyers' interactions with social workers. The term 'lawyer' is used generically throughout this paper, to cover legal representatives in any jurisdiction, although they may locally be referred to as lawyers, solicitors, or advocates. Where we use the term 'solicitor', we are referring specifically to those providing representation in the hearings system.

Adversarialism, inquisitorialism, and non-adversarialism in child welfare

Among the general population, meanings of 'adversarial' include hostile or characterised by conflict; by contrast, this paper is specifically concerned with addressing 'adversarial' as a legal practice concept.

An adversarial approach involves the presentation of opposing perspectives to an adjudicator who is tasked with assessing their relative merits (Hardcastle, 2005, Thomas, 2013). In this way, 'each litigant will present his or her own case and attack that of the opponent' (Thomas, 2013). Adversarialism is the prevalent system in most areas of law in the UK, USA, and similar jurisdictions. Proponents suggest 'the fairest and most effective way of resolving private disputes is to allow the parties to present their respective cases before a neutral judge' (Hardcastle, 2005). In presenting their case, most individuals are assisted by a legal representative.

Adversarialism is often contrasted to an inquisitorial approach to decision-making, such as that more common in mainland Europe. An inquisitorial approach is one where a judge takes 'a proactive role of identifying issues and gathering evidence and also takes full control of the proceedings and governs the participation of the parties' (Thomas, 2013). Particular advantages ascribed to inquisitorial systems include that a judge may be able to facilitate individuals who might otherwise find it difficult to communicate or present their case effectively (Kim, 2014) and relatedly, that these systems may be better at finding 'truth' where adversarial systems may be better at pursuing 'justice' (Sevier, 2014). However, performance may be variable. Thomas (2013) highlights that while some inquisitorial tribunals are successful in engaging and enabling unrepresented parties, others do not incorporate the requisite processes, or are administered by those without the necessary skill.

Each approach has advantages and drawbacks and there have been calls to integrate aspects of one approach into the other (see for example Slobogin, 2014). Others have suggested that these two approaches are best suited to different legal contexts (Kim, 2014). Equally, there has been some evidence that the approaches do sometimes crossover or merge (Spencer, 2016).

Despite the continued dominance of adversarialism in much of the legal landscape of the UK, the USA, and similar jurisdictions, there has been interest in approaches that are less adversarial for areas of law such as child welfare decision-making and family law. This is exemplified in England and Wales by changes in child protection investigations (Lindley *et al.*, 2001) and youth justice reform (McVie, 2011). There has been a notable reduction in adversarialism in English family and children's courts (Thomas, 2013), with these courts aiming to be more discursive and less formal, with collaboration being valued over the enunciation of opposing views, and a desire to promote consensus following discussion

(Holland *et al.*, 2005, Thomas, 2013). There have been similar moves in the USA with changes to family courts for child custody cases (Goldis, 2014) and in Australia with changes to children's courts (Thomson *et al.*, 2017).

There are many critiques of adversarial systems, in particular for child welfare contexts. For example, in Australia, Thomson *et al.* (2017) recognised a sense that there was a '… need for less adversarial and more collaborative approaches to decision-making in Children's Courts'. Kisthardt (2006) argued that this is because adversarial systems are ill equipped to handle predictions of harm, and often exclude individuals who have a legitimate and useful role to play.

However, authors also express concern about informal, collaborative approaches and warn of associated risks. In particular, many authors recognise how these systems can in fact be characterised by power imbalances, social coercion, presumptions of a right for statutory intervention, and the suppression of issues of guilt or innocence in the interests of achieving compromise or managing relationships (Sinden, 1999, Holland *et al.*, 2005, Ney *et al.*, 2013, O'Mahony *et al.*, 2016). In the context of the Hearings, Griffiths and Kandel (2000) found that the participation of children and young people was not as active as originally intended.

The Scottish Children's Hearings System

The Scottish Children's Hearings System (the hearings system) is a longstanding symbol of the Scottish approach to child justice, care, and protection. The system consists of structures to manage, facilitate, and support tribunals conducted by three specially trained volunteer lay panel members to make decisions about compulsory interventions in the lives of children and young people below 18 years of age. Hearings consider whether the child should be subject to a compulsory supervision requirement, which may have conditions ranging from requiring a certain attendance rate at school, through to determining that the child should live away

from their birth family in the care of the state. In some cases, panels may make a recommendation about the permanent termination of parental rights.

Children and young people enter the hearings system through a referral to the 'reporter', who investigates the referral and determines if there are sufficient grounds for convening a hearing (Norrie, 2013). Grounds can be for alleged offending or for care and protection of the child; the consideration of offending alongside care and protection is a defining feature of the system.

The hearings system was established in 1971 following the *Kilbrandon Report* in 1964, and it is infused throughout with a *welfare* approach, focusing on the needs of children (their best interests), rather than a punitive or retributive approach (Cowperthwaite, 1988, Norrie, 2013). Whatever the grounds for a child's referral into the system, hearings are not about punishment; rather they are concerned to find the best course of action to help each child to flourish. Hearings do not establish the veracity of the grounds, if they are disputed; the matter is referred to a Sherriff court for determination. If confirmed, the case returns to the hearings system to determine the best way forward for the child. This 'needs not deeds' approach contrasts with other systems that focus on the child's actions.

A central commitment is that hearings are to be child-centred and is prominent in all guidance and training for participants (see for example Children's Hearings Scotland, 2012). This normative principle sits alongside other founding precepts, including that the child and family should take an active part in the discussion, that decisions should be made in the 'best interests of the child', and that hearings should be collaborative, informal, open, unhurried discussions (Kilbrandon Report, 1964, Stone, 1995).

The approach might be considered fundamentally non-adversarial; indeed, the hearings system displays several elements of a 'soft' inquisitorial system (Thomas, 2013). For

example, within this presumed collaborative setting, panel members actively seek information by asking children, parents, and workers for their accounts and views on various points. They may also decide to defer the hearing to seek further evidence from an expert witness, or to ask for a further assessment to be conducted by a Safeguarder[i] (Hill *et al.*, 2002, Hill *et al.*, 2017).

In 1971 when children's hearings began to hear cases, they overwhelmingly concerned young people who were accused of offending behaviour (McGhee and Waterhouse, 2002). Over subsequent years, increasingly more children have been referred because of care and protection concerns (also known as welfare concerns), and today nearly three quarters of children are referred on welfare grounds (SCRA, 2018).

Until recently there have been few significant changes subsequent to the establishment of the Children's Hearings System in the Social Work (Scotland) Act 1968. One clarification was the formalisation of the 'no order' principle of minimum intervention, and defined parental rights and responsibilities brought about by the Children (Scotland) Act 1995.

More recently, there has been greater change; the introduction of the Children's Hearings (Scotland) Act 2011, among other things, has extended the situations in which parents and other relevant people could apply for state financial aid for legal representation (whether this be in a hearing or before a Sheriff). To undertake funded work, solicitors must register by declaring their understanding of the hearings system and competence in a number of areas described in a Code of Practice (see Scottish Legal Aid Board, 2014a). The Code illustrates how legal practice in hearings is distinct from other settings; for example, it highlights the need for timely case progression, the importance of understanding children's capacity, and the skills needed to communicate effectively with children.

Previously, legal representation at children's hearings had been relatively rare. Although solicitors could be appointed where it was necessary to help a child participate effectively (Kearney, 2000, McGhee, 2011, Norrie, 2013), there was no access to legal aid to pay for representation (Scottish Legal Aid Board, 2013). Access to legal aid for parents and other relevant adults was introduced in the 2011 Act in response to the decision in SK v Paterson [2009] CSIH 76 that state support for representation should be available. Subsequently, legal representation in children's hearings has become much more prevalent (although still occurring only in a minority of cases) with more than 2,400 children's legal aid grants being made in 2013/14 (Porter *et al.*, 2016). Around 90% of legal aid for representation is currently on behalf of parents or other relevant adults (Scottish Legal Aid Board, 2014b) with just 10% of legal aid grants for the representation of children.

The purpose of legal representation in the hearings system is laid out in the Scottish Legal Aid Board's 'Children's Handbook' (Scottish Legal Aid Board). This handbook highlights that legal aid is intended to ensure effective participation, given 'the nature and complexity of the case', 'the ability of the individual to consider and challenge any document or information before the proceedings', and 'the ability of the individual to give his/her views in the proceedings in an effective manner' (Scottish Legal Aid Board Part 3, s.2.28 - 2.31).

Parental representation in child welfare cases

The suitability, or otherwise, of legal representation of parents in non-adversarial decision-making forums is discussed by Masson (2012) who found that legal representation was an effective way of securing parental engagement, and through this, ensuring greater confidence in the system itself. However, Masson (2012) also noted the concerns expressed by other professionals, such as a perception of over-emphasis on parental rights above those of children, and the lack of training or a suitable 'theoretical basis' for lawyers' work with

parents. Other concerns about the representation of parents, have been that it can introduce a requirement for additional time, extending uncertainty around decisions, and potentially harming children's development (Brown and Ward, 2013). Furthermore, Thomson *et al*.'s study (2017) found that '…representation of children and families' viewpoints sometimes obstructed decisions being made in the best interests of children or young people'.

The role of a lawyer in a non-adversarial context

As lawyers are increasingly viewed as active partners in child welfare systems, it is important to consider their role in non-adversarial systems (López, 2017, Miller *et al.*, 2017). Kisthardt (2006) suggests lawyers themselves have been confused about their role and that this has resulted in them retaining the adversarial posture which is central to their education, training and court-based practice. Similarly, Masson (2012) has found that lawyers' work in non-adversarial systems retained key characteristics of a more adversarial role; for example, making 'no claim to change their clients as people, only to help them use the law' (Masson, 2012, p209).

Key activities for lawyers include both adversarial and facilitative tasks. Adversarial tasks include ensuring that their client's voice is heard (whether by representing that voice, or empowering the client to speak) and challenging matters of substance; facilitative activity includes assisting with preparation, advising clients regarding behaviour, translating jargon and giving information (Lindley *et al.*, 2001, Kisthardt, 2006, Gupta and Lloyd-Jones, 2010, Featherstone *et al.*, 2011, Pearce *et al.*, 2011). Within non-adversarial contexts, these tasks may aid their client's understanding and engagement in the process, and consequently their trust or acceptance of the outcome.

The fact that lawyers confidently portray a particular professional persona focused on advising and representing their individual client may be part of what allows them to make a

positive contribution. Lindley *et al.* (2001) found that because lawyers were not subject to statutory duties as social workers and others were, participants saw them as independent, able to gain the trust of parents and work effectively with them.

Lawyer interaction with social work

Maintaining an identity as a member of a particular profession requires adherence to a set of professional values and behaviours (Dombeck, 1997). Couturier *et al*. (2008) highlight that diverse professionals also have different epistemological frameworks, which lead them to formulate different (and potentially contrasting) conceptualisations of problems and potential solutions. There are clear differences between professionals concerned with social work and with law (Dickens, 2006). King (2009) recognises a misalignment, seeing social work as inherently a relational and inexact predictor of future events, and law as requiring a formulaic and exacting consideration of past and existing rights.

If professionals are required to ally to positions or approaches that challenge values associated with their own profession, they may experience an uncomfortable sense of incongruence (Weinstein, 1997, Couturier *et al.*, 2008). Within the context of child welfare decision-making, social workers may need to project certainty about care plans, potentially becoming 'adversaries to the families they are supposed to serve', despite the usually contingent and relational nature of their discipline (Weinstein, 1997). Equally challenging, lawyers may struggle to establish the facts of the case, or advocate their clients' rights and wishes satisfactorily within an informal setting and a context that maintains the paramountcy of the child's interests.

When social workers or lawyers talk about the others' profession, their accounts tend to bear out the tensions between them. Social workers question the skills of lawyers in interviewing and communicating with children and young people, or their ability to act in the best interests

of children (Hill *et al.*, 2017, Thomson *et al.*, 2017). Other social workers fear lawyer 'collusion' with parents (Lindley *et al.*, 2001) or describe a tendency to demean social work (Kisthardt, 2006, Hill *et al.*, 2017). For their part, lawyers suggest social workers do not understand the lawyer remit, or appreciate that concepts such as 'the children's best interests' are far from simple and are inevitably open to interpretation (Lindley *et al.*, 2001, Thomson *et al.*, 2017). Lawyers further assert that the nature and extent of power wielded over families by child-protection authorities amply justifies careful examination, and a legal right of appeal (Lindley *et al.*, 2001).

In summary, literature suggests a need to understand more about the role of lawyers in informal legal environments, to explore the place of adversarialism within the context of decision-making for children's welfare, and, in the complex milieu described above, to establish changes that might help to ensure benefits are maximised and negative consequences minimised.

Methods

We designed the study using a mixed-method approach that incorporated data collection from the key actors attending children's hearings. Discipline-specific focus groups were conducted with social workers, solicitors, panel members, and reporters, along with interviews with children and with key informants who held strategic positions in social work, healthcare, education, national bodies, and third sector organisations. This paper draws on data from nine focus groups, three interviews with children, and nine key informant interviews. The small sample of interviews with children provides a limited insight into the perspectives of children, but are included to reflect their views as adequately as possible. Additionally, we circulated questionnaires to all solicitors registered with the Scottish Legal Aid Board for work in the children's hearings system, all social workers in children and families teams, all

panel members, and all reporters. We report a quantitative analysis of data from those questionnaires elsewhere, giving information relating to perceived performance of solicitors and adherence to standards of practice (Porter *et al.*, 2016).

Conducting focus groups and interviews enabled us to build a significant body of data. With interviews, we aimed to enable qualitative exploration of participants' perception of solicitors and the benefits and challenges of their presence in hearings; interviews enabled us to gain in-depth views and opinions from specific individuals with unique perspectives. With focus groups, we aimed to enable exploration of collective opinions and the development of reasoned debate around various issues (Morgan, 1996).

In accessing our samples, we tailored focus group recruitment around relevant organisations and structures. We approached solicitors directly from the Scottish Legal Aid Board register of solicitors; we recruited social workers via area teams in a rural and an urban catchment area; we recruited reporters via Scottish Children's Reporters Administration locality managers and via national managers on an existing forum; and panel members via area support team managers with facilitation from Children's Hearings Scotland. Table 1 illustrates the number of focus groups and participants recruited.

Table 1 Total number of focus groups and participants

Respondent group	**N focus groups**	**N participants**
Solicitors	2	7
Social Workers	2	10
Reporters	3	28
Panel members	2	9

In accessing key informants for interview, we used our own organisational networks to identify and recruit nine individuals with critical information and unique perspectives related to the hearings system. We also attempted to recruit a small number of young people and

parents via two third-sector organisations, this proved difficult within our timescales; however, three young people did participate in interviews.

The focus groups and the interviews were audio-recorded, transcribed, and imported to NVivo (Gibbs, 2002); the exception being interviews with children that were captured during the meeting through copious hand-written notes, transcribed soon after. Our qualitative thematic analysis involved coding and sub-coding the data, before consolidating codes into coherent themes (Braun and Clarke, 2006, Saldana, 2013). We used deductive and inductive approaches, driven by the research objectives and our understanding of existing literature as well as responding to prevalent or interesting themes identified in the data (Braun and Clarke, 2006, Miles *et al.*, 2013, Saldana, 2013). Adversarialism was an example of an emerging theme that prompted a more detailed re-analysis of our data. Two or more researchers independently coded all data, and we met as a group of three periodically to discuss developing ideas.

The University of Strathclyde ethics committee approved the study approach and protocols. To reduce the potential for inadvertent identity disclosure, we have anonymised references to localities and we report the data with minimal reference to specific identifiable issues.

Findings

Across the responses received, the majority of comments were made in relation to legal representation of parents and relevant others, rather than the representation of children. Where participants did address the legal representation of children, they almost exclusively considered it constructive, positive, and helpful in achieving decisions in the best interests of the child. In relation to representation of parents and relevant others, participants usually reported that the majority of solicitors acted appropriately; however, many also felt the involvement of solicitors could negatively affect the hearing and some participants expressed

concerns about specific aspects of solicitors' behaviour. Except where directly noted, quotes are representative of generalised findings, selected to exemplify sentiments expressed by participant groups. We first present findings concerning adversarialism; then three additional themes related to concerns about solicitor involvement.

Adversarialism

Non-solicitor participants seemed particularly concerned with what they saw as alien values and motivations, they expressed the opinion that solicitors were:

> …not there for the best interests of the family. They're there to represent their clients and make money, and that is what comes across (Social Worker, Focus Group).

We did not explicitly ask participants to comment on adversarialism or adversarial behaviour, but they frequently used these terms, deploying both the commonly understood and jurisprudence meanings; often meanings were indistinct or blended. For example, several used the concept of being 'highly', 'overly', or 'excessively' adversarial, seemingly to suggest conduct that was unwarrantedly hostile or conflicting.

All respondent groups reported having witnessed solicitors behaving in an 'adversarial manner' and explicitly stated the shared view that this was often inappropriate to the hearing context:

> …there are some solicitors who don't understand the focus and the ethos of a children's hearing, they can't get a court mentality out of their head, and they can be very adversarial in their approach (Panel Member, Focus Group).

Responses from all participant types recognised that the hearing environment was intended to be open, discursive, informal, and non-adversarial:

Solicitor 1: Certainly, the intention of the panel is that it should be a more informal and encouraging environment for both parents and children. …it's much more discursive…

Solicitor 2: It's less adversarial (Solicitors, Focus Group).

Non-solicitor respondents frequently reported that an increased attendance of solicitors had introduced greater adversarialism to the hearings process over recent years. They suggested that this manifested in implied 'threats' such as: *'The panel need to be very careful about what they're deciding'* or stating before the hearings begins that: *'This will be appealed'*. Similarly, some participants reported solicitor behaviours that they experienced as disrespectful or 'overly confrontational', such as leaving early or arriving late, pointedly questioning a social worker's expertise or their report, interrupting, theatrically tutting while others are speaking, sighing, and using body language such as eye-rolling.

Solicitor participants acknowledged there had been instances of behaviour they felt was inappropriate, but equally felt that it was appropriate for them to challenge social work reports and presentations. They felt that they understood and responded to the differences between the hearing environment and court. In particular, they indicated that it was in their interests to recognise this difference, as *'...if you're going to take that [adversarial] approach, it's not going to help'*. However, one solicitor queried whether it was correct to portray hearings as less 'formal' than a child-welfare hearing conducted in court, since hearings made equally important decisions.

Additional themes

Below we discuss three particular concerns about solicitor presence that were clear in the accounts of participants: a) the de-centring of the child and their interests; b) a power shift towards parental rights; and c) diminishing confidence, intimidation, and fear of making an 'error'.

a) The de-centring of the child and their best interests

Non-solicitor participants felt solicitors' presence a distraction that intrinsically diluted the focus on the best interests of the child. Many also suggested that solicitor behaviours produced a swing from a discursive and informal focus on the child, towards something more formal. Some solicitors were sensitive to this issue and the anxieties it provoked:

> You have to be quite careful, because if a panel think that you are being too legalistic, they will jump on you and they will be hostile right from the off. (Solicitor, Focus Group)

Panel members and social workers felt solicitor presence made the environment less child-friendly, some noting evidence that children were increasingly reluctant to attend hearings. Other participants imagined a dystopian 'court-like' hearings system where everyone had their own solicitor and children became increasingly peripheral:

> And, in some ways you think, 'Well, is that the way it's going to go next?' 'Cause then we're all there, we've all got lawyers, and then where's the child within that? (Social Worker, Focus Group).

Social workers also suggested that some solicitors advised clients not to co-operate with social work services outside of the hearing, seeing this as evidence of a wider de-centring of the child's interests:

> What happens with the involvement of solicitors is…it then becomes a 'them' and 'us' situation; and they withdraw from us and they don't want to work with us and they'll only speak to us through the solicitor (Social Worker, Focus Group).

Social workers, reporters, and panel members also reported their belief that, contrary to a child's interests, solicitors sometimes used delaying tactics to prevent the hearing reaching substantive decisions; reported 'tactics' included non-attendance or requesting additional reports that were otherwise unnecessary.

b) A power shift towards parental rights

Parallel to the de-centring of the child, participants concerns often related to their perception that the presence of solicitors tended to increase the focus on parents' rights. Non-solicitor participants often stated that solicitors were exempt from a concern with the best interests of the child:

> [Solicitors are] not there to safeguard the interests of the child, which is the ethos of the Act, their role is to verbalise their client's position, whether they personally believe that or not. Their role is to represent their client (Reporter, Focus Group)

Similarly, solicitors portrayed the promotion of their clients' (most often parents') interests and rights as their key duty. When representing parents, solicitors felt the promotion of their position to be a necessary and appropriate counter to what they saw as panels' tendency to judge families harshly against inappropriate norms:

> [The child has] parents who quite often are from housing schemes, they've got learning disabilities, they're victims of domestic violence, they have a whole host of problems, and they can't compete with [foster families]' (Solicitor, Focus Group).

Panel members seemed wary or reluctant to engage with parental rights, sometimes characterising them as a distraction from what they 'should' be focusing on, namely the best interests and rights of the child:

> …the panel is focusing on the child and very often they're [solicitors are] raising the rights of somebody else, which potentially conflict with that, or in the panel's view do…that's when it gets more difficult (Panel Member, Focus Group).

Solicitors felt that panel members tended to assume that parents' rights were often the antithesis of the child's interests, and that they routinely disapproved of solicitors' attempts to highlight parental perspectives. Conversely, solicitors argued that parents and children's rights could be complementary, and that where they were not, understanding and

acknowledging the parent's position need not detract from effective decision-making for the child.

c) Diminishing confidence, intimidation, and fear of making an 'error'

Many respondents reported a perception that panel members (particularly newer panel members) found the presence of solicitors to be intimidating. Panel members, social workers, reporters, and solicitors all made this observation, with all but reporters identifying a 'fear of appeal' amongst some panel members. Participants recognised that solicitors influenced panel members in a variety of ways. This could manifest in an increase in 'compromise decisions' that involved attempts to convince a party to acquiesce to a decision:

> Sometimes the panels…keep the peace. So, it'll give you that wee bit. 'Well, we'll give you a wee bit of contact. Are you happy with that?' As opposed to, again, thinking about this from the child's point of view (Social worker, Focus Group).

> … sometimes, I think, the panel want to encourage the child to change their view, so that it's something more (that they think is more) in their best interest, where that is really not their role. Their role is to make the decision (Solicitor, Focus Group).

Participants also felt that the fear of appeal by solicitors in contentious cases led to an increase in deferrals to the next hearing, as panel members opted not to make a substantive decision:

> …the panel is then faced with a difficult decision and, yeah, they do have to make a dec-, well actually, they quite often don't make decisions in those cases (Reporter, Focus Group).

Despite these views, non-solicitor participants also acknowledged that solicitor presence sometimes had a beneficial effect on decision-making, for example, by promoting focussed discussions:

> [solicitor presence] can really promote a much better discussion, a much more focussed discussion, and sometimes can help panel members ask the right kind of questions, to make good, informed decisions, and robust reasons at the end of the day (Reporter, Focus Group).

These views echoed a position expressed by some solicitors who felt that the practice of panels tended to improve when a solicitor was present:

> …a panel member has said 'we better do it right 'cause there's a lawyer here', does that mean that if we're not there, they're not doing it right? (Solicitor, Focus Group).

It was also suggested that some social workers, particularly newly qualified workers can feel intimidated by the presence or behaviour of a solicitor. Social workers, panel members, and reporters all suggested there was a tendency for solicitors to appear to lack respect for social workers. Some social workers reported that they could feel 'exposed' in the hearings, and were offered inadequate protection or support from the panel or reporter:

> You do constantly have solicitors butting in, interrupting, challenging us. Parents obviously getting quite animated as well. And then, reporters who don't do anything about it, and panel members who seem scared to say anything to a solicitor… (Social Worker, Focus Group).

In particular, social workers' sense of vulnerability was exacerbated by the fact they had to put forward a report that other parties could study before the hearing, and come prepared to criticise:

> …it's easy to sit there and just pick it all off…so that's why in terms of social workers [they feel] quite vulnerable as well because, you know, lawyers will focus on that, as opposed to what's the best interests of the child. And, nobody else has to present anything (Social Worker, Focus Group).

Solicitors recognised that others felt threatened, and identified that in some localities social workers were receiving specific training in how to respond to solicitor involvement.

Contrarily, some solicitors highlighted that panels often gave social work reports more weight than was due:

> …if they [social workers] were actually in court, I don't know if they'd hold themselves out to be an expert…I think they'd say, 'No, you need to go to a clinical psychologist for that' (Solicitor, Focus Group).

Discussion

Studying the role of solicitors in the Scottish Children's Hearings System is illuminating, firstly, because of recent increases in legal representation, and secondly, because of the avowed prominence of non-adversarial features, a characteristic increasingly shared with child welfare proceedings in other jurisdictions. The increased presence of solicitors in the hearings system has been attributed to concerns about due process and issues related to rights (Kearney, 2000, Norrie, 2013).

In this paper, we describe challenges, but also consider whether adversarialism can add value to the hearings process. We begin our discussion by considering what we learned about adversarialism within hearings and associated anxieties around the promotion of parental rights; we then move to other ramifications of solicitors' presence in the hearing, such as impact on panel members before finally considering the accommodations solicitors and others in the hearings could make to ensure hearings benefit from an element of adversarial input.

Our findings suggest that some participants conflate adversarial behaviour and conflict; this is particularly problematic in the context of children's hearings. 'Conflict' is seen as the antithesis of the collaborative atmosphere of an ideal hearing. For example, one of six core courses that sitting panel members are required to undertake is entitled 'Managing conflict within hearings'; its aims include 'minimising', 'managing', and 'de-escalating' conflict, as

well as managing the expectations of the various professionals present (Children's Hearings Scotland, 2018). When other professionals see adversarial behaviours as conflict, they will inevitably feel these approaches sit uneasily within the hearings ethos.

As per our introduction, many writers consider non-adversarial approaches well suited to child welfare processes, arguing that they promote engagement and are less likely to undermine working relationships between the family and social workers. We agree that unfettered adversarialism based on the interests and rights of individuals is unsuitable for child welfare contexts, not least as this is likely to exclude important information and nuance, including the interactions and relationships between multiple parties.

Many non-solicitor participants favoured non-adversarial systems and were apprehensive about the introduction of adversarial elements. Their concerns coalesced around three areas; they described a de-centring of the child, a power shift towards parents relative to children, and impacts on process and decision-maker confidence.

The hearings' ability to focus on the child and ensure they remain child-friendly spaces is seen as key (Norrie, 2013). Child–friendly (in the context of justice) has often been used to imply simplicity, accessibility, and a reduction in ritual or overt indicators of status (Goldson and Muncie, 2012). Specific legal approaches to making justice 'child friendly' have focused on ensuring children's rights to voice, participation, and information are upheld (e.g. The United Nations Convention on the Rights of the Child). The European Convention on the Exercise of Children's Rights differs in this respect, focusing on family legal proceedings. Article 6 of this Convention confers a right to apply for the appointment of a special representative. However participants in this study emphasised elements such as those referenced by Goldson & Muncie (2012), focusing on the importance of the hearing being a child-friendly space. Legal representation has the potential to negatively impact upon this

interpretation of child friendly justice if it is not carried out in an appropriately child-friendly manner. This perspective mirrors views reported elsewhere, where less formal, non-adversarial systems are said to be more effective at maintaining the focus on the best interests of the child (Hill *et al.*, 2007).

Maintaining a focus on the child, whilst paying attention to the rights of parents, is clearly a challenge in many legal environments concerned with child welfare (Lindley *et al.*, 2001, Dickens, 2006, Kisthardt, 2006, Dickens and Masson, 2016, O'Mahony *et al.*, 2016). Concern about losing focus on the child seems to be at the heart of non-solicitor concerns in this study. However, due process and attention to rights is especially important where enduring decisions are made about compulsory intervention in families' lives (Kisthardt, 2006). However, the rights of parents or relevant others and the best interests of the child are unlikely to be wholly unconnected; it seems necessary and justified that child protection systems take full consideration of relevant rights (O'Mahony *et al.*, 2016). None of the participants in this study explicitly stated they should disregard parents' rights, but some were clearly anxious that consideration of parental rights risked detracting from the focus on the best interests of the child. This is a sentiment that has also been noted in other systems (Lindley *et al.*, 2001, Featherstone *et al.*, 2011).

Whilst child-centred approaches are widely advocated, we need to consider whether such an ethos may be detrimental by preventing important information being considered; for example, by discouraging some participants from pressing their perspective, asserting their rights, or giving a full account of the situation as they see it. Sinden (1999) argues that by avoiding discussion of innocence or guilt, less formal decision-making environments disadvantage vulnerable children and parents. She explains that informal processes can coerce the weaker party (in care and protection cases, usually the parent, often the mother) to

acquiesce to the view of the powerful party (usually the local authority or government). Simultaneously, the high value placed on collaboration and the child's best interests can close down discussion *'treating any effort to frame problems in an adversarial context as unmotherly and harmful to the child'* (Sinden, 1999).

Goldis (2014) echoes concerns about procedural fairness and the suppression of the rights discourse, arguing that decision-makers in informal legal environments become involved at a personal level, and as a result make less-objective decisions. She argues that these elements of due process are *'not just an abstract ideal. Compromising process leads directly to bad outcomes for the most vulnerable children'* (Goldis, 2014).

The prescribed model of hearings can be regarded as an example of a 'soft' inquisitorialism (Thomas, 2013). Panel members are not expected to be passive recipients of reports and monologues, but to actively examine the case before them. They need to control the flow of information into the hearing, facilitate engagement, and manage the various contributions. Viewing their role in this way should provide panel members with a framework in which to balance solicitors' inputs and ensure they are a helpful part of the process. When legal representatives focus on the interests of parents or relevant others, their input is still pertinent to the child and their care, and it is for panel members to judge how to promote or restrict parents' rights and wishes whilst determining how best to enable the child to flourish.

As in other research, we found a professional positionality across a number of aspects of the hearing. For example, social workers were concerned that solicitors' approaches (often explicitly named adversarial) were inappropriate for hearings, since solicitors were not acting in the best interests of the child and did not properly understand child development or how to communicate with children. Their views about de-centring of the child in this way closely

reflect social work opinions reported by other researchers (Lindley *et al.*, 2001, Pearce *et al.*, 2011, Masson, 2012, Thomson *et al.*, 2017).

Conversely, solicitors felt that their approach was simply to represent an alternative interpretation of the best interests of the child, and that since their approach promoted rigorous examination of the case, it was likely to lead to better decisions. Lawyers elsewhere share these views, often suggesting that an adversarial approach that clearly sets out opposing arguments supports decision-makers in reaching the best decisions (Lindley *et al.*, 2001, Masson, 2012, Thomson *et al.*, 2017).

The diverse groups of participants in this study differed in their opinion of what constitutes an appropriate adversarial approach, and what is inappropriately hostile; for example, while panel members and social workers perceived solicitors' references to potential appeals to be attempts at intimidation, solicitors saw them as appropriate reminders of the significance of the decisions panel members had to make.

Theatrical displays of adversarial behaviour (eye rolling, tutting, etc.) noted by social workers, reporters, and panel members are clearly memorable events despite their reported rarity. Similarly, arriving late or appearing pre-occupied with phone messages is seen as disrespectful to the hearings system or those present. Generalisation from the behaviour of the minority undermines other professionals' confidence that solicitors value the hearing process.

Tensions between professionals from legal and social welfare disciplines is not new, and is not limited to the children's hearings system (Dickens and Masson, 2016). Engaging in collaborative interprofessional work often requires adopting an approach that clashes with the culturally determined ideal characteristics of a particular profession. This can undermine a worker's sense of professional identity, what Dombeck (1997) refers to as 'professional

personhood'. As discussed earlier, conflicting sets of values and perceived differentials in power or prestige can be particularly challenging in settings that require collaboration. In our study, it seems the professional identity of social workers was in most jeopardy, despite the prevailing critiques of solicitors.

Societal views of the relative status of the professions of social work and law are likely to play a part. Where inter-professional hierarchies are known to exist (e.g. healthcare), those who have less power are likely to perceive problems such as feeling their inputs are marginalised, whereas those in relatively powerful positions are untroubled (see for example Cott, 1998, Robinson and Cottrell, 2005). In this study, social workers felt that panel members often privilege solicitors' inputs and showed less respect for social work expertise. A similar sentiment has been noted elsewhere; for example, Hill *et al.* (2017) found that panel members reported being most impressed by the skills and clarity of safeguarders who had legal backgrounds, and that social workers felt that legal training was held in higher regard than their own. Beyond the hearings system, Kisthardt (2006) found that social workers were frustrated that their role and perspective was often placed as secondary to the lawyer's view. It has been further suggested that this frustration is compounded when courts are '…disparaging social workers, discounting their evidence and ordering new or repeat assessments by independent 'experts' as a matter of course' as described by Dickens and Masson (2016).

The role, skills, and confidence of panel members were further areas of concern for participants in this study. Panel members undertake very challenging and complex work on a voluntary basis with relatively little training and preparation (Norrie, 2013). Many of our participants felt that in the presence of a solicitor, panels' increased fear of making an 'error' could reduce the quality or timeliness of their decisions. Additionally, both solicitors and

social work participants felt that panel members were often too keen to find a compromise position to which all parties could agree. Panel members may see this as exemplifying an inclusive, problem-solving approach; other participants felt it distracted from a focus on the child and could result in suboptimal decisions.

Conclusion

Children's hearings are tribunals whose decisions carry legal force. The interventions within their remit include removal of a child from the family home and otherwise curtailing parental rights; these profound responses are appropriate when proportional and in the best interests of the child (Feldman, 1999). However, great care is needed as these moves impact significantly on the lives of children and their family members, and intervention itself is likely to have some adverse effects for the child (Gilligan, 2000, Doyle, 2013).

The introduction of adversarial behaviour has brought challenges to the hearings system that resonate with those seen in child protection decision-making and similar legal environments elsewhere. Participants dispute the nature and cause of these challenges; some views seem influenced by relatively rare but memorable examples of perceived poor behaviour. Solicitors feel that for the most part, they make a valuable contribution, other participants perceive disruption of the prevailing hearings ethos, and distractions from the child-centred focus or note solicitor actions or behaviours they feel contribute unacceptable delays to decision-making for children and young people.

Child protection systems are frequently explicit in the value they place on the centrality of the child within collaborative and informal environments; this paper cautions against the view that all aspects of adversarial behaviour should be excluded from these legal environments. We conclude that the continued success of the hearings system requires maintenance and development of the child-friendly and child focused environment. Nevertheless, solicitors

need to be able to constructively advocate their client's position. While these perspectives clearly should not dominate proceedings, failure to examine all perspectives thoroughly may result in poorer decision-making and deny both parents and children the opportunity to have their rights, wishes, and welfare recognised. Achieving this balance requires all involved to understand and accept a solicitor role that embraces their independence and values their freedom to argue for their clients' rights.

Contemporary children's hearings demonstrate how lawyers need to adapt their practice to fit less-adversarial child protection contexts, where often their role has been ambiguous or confused (Kisthardt, 2006). Lawyers need to be aware that confrontational language and behaviour should be minimised, and discussions held in a constructive and positive manner. They need to understand how legal settings such as children's hearings present opportunities to use their skills differently. Legal representation can be adversarial, but need not be confrontational. Lawyers will want to reassure their clients by presenting a competent image, but effective adversarial inputs do not require explicit displays of high status or power. Legal representatives also need to accept that it is inappropriate to contrive to delay decision-making against the best interests of the child or seek to compel decisions that are clearly contrary to the child's interests. Lawyers who respect and appreciate the approach taken by less-adversarial legal environments are likely to be able to adapt their approach; those that are also sensitive to the perils of interprofessional working, and have an appreciation of child development and communication, are particularly likely to work effectively within contexts such as children's hearings. As others have pointed out, collaborative working in legal decision-making forums is contingent on good relationships and interactions between diverse practitioners (Preston-Shoot, 2014).

This examination of children's hearings also highlights that, while modification of lawyers' approach is sometimes necessary, calls for change should not focus only on lawyers. Within the context of hearings, social workers also accept that they have work to do, particularly in relation to writing and presenting their reports in a more robust fashion. Panel members, as decision-makers, have a significant role to play in relation to solicitors in hearings; it is their responsibility to ensure that hearings remain child-centred and that another perspective does not dominate. Presently, many panel members appear to find this element of their role challenging. We cannot generalise this to decision-makers in other systems. We can however, assume that decision-makers who lack confidence with the law or ability to manage a child-centred setting, will be predisposed to feel awkward or anxious about the involvement of lawyers, they may also be inclined to interpret adversarial behaviour as confrontational behaviour that transgresses cherished tenets of legal environments considering child welfare. Decision-makers need confidence, skills, and motivation to seek and hear all relevant views, understand all perspectives, and acknowledge all relevant rights. Indeed explicit acknowledgement of parents' positions may be particularly important when decisions will restrict their rights in the best interests of the child. It may help panel members to understand their role as being within a 'soft' inquisitorial system that requires them actively to seek the truth of the situation, the cardinal truth being 'what arrangement is most likely to enable this child to flourish'. To achieve this they are entitled, and bound, to understand all relevant information, rights, and perspectives. Solicitors will sometimes provide valuable assistance in helping the panel understand their clients' perspective.

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[i] The role of Safeguarder is similar to a Guardian ad litem in other jurisdictions.