

Promoting rights: Protecting and respecting children

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Abstract

This article explores the complex landscape of decision-making for children who are in need of care and protection. It sets out some of the challenges when ascertaining children's views and emphasises the importance of protecting children's rights by involving them meaningfully in all decisions that affect their family life; by recording their views, according these weight and by keeping a written record of what actions were taken and why throughout their involvement with statutory services. It sets out how we currently gather children's views and encourages the use of more creative approaches to ensure that children's voices are heard — and their rights respected — throughout all decision-making that affects them.

Keywords

Children's rights, participation, children's hearings

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Introduction

Since the inception of the Children's Hearing in 1971 there has been a slow but incremental increase in the extent to which both Scottish society and the systems that have developed to protect children from harm have embraced children's rights and encouraged their meaningful participation in the numerous decision-making processes that impact on their lives. 'The only source of knowledge is experience' applies to all of us — but if our experience is one where we are supported to tell our truth, to engage meaningfully and have those with power listen and take us fully into account — then we will take this with us. If, however, we are side-lined, ignored or patronised — then we take something very different away with us into life. The experience of every child is dynamic and complex and affected in a multitude of ways by a multitude of things. When adults approach any work with children in a rights respecting way from the start of a 'care journey' then perhaps the course of that journey can be altered.

The significance of rights and children's rights in the context of the provision of 'care' by a state is recognised internationally. In Canada on January 1st 2020 the [*Act Respecting First Nations, Inuit and Métis children, youth and families*](#) came into force giving the opportunity for indigenous people to choose their own solutions for their children and families ([Reducing the number of Indigenous children in care](#)). In New Zealand the Oranga Tamariki Ministry for Children website [homepage](#) ([When does a child go into care?](#)) indicates clearly the rights based approach that is being taken.

The website offers (amongst other things):

- Support for families
- Working with children
- Children in our care
- Caregiving

In Scotland [The Promise](#) reports from the Independent Care Review point us clearly towards a future which uses children's rights as the lens through which we view how we work with children for them to develop into happy, healthy

adults: 'We grow up loved, safe, and respected so that we realise our full potential' (Independent Care Review, 2020, p.1). This future will be transformational – and is a world away from where the Children's Hearing began.

In the early days children and their parents were expected to attend Children's Hearings without the reports that provided much of the crucial evidence-base for decision-making being shared with them and with little attention being given to the child's view of the situation they found themselves in. Information was only made available to the Reporter, Social Worker and Panel Members.

It is a surprise to many that practice of this nature was still in operation in the 21st century. In fact, the routine sharing of hearing papers with all children did not become a statutory requirement until the Children's Hearings (Scotland) Act 2011 came into force on 24th June 2013.

Thankfully however, Scottish society has changed since the 1970s and so has the way Scotland views children and takes cognisance of their rights. The Covid-19 global pandemic has shone a light on the impact of adult decision-making on children at a time when legislative changes that impact them directly has quickened. In the past few years Scotland has:

- seen the introduction of Corporate Parenting responsibilities for a host of agencies;
- raised the age of criminal responsibility and is actively considering a further rise;
- outlawed assaults on children by removing the defence of 'reasonable chastisement';
- consulted on raising the age of referral to the Principal Reporter to 17;
- and, most significantly of all, consulted on seeking to incorporate the United Nations Convention on the Rights of the Child (UNCRC) into Scots Law.

Society quite properly places reliance on the family to protect a child from harm, meet the child's needs and ensure that the child's rights are respected and upheld — but some families are not able to meet these expectations. Sometimes care-givers need additional help to meet a child's needs but are unable to accept or actively refuse to engage with supports voluntarily. Some refuse support altogether. Some intentionally or unintentionally place the child at risk of harm. All of the foregoing are potentially detrimental for a child and may require referral to the children's hearing system for proportionate exploration of the child's circumstances and possible statutory intervention.

In practical terms the threshold for referral is clear in section 60 through 66 of the 2011 Act — that a child may be in need of protection, guidance, treatment or control and it might be necessary for a compulsory supervision order to be made in respect of the child. The threshold for the statutory intervention of the Children's Hearing in the 2011 Act, section 66 (2), is also very clear:

66 (2) The Principal Reporter must determine –

(a) whether the Principal Reporter considers that a section 67 ground applies in relation to a child, and

(b) if so, whether the Principal Reporter considers that it is necessary for a compulsory supervision order to be made in respect of a child.

If both these conditions are met the Reporter must arrange a children's hearing.

Referral to the Reporter and any subsequent referral to a children's hearing effectively passes the power to take important decisions about the child's life away from a family¹. These decisions may include where the child will live and with whom the child shall have contact – as well as the responsibility for

¹ A child or children may become subject to child protection procedures and a child protection planning meeting (previously a case conference) followed by core group meetings and supports. This can happen with or without additional referrals to other public supports (Child and adolescent mental health / family support / parenting supports) 3rd sector support services and referral for consideration of statutory intervention through the children's hearings system if a compulsory supervision order may be required.

ensuring the child's rights are upheld. Currently these decisions are entrusted to an array of decision-makers within the wider children's hearing 'system' in place of the family. These 'layers' of decision-makers include:

- social workers and other professionals in education and health who assess a child's background and current situation and then recommend what action should be taken next.
- independent officials (Reporters) who consider these recommendations in the context of children referred to them and then make their own individual assessment about what further action (if any) should be taken.
- a quasi-legal tribunal (made up of Children's Panel Members sitting in a Children's Hearing) who will be asked to consider assessments and enter into discussions with a child and family before making their own decisions as to what's best for the child.²
- and then a Sheriff in the relevant Sheriff Court, if the reasons for referring a child to a children's hearing need any 'fact finding' or if a child and family do not agree with the decision reached by their children's hearing and they want to appeal it.

At each stage of decision-making the need to protect the child has to be balanced with the need to be proportionate when interfering with the rights enjoyed by the child and their family. Needless to say, this is a delicate balance for professionals to strike, but it is important that the child is heard — which may mean the child's feelings, views, thoughts, understanding, perceptions may all need to be communicated — which can be difficult in a children's hearing when a child's loyalties can be really tested, and people can be under pressure and in some emotional distress. It is also important that opportunities and encouragement to participate meaningfully are provided throughout the decision-making process to ensure the rights of the child are upheld and that this applies to every child; this can be difficult in practice for infants and non-

² [Children's Hearings Scotland](#) are the non-departmental public body who oversee the recruitment, training and support of Scotland's volunteer panel member community, which includes the panel members who sit in children's hearings as well as the other volunteers who support them and provide practice advice.

verbal children where professional and other assessment of behaviour has to interpret what cannot be articulated. As it often takes time to build a trusting relationship with a child before they will openly share their views this is an important step in the process of information gathering that must not be rushed or skipped over in the race to complete assessments or to make decisions to meet short timescales.

Our children's hearing has long recognised the importance of ascertaining the child's view. The Children (Scotland) Act 1995 enshrined in law that listening to and taking account of the views of children was to take place when decisions were being made about their family life. This was a position that The Children's Hearings (Scotland) Act 2011 re-stated and expanded upon; [Section 27](#) (modified by the Children (Scotland) Act 2020 [Section 3](#)) of the 2011 Act provides that a child has to have the opportunity to give a view; should be able to give their view and that decision makers should consider that view. In addition, [Section 121](#) of the 2011 Act specifies that the chairing member of the children's hearing must ask the child whether the documents before the hearing accurately reflect the view / views the child has expressed. Despite UNCRC and the current legislative framework it is often unclear to what extent — if at all — the views of the child are sought and, if available, the extent to which they are enabled and given due and proper consideration within each stage of the decision-making process.

Dr Robert Porter's study (2019) demonstrated that in both social work assessment and panel decisions:

children and young people's views are poorly recorded, and that clear views are recorded in only a minority of decision paperwork

and

when views are absent it is very difficult for those who gave those views to believe that those views were taken seriously, or indeed taken into account by the decision maker at all. (Porter, 2019).

Such decisions may be less likely to be railed against if the child's view (and that of the carers) is respected and recorded and if decision-makers set out clearly to what extent this has been considered as a factor within the decision-making process in a way which does not routinely occur now. Currently social work assessments (and other assessments of children) are required to include the child's view and the children's hearing is required to take that view into account. There is however no requirement to explain how this has fed into their decision-making. The hearing must provide reasons for each decision they make and some of their reasons for decision may include the views of the child — but they are not required to reference these.

Agreement and 'buy-in' to decisions imposed on children and families could also be improved if the information provided as a basis for decision-making was concise and readily understood by everyone involved; for example, by having an easy-to-follow written report that sets out clearly why intervention is necessary and what support mechanisms are in place to work alongside a family to make changes for the child's benefit. It would also be beneficial if the rationale for each decision made was set out clearly; for example, with the reasons for decision of a children's hearing narrating what weight has been given to the multiple factors in a case that justify the making of a Compulsory Supervision Order.

Professionals and decision-makers must build trust in order to work in partnership with children and families; and in order to build trust it is important that the reasons for any interventions in their family life are understood and that solutions are both available and attainable. Families should not be oppressed by the 'system' or set up to fail — and when/if this occurs it should be challenged. Legislation doesn't always alter things quickly either. For example, the 2011 Act included a provision that children should be supported by advocacy workers in the children's hearing, but it took nine years for this to be implemented. The delayed implementation of specific aspects of legislation can mean that the legislation is not fully understood/misinterpreted/may not be as effective as was intended and legislation is not enough to make change happen — the implementation of good intention in legislation is dependent on practical system and cultural shifts for the change to really happen.

Systemic oppression approaches have started to deconstruct the accepted/established apparatus of social systems in their historical context in order to imagine a different future ([Brady, 2017](#)). In Scotland a wider recognition of the impact of the social systems and processes in place and the perception of the ways those systems impact on groups of people and on individuals is now very current following the publication of the findings of the Independent Care Review and in the widely reported considerations of the Scottish Child Abuse Inquiry. This recognition and awareness has also been a feature of the learning from significant case reviews across the country ([Care Inspectorate, 2019](#)). It is hoped that these findings will lead to the deliberate and careful construction of new national frameworks and systems for future decision-making that are rights respecting and ensure the full participation of children and families at every stage of any future process.

When gathering information professionals should consider how the child is being supported to give their view; the ways in which that view could be best presented to enable the voice of the child to be heard and what can be done to ensure that any view expressed is truly taken account of, given weight to and recorded robustly at each stage of decision-making. The Scottish Government's intention to fully incorporate the United Nations Convention on the Rights of the Child (UNCRC) as well as the ongoing recognition and promotion of children's rights in Scottish domestic legislation³ squarely places 'fairness' and rights as central to the approach to be taken by decision makers – but this does not necessarily reflect the perception and experience children and young people may have of our current systems and the ways they operate. Incorporation will, however, focus the attention of public services on how they uphold children's rights within existing systems and will hopefully start a process of internal scrutiny and an 'audit' of the services currently provided — this should clearly show the ways in which these services protect, promote and respect children's rights. Such an audit may also result in public services recognising changes

³ From the creation of the office of the Scottish Commissioner for Children and Young People in the 2014 Children and Young People (Scotland) Act 2014 to the moves to change the age of criminal responsibility in the Age of Criminal Responsibility (Scotland) Act 2019 and the statutory review of the age at which this should be set

which need to be made in order to prevent systemic oppression — be that actual or perceived oppression.

The 2011 Act gives children the same rights within the hearing process as those enjoyed by adults, whilst recognising that their 'age and maturity' should also be considered. To quote the Scottish Children's Rights Administration (SCRA) statistics, '85% of the 8,875 children and young people subject to a Compulsory Supervision Order as at the 31st March 2020 have only ever been referred on care and protection grounds' ([SCRA](#), 2020 October, p.2). Most of the children who need the intervention of statutory measures of care and protection are placed at risk of harm because early recognition of need or request for support to meet parental responsibilities has not been sought, identified, effective or engaged with; in fact, SCRA Home CSO Research Reports in 2019 indicates throughout the separate reports that support may only be available through a CSO; wasn't available before the CSO; was not fully identified at the right time and therefore actions other than a home CSO may be required to address a child's presenting needs. Children are likely to require a greater level of support than their carers to help them give their views to decision-makers and to enable them to participate fully in a children's hearing. The Children (Scotland) Act 2020 removed 12 years as the age by which children are presumed able to give a view. Section 1 states that 'in considering whether the child is capable of forming a view, the person is to start with the presumption that the child is'. A child who has or is experiencing trauma through unmet need or harm may not be developing according to chronological milestones, so age is an unhelpful determinant of a child's capacity or ability to articulate an authentic view — and there is an ongoing need for adult support for children to enable 'a view' to be developed and delivered.

Currently the following are used to support the child and bring the child's views into decision-making:

Instructing a solicitor / legal representative

But many children coming to a children's hearing are too young to instruct a legal representative and most legal representatives attend to represent adults.

Appointment of a Safeguarder

This must be considered by the panel members at every hearing. Safeguarders will ascertain the child's views and make their own independent recommendations for action to a children's hearing. Safeguarders can also be appointed in associated children's hearing court proceedings.

Use of technology

The use of Virtual Hearings during the Covid19 pandemic has provided an opportunity for children to attend hearings remotely. The use of technology in and of itself however gives rise to additional concerns around fairness and participation ([SCRA](#), 2020 June and , [SCRA](#), 2020, July).

Use of advocacy workers

The Scottish Government has now enacted section 122 of the 2011 Act so there is a duty on each and every Children's Hearing to make children aware of the availability of children's advocacy services ([Hearings Advocacy](#)) to support them before, during and after their Children's Hearing (age and maturity being taken into account).

A further step to empower children to give their views is [Section 14](#) of the Children (Scotland) Act 2020 which puts a new duty on local authorities to seek the views of children in relation to contact with any brother or sister relationships and sets clear criteria for determining 'individuals with participation rights' in the children's hearing. This will allow brothers and sisters, as well as others who have brother/sister 'type' relationships with children to give their views in decision making and have decisions reviewed for the first time in relation to 'contact'.

Before the pandemic children's hearings were moving tentatively towards providing children with more freedom of choice about the ways in which they could present their views to decision-makers; accepting that filling in a form 'All about me' was not helpful for many and embracing, for example, the use of avatars and digital devices. The pandemic has also permitted children for the first time to really have an element of choice about whether or not they attend a

hearing/part of a hearing — it is much easier to 'switch off' a virtual hearing than it is to leave a room full of people (for example), although further consideration of this is required (including consideration of whether children are under any undue pressure when using technology to access their hearing and the impact of the digital divide on children at the hearing and the response of children to virtual hearings is not at all a 'uniform' response — as detailed in the [Our Hearing Our Voice](#) views on returning to face to face hearings which can be read [here](#)). The pandemic has of necessity shown that radical changes to systems can take place in a short timeframe where there is the collective will to make this happen.

The use of more creative approaches to help children give their views on current systems and practice has been driven by the work of [Our Hearings, Our Voice](#) (OHOV) – the Independent Board of Children and Young People for the Children's Hearings System. OHOV has worked closely in its first year with the [Verbatim Formula](#), with Napier University School of Computing and [John Morrison](#) to develop ways of effective storytelling / digital storytelling; to share with a wider audience what it feels like to be a child caught up in the current system, to begin to challenge existing practice and to begin imagining what the child protection landscape could look like if children's rights were truly at its heart.

Our Hearings, Our Voice members are saying profound, moving and eloquent things about the experiences they have had; the impact of this on them and on their engagement with the Children's Hearing. Their experiences along with the findings of the Independent Care Review challenge us to change our systems, develop new ways to engage with children of all ages and to provide the supports they tell us they need to ensure their rights are upheld and their views are properly considered at every stage where decisions are made that affect them.

Across a wide range of children's services there is now a recognition that approaches designed specifically for children and young people to help them articulate their experiences and feelings are valuable. A good example of this occurred as part of the London Borough of Culture 2019 in Waltham Forest -the

[East Side Story](#) pulled together young people from across the community to articulate their experiences and their hopes for the future – and to write and perform their story. East Side Story was broadcast on the BBC and as a production is now an entity in and of itself.

Across Scotland, champions' boards and Our Hearings Our Voice are also working with the creative arts to develop ways in which children can express their genuine feelings about the often emotionally challenging situations they find themselves in; about the futures they want to see for themselves and their families and about changes that they recognise are needed to improve the experience of any relevant proceedings for other children who will need such supports in the future. Working alongside those with lived experience should help us reshape and improve our future child protection/youth justice systems and help eradicate any real or perceived oppression.

As we move towards life post pandemic and 2022 it is important that practitioners who support children and families and legal decision-makers in the children's hearing devote time and resources to examining how they currently engage with children and in considering what extra approaches could be tested to support, co-develop and implement creative and innovative solutions that protect children's rights, ensure their voices are heard and increase their meaningful participation in all decision-making that affects their lives.

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About the authors

Melissa and Elaine have between them over 40 years of experience working in child protection with the Scottish Children's Reporter Administration (SCRA) in

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