



11 May 2016

Dear Simon

Commission and Diligence in Family Actions in the Civil Courts
Your Ref: A 13769970

Thank you for your letter of 22nd March 2016 seeking views on commission and diligence in family actions in the civil court. In relation to the first question, we agree that the description of the law and practice in relation to commission and diligence set out in Annex B to the letter is accurate.

In response to questions 2 and 3, here is a summary of our views.

- Amendment to the law may be useful for the purposes of clarity.
- The court cannot determine whether the child's right to confidentiality can justifiably be overridden without knowing the content of the documents concerned. Accordingly, we do not think any amendment should relate to the court's power to order recovery in the first place. The appropriate place for amendment is in respect of the court's power to determine a motion to open a sealed packet.
- The suggested amendment emphasizing the paramountcy of the child's welfare may not do enough to recognise the human rights of others. Our tentative view is that a better amendment would stress the responsibility of the court to take into account the rights of all parties, bearing in mind that the welfare of the child is the paramount consideration, when determining whether a sealed packet should be opened. This will always be a balancing act, as recently explored in [C v W](#).¹
- Further consultation should be carried out before any amendment is taken forward by the Government. It will be particularly important to canvas the views of sheriffs and judges during that process in order to determine whether supplementary support or training may be necessary to ensure the appropriate procedure is followed.

The difficulty with making legal provision in relation to confidentiality is that bright line rules are a poor mechanism for handling the diversity of circumstances in which that confidentiality might be challenged. The most that legislation can do in this area is make

¹ [2016] SC Edin 26, at para [49] where Sheriff Sheehan explores the relationship between the welfare principle and Article 8, ECHR.

clear the parameters within which the court's discretion will be exercised. Beyond that, it is important that support be provided in practice to stakeholders, including sheriffs and judges, involved in the process of making decisions about how to deal with confidential information disclosed by a child.

In a situation where a child discloses sensitive information to a support service, and requests that it remains confidential, the rights of several different people may be engaged.

First, **the child making the disclosures**. The child has a right to protection from abuse and promotion of her best interests.² Breaching requested confidentiality will cause her emotional distress, may put her at risk of retaliation from a person (such as an abuser) about whom disclosures have been made, and may dissuade her from making such disclosures in future, thereby preventing her from accessing support. It also undermines the child's interest in autonomy, which becomes an increasingly significant concern the closer the child is in age and/or maturity to legal adulthood. On the other hand, a child (particularly a younger child) may not be sufficiently mature to balance the risks of disclosure against its benefits. The harm caused by breaching confidentiality may be less than the harm caused by maintaining it. For example, a child suffering abuse may believe it is preferable for confidentiality to be maintained, but her welfare may be better protected by preventing the abuser from having access to her, which may only be possible if the abuse is disclosed to a court. The extent to which a request for confidentiality should be respected in order to promote the child's welfare will accordingly vary.

Second, **the person in respect of whom disclosures are made**. A child may disclose mistreatment at the hands of an adult with whom she has a relationship. This may result in a change to the rights of the adult – for example, cessation of the right of contact – in order to protect the child's welfare. Determination of an adult's civil rights engages the right to a fair trial.³ The right of the adult to family life is also likely to be engaged in these circumstances.⁴ Where a determination of rights is made on the basis of evidence that the adult has not had access to, these rights are likely to be violated. Recognition of this right on the part of an adult is part of the reason for recent changes to the Children's Hearings process.⁵

Third, **other persons affected by the disclosures**. In particular, disclosures made by a child may suggest that the welfare of other children – siblings, for example – is at risk.⁶ Additionally, disclosures that result in changes to those holding rights and responsibilities in respect of the child will engage the rights of all members of that family to their family life.

A judge or sheriff dealing with a specification of documents in a family law action is already under a legal responsibility to take all of these rights into account when making

² UNCRC article 2 and 3; Children (Scotland) Act 1995, ss 11(7) and 16.

³ ECHR, art 6.

⁴ ECHR, art 8.

⁵ [McMichael v UK](#) (16424/90) [1995] Fam Law 478; Children's Hearings (Scotland) Rules 1996, r 5(3); Children's Hearings (Scotland) Act 2011, s 76(3).

⁶ See, for example, [In the matter of A \(A Child\)](#) [2012] UKSC 60.

her determination.⁷ That responsibility may not be clear to a lay person, however, since this responsibility of the court is not set out explicitly in the law or court rules in respect of commission and diligence. Clarity in the law is particularly desirable in family law actions. An express statement of the court's responsibility may also encourage the court towards explicit discussion of the various rights when making a determination in relation to a specification of documents. On that basis, we support an amendment to the law.

A sheriff or judge cannot make a meaningful assessment of these rights without knowledge of what confidential documents exist in a case. As argued above, the appropriate balance to be struck between the rights of the various parties depends on the circumstances of the case. Accordingly, it does not make sense to amend the law in relation to the grant of an order for recovery. Instead, amendment should relate to the procedure to be followed in family actions when documents are produced in a sealed packet, and a party moves to have the packet opened.

The amendment proposed highlights that the welfare of the child is paramount. An emphasis on this principle should certainly form part of any amendment. However, our human rights obligations require that the rights of other parties must also be taken into account, as stressed by the Supreme Court in *In the matter of A (A Child)*. Accordingly, we consider that an amendment should also incorporate reference to the human rights of all parties who are affected by the motion to open the sealed packet.

Finally, we believe that amendment to the law can only go so far to protect the rights of the child in this context. How the law is applied in practice will be key here. For that reason, we consider that further consultation, particularly with sheriffs and judges, should be undertaken to establish not only whether amendment to the law is necessary, but also whether other forms of support are necessary to ensure the child's interest in confidentiality is appropriately dealt with in practice.

We hope these comments are helpful and would be happy to clarify anything said above.

Yours sincerely

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⁷ Human Rights Act 1998, s 6.