Review of Part 1 of the Children (Scotland) Act 1995 and creation of a Family Justice Modernisation Strategy

A Consultation

May 2018

Scottish Government
Riaghaltas na h-Alba
gov.scot

Structure

Ministerial Foreword

This consultation seeks your views on potential changes to Part 1 of the Children (Scotland) Act 1995 (the 1995 Act) and on related matters.

Part 1 of the 1995 Act covers parental responsibilities and rights. It also covers contact and residence cases relating to children when parents are no longer together.

At the time, the 1995 Act was seen as ground-breaking and it has served Scotland well.

However, we know that many children, parents and organisations are expressing concerns about how Part 1 of the 1995 Act works in practice.

In preparing this consultation, we have taken full account of *Power Up Power Down*, a participation project with children and young people carried out by the Children and Young People's Commissioner and Scottish Women's Aid.

In this Year of Young People, the Scottish Government is seeking views on how the interests of children and their need to form and maintain relationships with key adults in their lives can be at the heart of contact and residence cases.

The consultation covers a wide range of issues that affect children including how the court considers the views of the child, support for the child, who a child should have contact with and how contact should happen, how children and victims of domestic abuse can be protected and how we can improve the process for children and young people.

This consultation, with its associated partial Impact Assessments, carefully analyses the issues.

You do not have to respond to every question in the consultation if you do not wish to do so.

I look forward to hearing your views.

ANNABELLE EWING
Minister for Community Safety and Legal Affairs

Glossary of Terms used in this consultation.

Note: On-line access to legislation is available at legislation.gov.uk[1]

"1965 Act" – The Registration of Births, Deaths and Marriages (Scotland) Act 1965

"1986 Act" – The Family Law Act 1986

"1995 Act" – The Children (Scotland) Act 1995

"2006 Act" – The Family Law (Scotland) Act 2006

"2008 Act" – The Human Fertilisation and Embryology Act 2008

"2011 Act" – The Children's Hearings (Scotland) Act 2011

"2011 Act Proceedings" – The court proceedings that arise from Children's Hearings, mainly relating to proof of grounds of referral or appeals against Children's Hearings.

"Brussels IIA" – Regulation 2201/2003[2] establishes rules on jurisdiction in matrimonial proceedings and provides for mutual recognition and enforcement of judgements from such proceedings. It also covers jurisdiction and recognition and enforcement of orders relating to parental responsibility (including residence and contact) and provides rules on the return of children abducted to, or wrongfully retained in, other Member States.

"CAFCASS" –The Children and Family Court Advisory and Support Service in England and Wales. CAFCASS' duty is to safeguard and promote the welfare of children through the family justice system.

"Child" – defined in section 1(2) of the 1995 Act as a person under the age of 16 years for the purposes of Parental Responsibilities and Rights apart from in relation to parents providing guidance where a child covers a person under the age of 18 years.

"Child Welfare Hearing" – When contact disputes reach court they are usually heard in Child Welfare Hearings. Child Welfare Hearings are usually held in private with both parties being present. They are intended to allow the judge to speak to the parties direct, identify the issues and establish how the issues are to be dealt with. Child Welfare Hearings are generally informal procedures.

"Child Welfare Reporter" – formerly called "bar reporters". They are court appointed people who prepare reports on the best interests of the child.

[1] http://www.legislation.gov.uk/
[2] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003R2201:EN:HTML

"Children's Hearing" – This is a legal meeting (often just called a Hearing or a Panel), that children and young people are sometimes asked to go to with their families or carers if there are concerns about the child or young person.

"Children's Hearings System" –The Children's Hearings System deals with children and young people in Scotland under the age of eighteen who are in need of help. The two main reasons why the Children's Hearings System will help a child or young person are because they are in need of care and protection or because they have got into trouble with the police.

"Children's Reporter" (sometimes just called a Reporter) –This is the person who decides whether or not a child or young person who has been referred to the Scottish Children's Reporter Administration should attend a Hearing.

"Curator *ad litem*" – An officer of the court who is appointed to represent and protect the interests of a person lacking full capacity, including a child.

"ECHR" – European Convention on Human Rights[3]. An international treaty which protects human rights and fundamental freedoms in Europe. The Scottish Ministers are required to act compatibly with the terms of the ECHR.

"Family law" – covers a wide range of areas including divorce and dissolution, parental responsibilities and rights, contact and permanence and adoption cases.

"FLC" – The Family Law Committee of the Scottish Civil Justice Council. Its role is to keep the relevant civil court rules under review, consider and make proposals for modification and reform, require that family actions and proceedings are dealt with as efficiently as possible, review, develop and promote a case management structure for family actions and to report to the Scottish Civil Justice Council with its recommendations and, where applicable, draft rules of court.

"Grounds of referral" – This is the name given to the statement of facts that set out the reasons for a child being referred to a Children's Hearing under the 2011 Act.

"Hague Convention" – The Hague Convention on the Civil Aspects of International Child Abduction[4] provides a worldwide mechanism for the return of children abducted to, or wrongfully retained in participating countries.

"Legal Aid" – Publicly funded legal assistance allowing people to pursue or defend their rights, or pay for their defence, when they could not otherwise afford to do so. When someone applies for legal aid, their application is subject to statutory tests which cover the merits of the case and the means available to the applicant.

[3] https://www.echr.coe.int/Documents/Convention_ENG.pdf
[4] https://www.hcch.net/en/instruments/conventions/full-text/?cid=24

“Lord President” – the most senior judge in Scotland and the head of the court judiciary.

“National Convener” –The National Convener is an official of Children’s Hearings Scotland (CHS) whose main functions, supported by CHS, are to recruit, monitor and train the 2,900 volunteer national Children’s Panel members across Scotland who conduct and support Children’s Hearings.

“NRS” – National Records of Scotland is responsible for collecting, preserving and producing information about Scotland’s people and history. For example, it carries out functions in relation to birth registration and publishes statistics on birth registration.

“party litigant” – person who represents themselves in court.

“Principal Reporter” – The Principal Reporter is an independent official within the Children’s Hearings System with powers to delegate functions to other officers in particular Children’s Reporters.

“primary legislation” – Acts of Parliament.

“proof” - Final stage of court proceedings at which a sheriff determines a case after hearing evidence.

“PRRs” – Parental Responsibilities and Rights as defined in section 1 of the 1995 Act.

“Relevant Person” – Someone who has the right to attend a Children’s Hearing and get information about it. A Relevant Person can be the child or young person’s parent, grandparent, carer, guardian or the person who looks after them, but they must be deemed to be relevant by a Children’s Hearing if they are not the child or young person’s biological or adoptive mother or father. A pre hearing panel can decide that someone should be treated as a Relevant Person because they have or recently have had, significant involvement in a child or young person’s upbringing. This is called “deeming” someone to be a Relevant Person. Someone with deemed Relevant Person status can have this reviewed at a later date if they no longer have significant involvement with the child or young person.

“Safeguarder”- An independent person appointed by a Children’s Hearing in relation to a child to prepare a report to assist the hearing to make a decision on what is in the welfare of the child.

“SCJC” – The Scottish Civil Justice Council prepares draft rules of procedure for the civil courts in Scotland and advises the Lord President on the development of the civil justice system in Scotland.

“SCRA” – The Scottish Children’s Reporter Administration is a national body focused on children and young people most at risk. Its main responsibilities are to facilitate the work of Children’s Reporters, to deploy and manage staff

to carry out that work and to provide suitable accommodation for Children's Hearings.

"SCTS" – Scottish Courts and Tribunals Service is an independent body providing administrative support to Scottish courts and tribunals and to the judiciary.

"Secondary legislation" – Forms of law that are not primary legislation. This includes statutory instruments.

"Section 11 Order" – An order made by either Court of Session or the sheriff court under section 11 of the 1995 Act in relation to parental responsibilities and rights, guardianship, the administration of a child's property, who a child lives with or who a child should maintain personal relations and direct contact with.

"Sheriff" – A judge in the Sheriff Court. Sheriffs deal with the majority of civil and criminal court cases in Scotland. Sheriffs hear almost all family cases including divorce, child welfare, adoptions and Children's Hearing's cases.

"Sheriff Principal" – The Sheriffs Principal head each of Scotland's six Sheriffdoms. They have responsibility for ensuring the efficient disposal of court business.

"SLAB" – Scottish Legal Aid Board. Manages the legal aid system in Scotland.

"SLC" – The Scottish Law Commission makes recommendations to both UK and Scottish Government to simplify, modernise and improve Scots law.

"UNCRC" – The United Nations Convention on the Rights of the Child[5]. An international treaty which covers all aspects of a child's life and sets out the civil, political, economic, social and cultural rights that all children are entitled to and how adults and governments must work together to make sure all children can enjoy their rights. The Scottish Ministers have duties under the Children and Young People (Scotland) Act 2014 to keep under consideration whether there are any steps which they could take to give better or further effect to the UNCRC requirements.

[5] http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx

Part 1: Introduction and how to respond to this consultation

Introduction

1.01 The 1995 Act is centred on the needs of children and their families. It defines parental responsibilities and rights in relation to children. It sets out the duties and powers available to public authorities to support children and their families and to intervene when the child's welfare requires it.

1.02 This consultation seeks views on reforming part 1 of the 1995 Act which covers parental responsibilities and rights and on creating a Family Justice Modernisation Strategy.

1.03 It also seeks your views on other matters related to family law, such as aspects of the Children's Hearings System. This consultation concentrates on family law as it impacts on children and young people. That is particularly relevant this year as it is the Year of Young People.

1.04 More generally on family law, the SLC has just announced its 10th programme of work. The programme includes a joint project with the Law Commission for England and Wales on surrogacy and an intention to carry out other family law projects[6].

1.05 There are a number of areas which this consultation does not cover as they are not the responsibility of the Scottish Government. These areas include:

- Judicial training. This is a matter for the Judicial Institute;[7]
- Judicial continuity when a case is being dealt with by the courts[8]. The deployment of the judiciary is a matter for the Lord President and the Sheriffs Principal; and
- The potential introduction of specialist sheriffs to hear family cases. Sections 34 to 37 of the Courts Reform (Scotland) Act 2014 give relevant powers in this area to the Lord President and the Sheriffs Principal.

1.06 Rules of Court are a matter for the SCJC and the Court of Session. The SCJC's functions include reviewing the practice and procedure followed in civil proceedings and preparing draft rules of procedure. The Scottish Government can and does submit policy papers to the SCJC and its Family Law Committee. It is open to anybody to provide feedback to the

[6] https://www.scotlawcom.gov.uk/files/1615/1923/2050/News_release_-_Tenth_Programme_of_Law_Reform_Report_No_250.pdf

[7] http://www.scotland-judiciary.org.uk/59/0/Judicial-Training

[8] The FLC recently set up a sub-group to consider Case Management in Family Actions. The sub-group's report, which the SCJC intends to consult on, is at http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/flc-meeting-files/flc-meeting-papers-23-october-2017/paper-5-1a---report-by-flc-sub-committee-on-case-management-in-family-actions-(revised)--private.pdf?sfvrsn=2 . Recommendation 8 at paragraph 4.14 contains a recommendation on judicial continuity. Paragraph 4.14 also said that "the sub-committee notes that insofar as practicable and feasible, the Sheriffs Principal all encourage judicial continuity in their courts."

SCJC on Rules of Court and to suggest changes to them. Details of how to do this are available on the SCJC's website[9].

Why we are consulting

1.07 The Programme for Government 2017-2018 set out the Scottish Government's commitment to consult on reforms to the 1995 Act and also to create a Family Justice Modernisation Strategy.

1.08 Consultation is an essential part of the policy-making process. We will consider the views expressed in response to this consultation along with other available evidence to help inform the Scottish Government's decisions.

Responding to this consultation

1.09 We are inviting responses to this consultation by **7 August 2018.**

1.10 We will be running engagement events with children and young people after the consultation has closed. This is due to the school summer holidays. Any views expressed during these events will be taken into account during the analysis of consultation responses.

Replying on-line using Citizen Space

1.11 Please respond to this consultation using the Scottish Government's consultation platform, Citizen Space. You can view and respond to this consultation online at: https://consult.gov.scot/family-law/children-scotland-act You can save and return to your responses while the consultation is still open. Please ensure that you submit your consultation response before midnight on **7 August 2018**.

Replying by post

1.12 If you are unable to respond online using Citizen Space, please submit your response by post. You must complete and return the Respondent Information Form at Annex A (see "Handling your Response" below) with your response. You can answer the Consultation Questions using Annex B. Please send your response and the completed Respondent Information Form to:

Family Law Review
Room GW-15
St. Andrew's House
Regent Road

[9] http://www.scottishciviljusticecouncil.gov.uk/rule-making (please see under "Requesting Rules and Providing Feedback")

Edinburgh
EH1 3DG

Not accepting responses by email

1.13 We will not accept responses submitted by email.

Handling your response

1.14 Please indicate how you wish your response to be handled and, in particular, whether you are happy for your response to be published.

1.15 If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly.

1.16 If the response comes from an organisation, we will indicate that the organisation has responded to the consultation.

1.17 Annex C contains information on how we will handle your personal data.

1.18 The Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

Next steps in the process

1.19 Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material, or offensive material, we will make responses available to the public at http://consult.scotland.gov.uk. If you use Citizen Space to respond, you will receive a copy of your response by email.

1.20 Following the closing date, all responses will be analysed and considered along with any other available evidence to help us. Responses will be published where we have been given permission to do so.

1.21 After the consultation, the Scottish Government intends to publish a Family Justice Modernisation Strategy outlining existing work to improve how family cases are dealt with and further work planned.

Comments and complaints

1.22 If you have any comments about how this consultation exercise has been conducted, please send them by email to family.law@gov.scot or by hard copy to the address at paragraph 1.12 above.

Scottish Government consultation process

1.23 Consultation is an essential part of the policy making process. It gives us the opportunity to consider your opinion and expertise on a proposed area of work. You can find Scottish Government consultations online: https://consult.gov.uk. Each consultation details the issues under consideration, as well as a way for you to give us your views.

1.24 Consultations may involve seeking views in a number of different ways, such as public meetings, focus groups, or other online methods such as Dialogue (https://www.ideas.gov.scot).

1.25 Responses will be analysed and used as part of the decision making process, along with a range of other available information and evidence. We will publish a report of this analysis for every consultation. Depending on the nature of the consultation exercise, the responses received may:

- Indicate the need for policy development or review;
- Inform the development of a particular policy;
- Help decisions to be made between alternative policy proposals; or
- Be used to finalise legislation before it is implemented.

1.26 While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

Part 2: Obtaining the views of a child

Introduction

2.01 In this section of the consultation, we are seeking your views on:

- The potential removal of the presumption that a child aged 12 or more has sufficient age and maturity to express a view;
- How the court obtains the views of a child in section 11 cases;
- How feedback is provided to a child on the court's decision in section 11 cases; and
- Regulation of child welfare reporters and curators *ad litem* in section 11 cases.

Background

2.02 Article 12 of the UNCRC provides that

"1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

2.03 As mentioned below, Part 1 of the 1995 Act already makes provision on the voice of the child being heard and on the court having regard to any views expressed by the child. The question arising is whether improvements could be made so the child's voice is heard better.

2.04 Ensuring the child's voice is heard does not mean that the views of the child have to be followed in all cases. The court might decide, after considering all relevant factors, that the best interests of the child are met by an outcome that goes against the views of the child.

2.05 In general, children themselves do not appear in person in section 11 cases. However, there are a variety of ways used by the courts to obtain the views of a child. These include:

- A form (F9) to be completed by children, outlining their views;
- Court ordered reports, prepared by child welfare reporters;
- Speaking directly and in private to sheriffs; and
- Representation by a solicitor.

2.06 The court may also order that a curator *ad litem* be appointed to represent the child's interests.

2.07 In preparing this part of the consultation, we have taken account of a recently completed project by Scottish Women's Aid and the Children and Young People's Commissioner Scotland called Power Up/Power Down[10].

2.08 This project explored court ordered contact processes and decisions. It involved 27 children and young people who have lived with domestic abuse. It came up with a number of recommendations. The main ones in relation to how the voice of the child is heard are:

- Removing the presumption that a child aged 12 or above is of sufficient age and maturity to form a view in a case;
- A requirement on the court to actively consider what is in the best interests of a child. There is already a duty on the court to do this under section 11;
- The introduction of a trained person to support a child through the court process; and
- Ensuring a child receives feedback on the outcome of the case.

The potential removal of the presumption that a child aged 12 or more has sufficient age and maturity to express a view

Background

2.09 Section 11(7) of the 1995 Act provides that the court, taking account of the child's age and maturity, shall so far as practicable give the child an opportunity to indicate whether they wish to express their views; give the child an opportunity to express their views if they so wish; and have regard to any such views. Section 11(10) of the 1995 Act goes on to provide that a child 12 years of age or more shall be presumed to be of sufficient age and maturity to form a view.

2.10 There is a similar provision in section 6(1) of the 1995 Act which states that a person must have regard so far as practicable to the views of the child concerned when they are fulfilling a parental responsibility or exercising a parental right. Section 6 also provides that a child 12 years of age or more shall be presumed to be of sufficient age and maturity to form a view.

2.11 Section 27 of the Children's Hearings (Scotland) Act 2011 (the 2011 Act) has an equivalent provision about the responsibility of the Children's Hearing or the sheriff to take into account the views of the child. The 2011 Act also includes the presumption that a child 12 years of age is of sufficient age and maturity to form a view.

2.12 We are seeking your views on whether the presumptions in section 11 and section 6 of the 1995 Act and section 27 of the 2011 Act that a child 12 years of age or more is of sufficient age and maturity to form a view should be removed.

[10] https://www.cypcs.org.uk/policy/domestic-abuse/power-uppower-down

2.13 Some stakeholders have said that this presumption has the practical effect of stopping children under 12 with capacity from expressing their views when they are capable of doing so. This is because the presumption has been interpreted to mean that children under 12 are not capable of expressing their views. This was not the intention when these sections were introduced.

2.14 Sections 11(9) and (10) of the 1995 Act also include a presumption that a child 12 years or more is presumed to be of sufficient age and maturity to form a view on whether they want a lawyer. This presumption is in line with section 2(4A) of the Age of Legal Capacity (Scotland) Act 1991 which provides:

"A person under the age of sixteen years shall have legal capacity to instruct a solicitor, in connection with any civil matter, where that person has a general understanding of what it means to do so; and without prejudice to the generality of this subsection a person twelve years of age or more shall be presumed to be of sufficient age and maturity to have such understanding."

2.15 We are only consulting on removing the presumption that a child aged 12 or more is presumed to have sufficient age and maturity to express a view. That reflects that children can often express views at a young age, particularly if provided with support. This consultation is not proposing that any changes be made to presumptions on when children and young people can instruct a solicitor, which has different implications to just expressing a view.

2.16 In other countries, such as New Zealand, there is no age limit for the courts seeking views of the child. Views are sought based on an assessment by the courts of the child's maturity.

Pros/Cons

2.17 The main advantage of removing the presumption that a child 12 years of age or more is of sufficient age and maturity to form a view is that this may increase the number of children under the age of 12 whose voices are being heard. However, care would need to be taken to ensure that tests of sufficient capacity did not end up being more restrictive than the current provisions.

2.18 Research shows that allowing children to express their views in court cases can lead to better outcomes for the child and can lead to higher rates of satisfaction amongst children of the outcomes[11].

2.19 Removing the presumption would appear to be in line with article 12 of the UNCRC given that it may increase the number of under 12s that are able to express their views to the court. Removing the presumption also

[11] Holt, S. 2016 The voice of the child in family law: A discussion paper *Children and Youth Services Review* 68

appears in line with General Comment 12 by the UN Committee on the Rights of the Child on the right of the child to be heard[12].

2.20 This option would require further work on how the voice of a younger child can be taken into consideration. This includes steps to ensure that young children would not be recipients of distressing materials relating to their case. There could be negative impacts on children where they have expressed a view but the judge decides a different outcome is in their best interests.

2.21 This emphasises the importance of the reasons for decisions being explained to the child as raised in the Power Up/Power Down project. Giving feedback to the child on the outcome of a court case is discussed in paragraphs 2.47-2.53 of this consultation. In some cases as well a child may choose not to express a view.

Question 1): Should the presumption that a child aged 12 or over is of sufficient age and maturity to form a view be removed from sections 11(10) and 6(1) of the 1995 Act and section 27 of the Children's Hearings (Scotland) Act 2011?
Please select only one answer.

(a) Yes – remove the presumption and do not replace it with a different presumption. ☐
(b) Yes –remove the presumption and replace with a new presumption based on a different age. ☐
(c) No – Leave the presumption as it is. ☐
Why did you select your answer above?

How the court obtains the views of the child in section 11 cases

Background

2.22 There are a number of ways that a child can express their views to the court.

The F9 form

2.23 One way the voice of the child is currently taken into account in Scotland is by the form F9[13]. This form is prescribed in court rules and is designed for the child to complete themselves. The form is handed to the

[12] http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsqIkirKQZLK2M58RF%2f5F0vHKTUsoHNPBW0noZpSp5d6MSKiT09ePYFY4cH5tmyyvg3YyYVL7uIXAET9fcgaUxKNMYk2%2faPGF8Uay9K0wAPru

[13] Sheriff Court form: https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/forms/sheriff-court-forms/ordinary-cause-forms/form-f09.doc?sfvrsn=12
The equivalent form in the Court of Session is 49.8N available at: https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/rules-of-court/court-of-session/chap49.pdf?sfvrsn=22

sheriff in a confidential envelope and the sheriff decides whether the content should be disclosed.

2.24 Research in 2000 suggested that in 26% of cases where notice of a legal proceeding was given to the child (intimation)[14], a form F9 was attached to the court process. In the Power Up/Power Down project none of the children involved were aware of the form.

2.25 Following a policy paper by the Scottish Government on the voice of the child in December 2015[15], the FLC are currently working on a revised version of the F9 form to make it more child friendly.

Child welfare reporters

2.26 Another way often used to gain the views of the child is by using a child welfare reporter. Child welfare reporters are appointed by the court to report on the welfare of the child generally or to specifically obtain the views of the child. Most child welfare reporters are family lawyers, but some come from other backgrounds such as social work. Child welfare reporters are discussed in more depth at paragraphs 2.54 to 2.75 of this consultation.

Speaking to the judge or sheriff

2.27 Judges can also speak directly with a child. Use of this option varies from country to country. For example, in New Zealand, judges are encouraged to speak with the child directly. However, in Australia, judges generally do not engage with the child[16].

2.28 In Scotland, a sheriff can decide whether they want to speak directly to a child. Research from 2004 found that 17% of judges in Scotland interviewed were willing to speak directly with a child[17]. The majority of the children involved in the Power Up/Power Down project said that they were keen to talk directly to the sheriff involved in their case.

Approaches in other jurisdictions

2.29 In a number of countries either solicitors or social workers are employed to seek the views of a child. Generally, the lawyers or social workers meet with the child and produce a report that indicates their views on what would be in the best interests of the child. This is similar to the role of a child welfare reporter in Scotland.

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[14] Monitoring the Children (Scotland) Act 1995 Scottish Government 2000 http://www.gov.scot/Resource/Doc/156495/0042016.pdf

[15] http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/flc-meeting-files/flc-07-december-2015-meeting-papers/paper-5-1a-hearing-the-voice-of-the-child-in-family-cases---sg-paper.pdf?sfvrsn=2

[16] Kay.E, Tisdall.M, Bray.R, Marshall.K & Cleland.A 2010. Children's participation in family law proceedings: A step too far or a step too small. *Journal of Social Welfare and Family Law* 26(1) p17-33.

[17] Kay.E, Tisdall.M, Bray.R, Marshall.K & Cleland.A 2010. ibid

2.30 In Australia, the most common method is through a report prepared by a family consultant and judges very rarely meet with a child. A family consultant is a psychologist or social worker and they meet with a child and each parent. Their report includes the views of the child and their recommendations about what is in the best interests of the child. There is also the option for the court to appoint an Independent Children's Lawyer who is required to decide what is in the best interests of the child and are not the child's legal representative. This role is similar to the role played by a curator *ad litem* in Scotland[18].

2.31 In New Zealand, a lawyer is appointed in every children's case that is likely to proceed to hearing unless the lawyer would serve no useful purpose[19]. The lawyer is there to report on the best interests of the child. However, they have to meet with a child to find out their views except in exceptional circumstances. The lawyer also has the responsibility of acting as the means of communication between a child and the judge and has to explain the content of any expert report and the outcome of a court judgement to the child.

2.32 In England and Wales, the Family Court Advisors employed by CAFCASS are social workers and are responsible for carrying out initial safeguarding checks when a case is lodged in the court. They also prepare reports for the court if ordered to do so by a judge. In preparing the report, they will meet with both parents, any other relevant adults and the child involved. The report focuses on the best interests of a child rather than necessarily the views of a child.

Child support workers in section 11 cases in Scotland

2.33 Power Up/Power Down also noted that in contact cases:

- It is "Good to have adults involved who are helping – but not too many – and the children need to know what they are there for."
- "Children need to know what is happening. When, why and what is coming next."
- "Children need to know why decisions have been made – and they need that information either directly or explained through a trusted adult."
- "Some children need extra help to talk about their worries and experiences."
- "Everything needs to be clearer: language needs to be right for children, visuals need to be used; helpers need to be there to help understanding if needed."
- "Opening up to someone you already have a relationship with is much better than meeting someone as one-off."

[18] Fernando. M 2014 Family Law Proceedings and the child's right to be heard in Australia, the United Kingdom, New Zealand and Canada*. Family Court Review* 52(1) p46-59
[19] Fernando. M ibid

- "Children need to be told what the decisions made are, why they have been made and what that means for the child."

2.34 One potential option for meeting these concerns would be child support workers. We are aware that workers of this nature (sometimes referred to as children's advocacy services or children rights officers) are already in place in some parts of Scotland[20]. However, there is not a uniform service across the country.

2.35 In relation to Children's Hearings, implementation of the relevant sections of the 2011 Act relating to children's advocacy services for these cases is currently being taken forward and could potentially be extended at a cost.

2.36 Child support workers in section 11 cases:

- Could be managed by a contractor appointed by the Scottish Government (similar to the process for safeguarders in the Children's Hearings System explained in paragraph 2.66);
- Could advise the child about the court process and help the child provide views to the court (eg by sitting in on any interviews with a child welfare reporter);
- Would not enter formally into the court process and would not be able to act as a legal representative for the child and would not have to be legally qualified. They would be there to support the child and explain things to the child rather than be a party to the court case; and
- Could have the duty of outlining court decisions to the child (this issue is explored in more detail in paragraphs 2.47 to 2.53 below).

Pros and Cons

2.37 We consider it is important that if a child is able to do so and wishes to do so that they should be given every opportunity to be heard. That is in line with article 12 of the UNCRC and with the existing provisions of section 11(7(b) of the 1995 Act. Even young children, with support if necessary, are capable of expressing views.

The F9 form

2.38 The Form F9 is a useful tool for courts to receive the views of a child. It may perhaps also be a less stressful way for a child to offer views. There is, for example, no need to go to the court as there would be if the child spoke directly to the sheriff.

2.39 The form needs to be child friendly and tailored to the needs of the child. As indicated above, the FLC are currently working on a revised version of the form to make it more child friendly.

[20] See, for example, http://www.avenue-info.com/index.php/children/consulting-children

2.40 The child may need support when completing the form. There is a risk that a parent may influence a child in their completion of the form.

2.41 During the recent work by the FLC on improving the form F9, some children said that they would prefer other ways of expressing their views rather than a form[21].

Child welfare reporters

2.42 The option of using child welfare reporters who may be either a solicitor or a social worker has the benefit of it being an independent person who is seeking the views of a child and offering recommendations on the best outcomes for the child. There is a further discussion in paragraphs 2.54 to 2.75 below about the regulation of child welfare reporters (and of curators *ad litem*).

Speaking directly to the judge or sheriff

2.43 Children may feel empowered by speaking directly to the judge or sheriff as they are speaking to the decision maker. However, a child would need to be adequately supported to do this and would need to be able to understand the court process.

2.44 A judge or sheriff will, inevitably, only be involved in a child's life for a short period of time. And a child speaking directly to the judge or sheriff does take up judicial time.

Child support workers

2.45 As outlined above, child support workers could help explain the court process to the child, support the child when the child offers views to the court and provide feedback to the child on the court's decision.

2.46 However, establishing a system of child support workers for section 11 cases across Scotland:

- would have significant cost implications. As a broad estimate, two per local authority area costing around £50,000 a year each would cost around £100,000 a year per local authority area or £3.2 million a year

[21] For example, the report on the Children's Parliament consultation on the proposed changes to the F9 form said that "the children thought that a form may not be the best way for some children to express their views and it would be easier for them to speak with someone directly". http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/flc-meeting-files/flc-meeting-papers-08-may-2017/paper-4-1c-children-39-s-parliament-feedback-report-on-form-f9.pdf?sfvrsn=2
See also comments by the Power Up/Power Down young people and children http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/flc-meeting-files/flc-meeting-papers-08-may-2017/paper-4-1d-scottish-women-39-s-aid-and-cypcs-feedback-report-on-form-f9.pdf?sfvrsn=2
Comments by Clan childlaw clients on the proposed changes to the F9 form are at http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/flc-meeting-files/flc-meeting-papers-08-may-2017/paper-4-1f-clan-childlaw-feedback-on-form-f9.pdf?sfvrsn=2

for Scotland as a whole. However, we appreciate that there might be variations between local authorities;
- may lead to more people being involved in the court case which may not be in the child's best interests;
- would raise issues of training and potential conflicts of interest, supervision and accountability; and
- would take some years to set up.

Question 2): How can we best ensure children's views are heard in court cases?
Please select as many answers as you want.

a) The F9 form. ☐
b) Child welfare reporters. ☐
c) Speaking directly to the judge or sheriff. ☐
d) Child support workers. ☐
e) Another way (please specify). ☐
Why did you select your answer(s) above?

How feedback is provided to a child on the court's decision in section 11 cases

Background

2.47 There is no requirement at present for any person to provide feedback to a child on a court's decision. As a result, in most cases feedback is not provided to a child as they are not a party to the proceedings. There may be feedback from the parents or from any support worker the child may have had.

2.48 The Power Up/Power Down project found that children are keen to know why decisions have been made and said that information should be explained to them either directly or through a trusted adult.

2.49 Feedback needs to be in language that is appropriate to the age and maturity of the child. Feedback is especially important where the court reaches a decision that is not in line with a child's views.

2.50 One option, as discussed in the previous section of the consultation, would be for a person such as a child support worker to provide feedback to the child on the court's decision. The child support worker would need to apply to the court to receive a copy of the outcome of the decision.

2.51 Another option would be for the child welfare reporter to be given this responsibility as they have already been seeking the views of the child.

2.52 We are aware of a recent case in Scotland where the sheriff wrote to the children to explain the decision of the court[22].

Pros/Cons

2.53 As matters stand, there is no duty on anybody to explain the court's decision in a section 11 case to a child. This may perhaps be a function for a child support worker or child welfare reporter. The benefit of this being done by either of these people is that a child is likely to have built up a relationship with them and they may be best placed to explain the outcome of the case. However, a drawback of using a child support worker is that providing a trained person to support a child would require significant investment as this currently is not available universally across Scotland. Providing feedback could be added to the functions of child welfare reporters if the role is set out in legislation as discussed in paragraphs 2.54 to 2.75.

Question 3): How should the court's decision best be explained to a child? Please select only one answer.

a) Child support worker. ☐
b) Child welfare reporter. ☐
c) Another option (please specify). ☐
Why did you select your answer above?

Regulation of child welfare reporters and curators *ad litem* in section 11 cases

Background

2.54 Child welfare reporters are appointed by the court to report on the welfare of the child generally or to obtain the views of the child. Curators *ad litem* are appointed by the court to represent someone who lacks capacity such as a child. We understand there are approximately 400 child welfare reporters in Scotland appointed across the six sheriffdoms.

2.55 People seeking to be a child welfare reporter may be appointed to lists held by the Court of Session and by the six Sheriffs Principal (for the Sheriff Courts in their respective Sheriffdom). The presiding judge or sheriff can then appoint a child welfare reporter on the appropriate list to report on a case.

2.56 Individuals can apply to the Sheriff Principal of a sheriffdom to be added to the lists of child welfare reporters and curators *ad litem*. The appointment criteria is set by each Sheriff Principal. For example, we are aware that one Sheriff Principal requires all child welfare reporters to have

[22] See, for example, the appendix to this note: https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2017scgla46.pdf?sfvrsn=0

five years' practical experience of family law whilst others only require a person to have extensive family and child law experience.

2.57 Most child welfare reporters are practising solicitors and many of them are family lawyers. However, some have other backgrounds such as in social work or in teaching.

2.58 Generally, the appointments are not for a fixed period of time and finish when a person asks to be removed from the list. The procedure for removing a child welfare reporter from office is a matter for each Sheriff Principal. We are not aware of any cases where a child welfare reporter has been removed from the list for misconduct. Complaints against child welfare reporters are infrequent and tend to be raised with the Sheriff Principal.

2.59 We understand that child welfare reporters do not have regular appraisals or any other monitoring or review except to ensure that their Protecting Vulnerable Groups registration is maintained.

2.60 In general, there is no requirement for any specific training. However, we are aware that certain Sheriffs Principal have organised training for their child welfare reporters. The Scottish Government wrote last year to the Faculty of Advocates, the Law Society of Scotland, the Family Law Association and Social Work Scotland to ask what they could do to provide training for child welfare reporters.

2.61 From 2013 – 2015, the Scottish Government chaired a working group to examine the role of child welfare reporters[23]. This working group led to a number of outputs including a guide to the child welfare report[24], instructions to child welfare reporters[25], changes to court rules (more on this below), a change in the name from Bar Reporters to child welfare reporters and proposed training requirements[26].

2.62 In October 2015, changes were made to the Ordinary Cause Rules for family cases in the sheriff court in relation to the use of child welfare reporters. A new form of interim order or decision (interlocutor) was introduced for sheriffs to complete when requesting a child welfare report. In the interlocutor making the appointment, the sheriff must specify exactly what the child welfare reporter will do and what their report should contain. At the same time the Ordinary Cause Rules were also amended to create a presumption that, so far as meeting the costs of a child welfare report

[23] http://www.gov.scot/Topics/Justice/law/17867/reporters

[24] http://www.gov.scot/Topics/Justice/law/17867/reporters/child-welfare-guide
This guide is currently being revised and a guide for children and young people is being prepared as well.

[25] http://www.gov.scot/Topics/Justice/law/17867/reporters/Instructions-to-reporters

[26] An exchange of correspondence between the Scottish Government, the Lord President's Office and the Sheriffs Principal on the proposed training scheme for reporters is at http://www.gov.scot/Topics/Justice/law/17867/reporters/letters-judiciary-Sep-16

were concerned, parties would share this equally in the first instance unless cause could be shown to do otherwise.

2.63 In 2017/18, figures from SLAB showed that it funded approximately 1596 child welfare reports for contact and residence cases at a total cost of £3.3m million. This is a 27% reduction on the costs in the previous year. This reduction appears to be linked to the new court rules on child welfare reporters on providing reporters with more direction. The report by SLAB shows that use made of child welfare reporters across Scotland varies considerably and there is no consistent pattern to their use[27].

2.64 Being a child welfare reporter is an important, difficult and challenging job. We are of the view that regulation is required to ensure that reporters are fully trained in the tasks they need to carry out and to ensure that the quality of reports is consistently high.

2.65 We are therefore seeking views on options to change the current system. We consider that there are two broad options in this area. Both would involve laying down in primary legislation what the role of reporters is (i.e. to obtain the voice of the child or to report more generally on the child). Both options would also involve the repeal of section 11 of the Matrimonial Proceedings (Children) Act 1958[28]on local authority reporters as regulation of child welfare reporters would also extend to local authority reporters.

2.66 The first possible approach would be the creation of new arrangements that would manage and provide training for child welfare reporters. This could involve arrangements similar to what happens now in relation to safeguarders in the Children's Hearings System. In 2013, responsibility for safeguarder recruitment, appointment and administration was transferred from local authorities to the Scottish Ministers. A national voluntary organisation, Children 1st, was awarded the contract to administer a national Safeguarders Panel.

2.67 The second possible approach would build more on existing arrangements. Under this option:

- The proposed primary legislation would contain powers for the Lord President and the Sheriffs Principal to appoint people to the lists so they can carry out the functions of a child welfare reporter when asked to do so by the court;
- When appointing persons to the lists, the Lord President and the Sheriffs Principal would have to be satisfied that the reporters met standards [eg qualifications, experience and training] laid down by regulations; and
- The Lord President and the Sheriffs Principal could then remove people from the lists if they cease to meet the standards or if, for

[27] http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/flc-meeting-files/flc-meeting-papers-23-october-2017/paper-4-2---report-by-slab---child-welfare-reporters.pdf?sfvrsn=2
[28] https://www.legislation.gov.uk/ukpga/Eliz2/6-7/40/section/11

example, a person dies, retires, asks to be removed or is no longer a fit and proper person to be a child welfare reporter.

2.68 This part of the consultation has focused primarily on child welfare reporters as they were the subject of our working group. However, if either of the options to regulate child welfare reporters were taken forward then we would propose that this be extended to curators *ad litem* appointed in relation to cases under section 11 of the 1995 Act.

2.69 If statutory provision should be made in respect of curators *ad litem* appointed under section 11, we might also take the opportunity to change the name of the appointment from curator *ad litem* to something like Child Interests Solicitor. The term curator *ad litem* is likely to mean little to children, or litigants. We consider that language used in court should be as clear, precise and simple as possible, to help children and litigants.

Pros/Cons

2.70 There are number of advantages and disadvantages of the options outlined above.

2.71 The main advantage of both options is that they would ensure that child welfare reporters meet a minimum standard upon appointment and could be removed if they don't meet the standard. This would be in the best interests of the child.

2.72 The first option would be a more expensive option as it would involve new arrangements for the appointment of child welfare reporters. This may also lead to certain child welfare reporters and curators *ad litem* resigning as this occurred when the safeguarders system was centralised.

2.73 However, the first option would ensure consistency of the service and that child welfare reporters and curators *ad litem* are appropriately trained, which would benefit children. This could also allow some standardisation of the costs of child welfare reports. It would also remove costs in this area from the legal aid budget. This option would allow the cost of child welfare reports to be closely controlled.

2.74 The first option could mean that those individuals who do not currently qualify for legal aid for a child welfare report may be entitled to the child welfare report for free. However, there are relatively few cases where the child welfare report is not funded by legal aid so the cost implications of this would be low.

2.75 The second option (building on the existing procedure) would ensure more consistency across Scotland, which would be in the best interests of the child. However, this option would not allow for any standardisation of the costs of the child welfare report. In addition, there would be resource implications for the SCTS in relation to the management of the lists.

Question 4): What are the best arrangements for child welfare reporters and curators *ad litem*?
Please select only one answer.

a) There should be no change to the current arrangements. ☐
b) A new set of arrangements should be put in place that would manage and provide training for child welfare reporters. (option 1 described above). ☐
c) The existing arrangements should be modified to set out minimum standards for child welfare reporters and allow the Lord President and Sheriffs Principal to remove them from the lists if the reporters cease to meet the necessary standards. (option 2 described above). ☐
d) Another option (please specify) ☐

Why did you select your answer above?

Part 3: Commission and diligence

Background

3.01 We are seeking your views on whether changes are needed in relation to the law on commission and diligence in cases under section 11 of the 1995 Act.

3.02 Commission and diligence is the procedure for recovering and preserving documents or other material for use in a court case and also covers the taking of evidence.

3.03 In particular, we would like your views on whether specific legislation should be made in relation to commission and diligence in cases under section 11 of the 1995 Act. This legislation would lay down that a court, in deciding whether confidential information should be provided to a party seeking it, should only do so where this is in the best interests of the child and after the views of the child have been taken into account. The views of the child could only be taken into account where the child has sufficient age and maturity to express a view.

3.04 There is a variety of existing legislation on recovering and preserving documents including:

- The Administration of Justice (Scotland) Act 1972. This made provision on the Court of Session and the Sheriff Court being able to order the recovery of documents which are relevant to an existing case or a likely forthcoming case. The 1972 Act was without prejudice to the existing powers of the Court of Session and the Sheriff Court in this area;
- Section 10 of the Court of Session Act 1988 made some provision on the Outer House of the Court of Session granting commission and diligence;
- Chapter 28 of the Sheriff Court Ordinary Cause Rules makes provision on procedures in the sheriff court for recovery of evidence. The Ordinary Cause Rules also make provision on forms to be used for this purpose;
- Chapter 35 of the Court of Session Rules make provision on the recovery of evidence in the course of on-going court proceedings; and
- Chapter 64 of the Court of Session Rules makes provision on applications for an order under section 1 of the 1972 Act where an action has not already started.

3.05 Local authorities and other organisations – including the NHS and the voluntary sector – may provide confidential services to children including during a parental separation. In some cases, a child will have experienced domestic abuse. Information held by local authorities and others can, in theory, be produced as evidence in a civil court case relating to the child. For example, if a child's parents have asked the court to decide which parent a child should live with, one parent may ask the court to look at

information held by an NHS psychologist about the child which the child provided in confidence.

3.06 Children and young people may reveal personal and private information to a support worker that they do not wish to be shared with anyone else. A child may not feel comfortable in revealing information if they know that the information may be used in a court case. There is also a risk that information may be shared with someone who is alleged to have abused the child, which may put children in danger.

3.07 However, support workers cannot guarantee absolute confidentiality. There may be good reasons why confidential information relating to a child needs to be shared with the court. For example, the court needs all relevant information and evidence to enable it to come to an informed decision.

3.08 The Scottish Government held a roundtable discussion in December 2015 and sent a letter seeking views on commission and diligence to a number of key stakeholders in March 2016.

3.09 The majority (but not all) of stakeholders were of the view that the legislation needed to be changed to ensure that confidential documents are only disclosed where this is in the best interests of the child. Stakeholders also suggested that any revised legislation could specify that the views of the child must be taken into account. Any change could perhaps be done by amending the Administration of Justice (Scotland) Act 1972.

<u>Pros/Cons</u>

3.10 There are a number of benefits to specifying that courts must take into account the best interests of the child and take the child's views into account. The main benefit is that children may be more willing to share information that will improve their wellbeing and health with organisations if they are reassured that this will not be shared with a court unless this is in their best interests.

3.11 However, there are also arguments for retaining the legislation as it is currently framed. A court needs all the information available to make an informed decision. In addition, some stakeholders have said previously that the current law in this area works and no changes are required. A court must already weigh up the rights of the child in maintaining the confidentiality of information before deciding whether it should be disclosed and, in that process, would consider the best interests of the child and may take the child's views into account.

Question 5): Should the law be changed to specify that confidential documents should only be disclosed when in the best interests of the child and after the views of the child have been taken into account?

Yes ☐
No ☐
Why did you select your answer above?

Part 4: Contact

Introduction

4.01 This part of the consultation is on the subject of a child's contact with various individuals who are important to them. Section 11 of the 1995 Act give powers to the Court of Session and Sheriff Court to make an order setting out the arrangements for maintaining personal relations and direct contact between a child and a person whom the child is not living with.

4.02 Article 8 of the UNCRC provides that a child has the right to preserve family relations. The Implementation Handbook to the UNCRC[29] lists grandparents and siblings as family relations.

4.03 This part of the consultation seeks your views on:

- Child contact centres;
- Child relationships with family members generally;
- Child contact with grandparents;
- Child contact with siblings;
- Contact between children who are looked after away from home; and
- Complying with contact orders.

Child Contact Centres

Background

4.04 Child contact centres can play an essential role in helping children whose parents have separated to maintain relationships with the parent they no longer live with or with other family members. We discuss this later in the consultation but there is evidence to show that a child benefits from both parents being involved in their life.

4.05 There are currently 44 contact centres across Scotland which are managed by Relationships Scotland. In addition, there are four independent centres in Aberdeen, Inverclyde, Paisley and Glasgow.

4.06 The contact centres managed by Relationships Scotland all follow National Standards and Practice Procedures for Child Contact Centres. Relationships Scotland has policies which cover issues such as domestic abuse, child protection, equality and diversity, confidentiality and vulnerable adults. Some of the independent contact centres have their own guidance on practices and procedures.

4.07 The contact centres offer a mixture of supported contact and supervised contact. Supported contact is where there is no significant risk to the child and therefore contact centres only record that the contact took place and not details of how it went. Supervised contact is where contact

[29] https://www.unicef.org/publications/index_43110.html

takes place in the constant presence of an independent person who observes and ensures the safety of those involved.

4.08 In 2016/17, 1427 children and 1309 families used the contact centres managed by Relationships Scotland for both supervised and supported contact. Approximately 24 to 30 children per year use the Paisley Child Contact Centre. In 2017, 76 children from 58 families used the Inverclyde Child (Family) Contact Centre. 376 children used the Promoting Positive Contact centre in Glasgow between February 2017 and February 2018. The VSA contact centre in Aberdeen facilitated contact for 23 families in 2015/16.

4.09 Contact centres can also be a venue to pick up and drop off children who are spending time with an adult who they do not live with. Staff can support the handover of the child if the adults do not want to meet each other.

4.10 Use of a contact centre can be ordered by a court or people may be referred to a contact centre by a body such as a social work department. Some centres accept self-referrals. Data from Relationships Scotland shows that in 2016/17 47% of contact cases were self-referral, 14% of cases were ordered by courts, 24% were referred by solicitors, 10% were referred by agencies such as NHS and Social Work and 5% other. Two of the current 24 families using the Paisley Child Contact Centre are self-referrals. In 2017, Inverclyde Child Contact Centre had four self-referrals, four referrals from social work departments, 13 arranged through lawyers and 37 ordered by courts. Between February 2017 and February 2018 the Promoting Positive Contact centre in Glasgow had 316 contacts ordered by courts and 60 self referrals or private arrangements.

4.11 There may be charges for using a contact centre and these vary from centre to centre. Those centres managed by Relationships Scotland have broad guidelines agreed at a national level on charges. Where charges are made, these are often funded by legal aid.

4.12 There is a public petition in the Scottish Parliament[30] calling for a review of the current system in relation to the operation of child contact centres to ensure the rights, safety and welfare of children are paramount.

4.13 It would be possible to regulate contact centres. This would involve primary legislation giving the Scottish Ministers powers to make regulations in a number of areas such as:

- Setting minimum standards for the accommodation used by contact centres;
- Laying down training requirements for staff around key issues including domestic abuse; and
- Laying down a complaints procedure that individuals can use.

[30] http://www.parliament.scot/GettingInvolved/Petitions/PE01635

4.14 There could also be independent inspection of child contact centres by a body such as the Care Inspectorate.

4.15 In England, Wales and Northern Ireland, CAFCASS will only refer an individual to a contact centre which is a member of the National Association of Child Contact Centres[31] (NACCC). This requires accreditation which shows that the centres have met agreed national standards. This accreditation is renewed every three years. National standards are set on: contact centre management; centre staffing; training; confidentiality; domestic abuse and health and safety issues.

Pros/Cons

4.16 There are advantages and disadvantages of regulating contact centres. The main advantage is that there would be clear standards for contact centres to follow. This could benefit children and their parents.

4.17 In relation to potential disadvantages, setting minimum standards across the board could lead to some local contact centres shutting if, for example, they could not meet minimum accommodation standards. This could have a detrimental effect on children as they may have to travel further to have contact.

4.18 Relationships Scotland are already committed to improving standards and have recently undertaken a benchmarking exercise. They are working with the NACCC on this.

4.19 There would be significant cost implications to regulating contact centres. Some of the proposed regulation would build on existing work by the contact centres. However, additional requirements in relation to the accommodation (bearing in mind that contact centres may use premises originally designed for another purpose and that centres may only be open for a few hours per week) would have costs. Similarly, additional requirements in relation to training would have costs.

4.20 Any regulation might need to take account of the different roles carried out by staff and volunteers at centres. There would also be costs in relation to any independent inspection regime.

4.21 We would also need to be clear exactly what would be regulated. The proposal being put forward in this consultation is that only places used wholly or mainly as child contact centres when there is a dispute between private parties (such as parents) would be regulated.

[31] https://naccc.org.uk/

Question 6): Should child contact centres be regulated?

Yes ☐
No ☐
Why did you select your answer above?

Child relationships with family members generally

4.22 When parents of a child split up or where children are cared for outwith the family home, children should be able to grow up with or continue to have relationships with family members, other than the parents themselves, who are important to them.

Question 7): What steps should be taken to help ensure children continue to have relationships with family members, other than their parents, who are important to them?

Child contact with grandparents

Background

4.23 According to figures from Growing Up in Scotland, close to 99% of children aged six in the survey had at least one living grandparent and 80% had three or more living grandparents[32].

4.24 Many children have close relationships with people other than their parents. This can include grandparents, sisters, brothers, aunts, uncles and cousins. Grandparents can play a major role in many families in relation to bringing up children.

4.25 Research has shown that grandparents may be an important source of support for their grandchildren particularly in times of a family crisis such as a parental divorce.[33] Some studies have also shown that a close relationship with grandparents can improve the way children manage their emotions after a parental divorce.[34]

4.26 Where family relationships break down, section 11 of the 1995 Act allows any person who does not have parental responsibilities or rights but who 'claims an interest' in the child to apply to the court to seek an order in

[32] http://www.gov.scot/Publications/2012/05/6645
[33] Jappens M. Van Bavel J. 2015 Parental divorce, residence arrangements, and contact between grandchildren and grandparents *Journal of Marriage and Family* volume 78 issue 2 p451-467.
[34] Lussier, G and Deater-Deckard K. 2002 Support across two generations: Children's closeness to grandparents following parental divorce and remarriage. *Journal of Family Psychology* vol 16. No 3 p363-376

relation to contact. Therefore, a grandparent can already make an application to the court to seek contact with their grandchild.

4.27 The Charter for Grandchildren[35] was introduced in 2006, and has recently been republished. This aims to highlight the role of the wider family. It says that grandchildren can expect amongst other things to know and maintain contact with their family except in very exceptional circumstances.

Proposal in relation to Grandparents

4.28 We are seeking your views on whether there should be a presumption in section 11 of the 1995 Act that children should have contact with their grandparents. If any such presumption should be added to section 11, the starting position of the court would be that children benefit from contact with their grandparents. Any such presumption would be rebuttable.

4.29 If any presumption that children benefit from contact with their grandparents should be added to section 11, we would assume this would also be influential in contact disputes which are settled by private agreement outwith court.

4.30 A contact right for grandparents was considered in the lead-up to the Family Law (Scotland) Act 2006 (the 2006 Act). The Policy Memorandum prepared by the then Scottish Executive for the Bill which became the 2006 Act outlines why the then Scottish Executive decided at the time against any legislative changes in this area[36].

4.31 There are some examples in other countries where a child's right to have contact with their grandparents is set out in legislation. Some provinces in Canada have passed legislation to support contact between a child and their grandparents. In New Zealand, the Care of Children Act 2004[37] extends the group of people who could apply for parenting orders to include any other person who is a member of the child's family, 'whanau', or other culturally recognised family group. In Australia, the law is based on the principle of the best interests of the child and provides for continuing contact with any persons significant to the care of the child which includes grandparents.

Pros/Cons

4.32 The benefits of introducing such a presumption include:

- Evidence shows that in certain circumstances contact with grandparents can reduce stress and is beneficial for grandchildren; and
- A presumption might reflect the role many grandparents play in bringing up their children.

[35] http://www.gov.scot/Publications/2018/04/3306
[36] http://www.parliament.scot/S2_Bills/Family%20Law%20(Scotland)%20Bill/b36s2-introd-pm.pdf (Paragraphs 4.23 to 4.33 discuss grandparents).
[37] http://www.legislation.govt.nz/act/public/2004/0090/67.0/DLM317233.html

4.33 However, there are a number of arguments against introducing any such presumption including:

- It might cut across the provisions of the legislation that the welfare of the child is paramount; on no order being made unless the court considers it better for the child that an order be made than that none should be made at all; and on the child expressing views;
- In some cases, it is possible that contact with a grandparent can lead to contact with an unsuitable parent;
- A presumption could lead to more people having rights over a child which may go against the key principle that the welfare of the child is paramount;
- A child's close relationship may be with someone other than a grandparent;
- A grandparent can already seek contact with their grandchild by applying to the court; and
- No case is the same and each case should be considered on its own merits.

Question 8): Should there be a presumption in law that children benefit from contact with their grandparents? Yes ☐ No ☐ Why did you select your answer above?

Child contact with siblings

Background

4.34 Many families have complex structures with full, half and step siblings. Research has shown that children's perception of brothers and sisters and who is in their family is rooted as much in their living experience as in biology[38].

4.35 "Sibling" could include full sibling, half sibling, step sibling by means of marriage or civil partnership, sibling through adoption, and any other person the child regards as their sibling and with whom they have an established family life. For example, a sibling might include a foster child, living in the same family.

4.36 Scottish Government Guidance on Looked After Children[39] recognises the need for contact with siblings living outwith the family home as being as important as contact with parents.

[38] http://www.gov.scot/Publications/2011/03/10110037/0
[39] http://www.gov.scot/Publications/2011/03/10110037/0

4.37 It is possible for a person to have contact with a sibling by seeking an order from a court. Section 11(2)(d) of the 1995 Act provides that the court may make an order regulating the arrangements for maintaining personal relations and direct contact between a child under 16 and a person with whom the child is not, or will not be living.

4.38 However, we are aware that there may be confusion over whether a court can make an order under section 11 of the 1995 Act to grant a person contact with a child without giving that person PRRs. Section 11(2)(b) of the 1995 Act provides that a person on whom PRRs are imposed must be at least 16 (or a parent of the child).

4.39 We are seeking views on whether to amend section 11 of the 1995 Act to make it clear that a person under the age of 16 may apply for contact with a sibling without being granted PRRs.

4.40 We discuss the broader option of amending section 11 of the 1995 Act to clarify that a court may award contact to any individual without awarding PRRs in part 7 of this consultation.

4.41 If the contact order should be breached, enforcement would be in line with usual procedures – i.e. raise an action seeking to hold the breacher in contempt of court. Paragraphs 4.45 - 4.63 of this consultation discuss enforcement of contact orders more generally.

<u>Pros/Cons</u>

4.42 The main advantage of clarifying the law would be that this could increase the number of people under the age of 16 who are granted contact with their siblings.

Question 9): Should the 1995 Act be clarified to make it clear that siblings, including those aged under 16, can apply for contact without being granted PRRs?

Yes ☐
No ☐
Why did you select your answer above?

Contact between children who are looked after away from home

4.43 For children in care the importance of maintaining established family life between children who have lived together is recognised in the Looked after Children (Scotland) Regulations 2009 and subsequent Guidance. The Guidance[40] says that:

"Local authorities should try to ensure that siblings are placed together, except where this would not be in one or more of the children's best interests. Where this proves impossible, they should, wherever possible be placed near each other. Where it is not in children's best interests for them to be placed together or this has proved unachievable, then it may be appropriate for frequent contact to be maintained."

4.44 We are seeking your views on whether anything can be done to strengthen the existing guidance, to help ensure a child can keep in touch with other children they have shared family life with.

Question 10): What do you think would strengthen the existing guidance to help a looked after child to keep in touch with other children they have shared family life with?

Complying with contact orders

4.45 We are seeking your views on how contact orders should be enforced.

Background

4.46 Currently, if a person believes a contact order is breached the person can go back to court and either seek a variation of the contact order or seek to hold the person breaching the contact order in contempt of court.

4.47 The Scottish Government's understanding is that the penalties for contempt of court following a breach of a contact order are laid down in section 15 of the Contempt of Court Act 1981. This provides for civil cases that:

- The maximum penalty which may be imposed for contempt of court by the Court of Session is two years' imprisonment or an unlimited fine or both.
- The maximum penalty which may be imposed for contempt of court by the sheriff court is three months' imprisonment or a fine of level 4 on the standard scale or both.

4.48 This area has attracted considerable attention and there has been previous research and work. In relation to research, a survey in 2006 of sheriff clerks' perspectives of child contact enforcement suggested that issues of non-compliance were very low and were reported as generally being 5% or less of family actions or court business.[41] The then Scottish

[40] http://www.gov.scot/Publications/2011/03/10110037/0
[41] http://www.gov.scot/Publications/2006/10/16092253/2

Executive also published a literature review in 2007 on "Dealing With Child Contact Issues: A Literature Review of Mechanisms in Different Jurisdictions".[42] There has also been research on enforcement in England and Wales[43] and a comparative study on enforcement across the EU[44].

4.49 During the Parliamentary passage of what became the 2006 Act, the then Scottish Executive announced a Family Contact Facilitator pilot project. The Executive at the time said that data on contact and contact enforcement was not reliable and a pilot project to test whether access to a facilitator would assist sheriffs in family cases where there was breach, or the risk of breach, of a contact order could be useful.

4.50 A procurement exercise to secure a host organisation which would recruit and manage the post-holders in two Sheriff Courts was run. However, the procurement exercise did not attract a tender which met the specifications. It was therefore not possible to let the contract and proceed with the pilot.

4.51 An amendment was also added at stage two of the Bill which became the 2006 Act. This required the court when making or varying a contact order to attach a notice warning of the consequences of failing to comply with the contact order. This was aimed as a deterrent for non-compliance. This amendment was removed at stage 3 of the Bill[45] as it was seen as possibly being unduly intimidating to warn parents, before either of them had done anything wrong, of the consequences of non-compliance.

4.52 In 2014, there was a public petition in the Scottish Parliament which, amongst other points, discussed enforcement of contact orders[46]. The Scottish Government held a roundtable discussion in January 2017 with a number of stakeholders on enforcement of contact orders[47]. The majority of the stakeholders agreed that it is inappropriate to jail someone for failing to obey an order.

4.53 There have also been relevant court cases. In one recent case in the Court of Session[48], the Court said in paragraph 62 of its judgment: "*It is not uncommon for disputes between former partners involving contact with children to be both acrimonious and emotional. A failure on the part of one parent to comply with court orders for contact, even where deliberate, may be an instinctive shying away from the immediate prospect of contact rather than some calculated or pre-planned refusal to comply*

[42] http://www.gov.scot/resource/doc/201147/0053739.pdf
[43] http://www.nuffieldfoundation.org/sites/default/files/files/enforcement%20briefing%20paper%20final.pdf
[44] http://ec.europa.eu/civiljustice/publications/docs/family_rights/study_family_rights_synthesis_report_en.pdf
[45] http://www.parliament.scot/parliamentarybusiness/report.aspx?r=4622&i=36023
[46] http://www.parliament.scot/GettingInvolved/Petitions/parentalrightstocontact
[47] http://www.gov.scot/Resource/0052/00525142.pdf
[48] https://www.scotcourts.gov.uk/search-judgments/judgment?id=434c27a7-8980-69d2-b500-ff0000d74aa7

with the order of the court. Ultimately, the court must enforce its orders, but in many cases the contempt proceedings themselves will provide a salutary reminder to the defaulting party of the need to comply. A custodial sentence, particularly on a mother with whom the children live, should only be imposed with reluctance and as a last resort."

Pros/Cons

4.54 There are a number of potential options in relation to the enforcement of contact orders. Some of these are outlined below. It may be possible to combine some of the options.

First option – no change

4.55 The first option is maintain the current situation. The main argument for keeping imprisonment as an option where a court order has been breached is that imprisonment should be available as a last resort.

4.56 There is also the argument that orders made under section 11 of the 1995 Act are private law cases. Therefore, it should be for one of the parties to alert the court that there has been a breach of the contact order.

Second option – alternative sanctions

4.57 The second option is for primary legislation to lay down alternative potential sanctions for a person held to be in contempt following the breach of a contact order.

4.58 This option reflects that there are also arguments that imprisonment is not the most appropriate sanction for failure to comply with a contact order. In addition, imprisonment of the mother may not be in the best interests of the child as research has shown that imprisonment of the parent with residence can have a negative impact on the child's health[49].

4.59 Alternative sanctions could require the breacher to undertake unpaid work or attend a parenting class or order compensation for any financial loss incurred. The potential advantages of this option are that this would give the court more flexibility and would offer more child-friendly options. Another possibility is to impose a civil penalty such as a fine when a person is held in contempt following a breach of a contact order.

4.60 The disadvantages are that contempt of court is a serious matter and the penalties should reflect this. Alternative sanctions may not encourage a family to work together. In addition, further consideration would need to

[49] See for example, as regards mother with residence Baldwin.L and Epstein.R 2017 Short but not sweet: A study of the impact of short custodial sentences on mothers and their children *De Montfort University* July 2017 available at: https://www.dora.dmu.ac.uk/handle/2086/14301

be given as to the consequences of not complying with an alternative sanction and whether this could result in imprisonment.

Third option – criminal offence

4.61 The third option is that primary legislation could make it a criminal offence to breach a contact order. Penalties could be non-custodial and could include unpaid work and requiring a person to attend a parenting class.

4.62 The advantages of this option are that enforcement would be for the police rather than for an individual and penalties could be less severe than current penalties for contempt.

4.63 The disadvantages of this option are that it may be heavy-handed to introduce criminal offences in this area as a person would receive a criminal record. It may also not improve the current situation. There could also be significant resource implications.

Question 11): How should contact orders be enforced?
Please select only one answer.
a) Option one: no change to existing procedure. ☐
b) Option two: alternative sanctions. (eg unpaid work, attending a parenting class or compensation). ☐
c) Option three: making a breach of a contact order a criminal offence with penalties including non custodial sentences and unpaid work. ☐
d) Another option (please specify). ☐
Why did you select your answer above?

Part 5: Cross border cases within the UK: jurisdictional issues

Introduction

5.01 In this section of the consultation, we are seeking views on:
- Registration of orders from elsewhere in the UK; and
- Whether we should take any action on other issues about cross-UK border jurisdiction in family cases.

5.02 In this section of the consultation, we are also providing an update on planned guidance on section 41 of the Family Law Act 1986 (the 1986 Act) on habitual residence.

Registration of orders from elsewhere in the UK

Background

5.03 Part 1 of the 1986 Act on "child custody" applies to a range of orders issued across the UK such as contact and residence.

5.04 Section 27 of the 1986 Act allows any person on whom any rights are conferred by an order to apply to the court which made it for the order to be registered in another part of the UK. Registration has to be "sent to the appropriate court in the part of the UK specified in the application".

5.05 The "appropriate court" in Scotland is defined by section 32 of the 1986 Act as the Court of Session. In England, Wales or Northern Ireland the High Court is the appropriate court.

5.06 Section 29 of the 1986 Act gives the court in which the order has been registered the same powers for the purpose of enforcing the order as it would have if it had itself made the order. This means that action could be taken in the Court of Session to enforce the court order. Chapter 71 of the Court of Session Rules sets out the procedure for how orders made elsewhere in the UK which are registered with the Court of Session can be enforced[50].

5.07 We are seeking views as to whether the appropriate court in Scotland should be defined as the Sheriff Court as well as the Court of Session. This would require an amendment to primary legislation.

Pros/Cons

5.08 An advantage is that there could be cost savings, but these would be modest due to the low number of cases. As the majority of contact cases are already heard in the Sheriff Court rather than the Court of Session,

[50] https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/rules-of-court/court-of-session/chap71.pdf?sfvrsn=8

there may be benefits to allowing court decisions from elsewhere in the UK to be registered in the Sheriff Court.

5.09 However, any change may lead to calls for a similar change elsewhere in the UK. If we do decide to change the definition of "appropriate court" then we would discuss the implications of the change with the UK Government and the Northern Irish administration. We would also need to consider whether further legislation would be needed so that registration in a Sheriff Court could be enforced in any other Sheriffdom in Scotland.

Question 12): Should the definition of "appropriate court" in the Family Law Act 1986 be changed to include the Sheriff Court as well as the Court of Session?

Yes ☐
No ☐
Why did you select your answer above?

Cross UK border cases

5.10 We have received correspondence in the past on jurisdiction in cross-UK border cases on matters such as contact and residence.

5.11 Section 41 of the 1986 Act makes provision on jurisdiction for the purposes of part 1 of the 1986 Act. Section 41 provides that a child under the age of 16 who is habitually resident in a part of the UK and becomes habitually resident in another part of the UK without the agreement of all persons who have the right to determine where the child is to reside, or in contravention of a court order, is to be treated as continuing to be habitually resident in the original part of the UK for one year.

5.12 We do not consider that section 41 of the 1986 Act needs to be amended. However, we are preparing a guidance note on section 41 which we intend to issue to legal practitioners and other interested bodies in Scotland. We also plan to send it to our counterparts in the other jurisdictions of the UK and to publish it on our website.

Question 13): Are there any other steps the Scottish Government should be taking on jurisdictional issues in cross-UK border family cases?

Yes ☐
No ☐
Why did you select your answer above?

Part 6: Parentage

Introduction

6.01 In this part of the consultation, we are seeking your views on the:

- The presumption that the husband of a woman is the father of her child; and
- DNA testing in parentage disputes.

6.02 Part 2 of the Human Fertilisation and Embryology Act 2008 (the 2008 Act) makes some provision on parentage. The 2008 Act is a reserved matter and this consultation is proposing no changes.

6.03 Surrogacy is also reserved and, again, this consultation is proposing no changes. As mentioned in paragraph 1.04 the SLC intends to carry out a joint project on surrogacy, working with the Law Commission of England and Wales.

Presumption that the husband of a woman is the father of her child

Background

6.04 Section 5(1)(a) of the Law Reform (Parent and Child) (Scotland) Act 1986 provides that the husband of a woman is presumed to be the father of her child:

"A man shall be presumed to be the father of a child – (a) if he was married to the mother of the child at any time in the period beginning with the conception and ending with the birth of the child".

6.05 Section 5(1)(b) of the Law Reform (Parent and Child) (Scotland) Act 1986 provides that in other cases, a man is presumed to be the father if he and the mother have both acknowledged that and registration has taken place accordingly:

"A man shall be presumed to be the father of a child—
(b) where paragraph (a) above does not apply, if both he and the mother of the child have acknowledged that he is the father and he has been registered as such in any register kept under section 13 (register of births and still-births) or section 44 (register of corrections, etc.) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 or in any corresponding register kept under statutory authority in any part of the United Kingdom other than Scotland."

6.06 These presumptions are rebuttable by proof on a balance of probabilities.These provisions in the Law Reform (Parent and Child) (Scotland) Act 1986 have their origins in a report by the SLC[51].

[51] https://www.scotlawcom.gov.uk/files/6212/8015/1386/26-07-2010_1436_823.pdf Report 82, on illegitimacy. Paragraphs 6.6 to 6.12

6.07 This consultation is seeking views on whether the presumption that the husband of a woman is the father of her child should be retained in Scots law.

Pros/Cons

6.08 There are number of reasons why the presumption should be retained including:

- We are not aware of any major problems arising as a result of the presumption;
- One of the ways in which a father gains PRRs is through being married to the mother. Without this presumption, there could be more disputes on whether a particular married father should have PRRs; and
- It may add clarity to rights children have under succession law to a deceased person's estate and property.

6.09 A reason for removing the presumption is that it may seem old-fashioned given that most children in Scotland now are born outwith marriage.

Question 14): Should the presumption that the husband of a mother is the father of her child be retained in Scots law?
Yes ☐ No ☐ Why did you select your answer above?

DNA testing in parentage disputes

Background

6.10 Currently, a person may apply to either the Court of Session or the Sheriff Court for a declarator of parentage or non-parentage. A person with a declarator of parentage may then use that to seek PRRs.

6.11 Declarators of parentage and non-parentage are based around biological relationships rather than wider tests of welfare. The fact that a person is the parent of a child may provide useful genetic information for the child and social information for the child on their background. The fact that a person is the parent of a child does not necessarily mean, of course, that they are the best person to bring the child up as this depends on the precise circumstances.

6.12 If a person (such as the mother) does not consent to DNA testing of the child in relation to any action for declarator of parentage or non-parentage, there is relevant provision in section 70 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. Under this, the court may draw from a refusal or failure to consent to the taking of a DNA sample from a child such adverse conclusion as it seems to it to be

appropriate. DNA samples can now be taken by way of a non-invasive mouth swab.

6.13 Data from SLAB suggest there have been 21 applications over the two years 2015/16 and 2016/17 combined for legal aid against a mother who may have refused to allow their child to be tested to establish parentage.

6.14 The proposal in this consultation is that if the mother refused to consent to DNA testing of the child in a parentage or non-parentage case, the court would be empowered to require DNA tests if in line with the best interests of the child.

6.15 Before legislating in this way, we would need to consider the ECHR implications carefully. We would also need to ensure that the rights of children and young people with capacity to take decisions and express views were fully protected.

Pros/Cons

6.16 There are a number of reasons in favour of giving the court such a power in relation to DNA testing such as:

- DNA evidence differs from other evidence because of the very high level of certainty it provides, so long as testing is of a rigorous nature;
- Taking DNA evidence could make a court case over parentage quicker and could reduce uncertainty which may be in the best interests of the child involved; and
- The child has a right to information about the child's own identity.

6.17 Arguments against making DNA testing compulsory are:

- It is a fundamental principle of civil procedure that a party should not be compelled to produce evidence that benefits their opponent;
- Obtaining a DNA sample without consent could be deemed a physical intrusion;
- Enforcing mandatory DNA testing would not be straightforward; and
- The current provisions of section 70 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 may be sufficient.

Question 15): Should DNA testing be compulsory in parentage disputes?

Yes ☐
No ☐
Why did you select your answer above?

Part 7: Parental Responsibilities and Rights

Introduction

7.01 We are seeking your views in this section on a number of topics in relation to who should have PRRs, the terms that are used, whether children benefit from both parents being involved in their upbringing and the role of non-resident parents who have PRRs. In considering whether any legislative changes are needed, our view is that any such changes must benefit children and must, of course, be compatible with ECHR.

7.02 The specific areas where we are seeking your views are on:

- Establishing a Step Parents Parental Responsibilities and Rights Agreement;
- Changing terminology of PRRs;
- Changing the terms contact and residence;
- Automatic PRRs for all fathers;
- Backdating of joint birth registration and PRRs;
- Making joint birth registration compulsory;
- Recognising joint registration of births overseas;
- Introducing a presumption that a child benefits from both parents being involved in their life: shared parenting;
- Introducing primary legislation laying down that courts should not presume that a child benefits from both parents being involved in their life;
- Encouraging involvement of non-resident parent in education decisions/provision of information to non-resident parent about their children's learning;
- Encouraging involvement of non-resident parent in health decisions;
- Clarifying that not all section 11 orders grant PRRs;
- Reducing occurrences of a parent turning a child against another parent; and
- Removing PRRs if a parent is found guilty of a serious criminal offence.

Background

What are PRRs?

7.03 Section 1 of the 1995 Act provides that so long as this is practicable and in the interests of the child, parents have the responsibility to:

- Safeguard and promote the child's health, development and welfare;
- Provide direction and guidance to the child;
- Maintain personal relationships and direct contact with the child on a regular basis if a child is not living with their parent; and
- Act as the child's legal representative.

7.04 In order to meet their responsibilities towards their children, parents have the right to:

- Have the child living with them or otherwise regulate the child's residence;
- Control, direct or guide the child's upbringing;
- Maintain personal relations and direct contact with the child on a regular basis if a child is not living with their parent; and
- Act as the child's legal representative.

7.05 When exercising a responsibility or right, a person who has PRRs must under section 6 of the 1995 Act so far as practicable take account of the views of the child concerned based on their age and maturity.

Who has PRRs?

7.06 The provisions in section 1 of the 1995 Act are subject to section 3 of the same Act which lays down when a mother or father has PRRs.

7.07 All mothers automatically get PRRs for their child. However, not all fathers get PRRs. A man gets PRRs if they are married to the mother at the time of the child's conception or subsequently.

7.08 If a man is not married to the mother, then the man can obtain PRRs by:

- Jointly registering the birth with the mother; or
- Completing and registering a Parental Responsibilities and Rights agreement [52] with the mother; or
- Obtaining a court order.

7.09 In relation to same sex parents, the child's mother receives PRRs as does any second female parent if:

- She was married or in a civil partnership with the mother at the time of the insemination/fertility treatment; or
- She is named as the other parent on the child's birth certificate; or
- She completes and registers a Parental Responsibilities and Rights agreement[53] with the mother.

7.10 There are also specific provisions on PRRs in relation to adoption cases. Prospective adopters can petition the Court of Session or the Sherriff Court to adopt a particular child. Those who hold PRRs must consent to the adoption or the Court may dispense with the necessity for consent. This will be where the parent is dead, cannot be found, is incapable of consenting or cannot in the court's opinion satisfactorily discharge their PRRs and are likely to continue to be unable to do so. The court may also dispense with the consent where the child's welfare otherwise requires it.

[52] http://www.gov.scot/Publications/2008/06/16155526/0 (form for non married fathers to gain PRRs).

[53] https://www.legislation.gov.uk/ssi/2009/191/regulation/2/made (form for second female parent to gain PRRs)

7.11 Where a child is 12 years of age or over, their consent must be sought before the adoption can be granted. The child would need to be considered incapable of giving consent for the adoption to be otherwise granted. Once the adoption order is granted, the child will be as though born into the adoptive family.

Court orders

7.12 The Court of Session and Sheriff Court may make a variety of orders under section 11 of the 1995 Act. These may:

- Deprive a person of some or all of their PRRs;
- Give a person over 16 (or a parent) PRRs;
- Regulate the arrangements as to with whom, or if with different persons alternately or periodically, with whom, during what periods, a child under 16 is to live (a residence order);
- Regulate the arrangements for maintaining personal relations and direct contact between a child under 16 and a person with whom the child is not, or will not be, living (a contact order);
- Regulate any specific question which has arisen (a specific issues order);
- Be an interdict prohibiting a person with PRRs from exercising a certain right;
- Appoint a judicial factor; or
- Appoint or remove a person as a guardian of the child. [Under section 7 of the 1995 Act, a child's parent may appoint a person to be guardian of the child in the event of the parent's death].

7.13 According to the Civil Justice Statistics in Scotland[54] in 2015/16, there were 2232 cases in the Sheriff Court in relation to PRRs, of which 1039 were regarding contact with a child, 712 were in relation to who a child lives with and 481 were other cases. In 2015/16, there were eight cases initiated in the Court of Session in relation to PRRs – three of which were in relation to contact and four of which were in relation to residence.

7.14 These statistics relate only to cases where contact is listed as the principal crave (The first legal remedy requested by the pursuer / petitioner, as stated in the initial writ / summons, etc). Therefore, the actual caseload is likely to be higher. Annex F to this consultation outlines proposals for improving statistics and evidence base in relation to family cases to be included in the forthcoming Family Justice Modernisation Strategy.

7.15 Data from SLAB indicates that they provided legal aid funding for 1986 contact cases in 2016/17 and 1160 cases in relation to residence.

[54] http://www.gov.scot/Publications/2017/03/5915/downloads

Establishing a Step Parents Parental Responsibilities and Rights Agreement

Background

7.16 We are seeking your views on whether to introduce a step parents parental responsibilities and rights agreement so that step parents could obtain PRRs without having to go to court.

7.17 Figures from the 2011 census show that step families made up:

- 8% (26,000) of married couple families and 29% (26,000) of cohabiting couple families;
- 8% of families with one dependent, 6% of families with two dependent children and 12% of families with three or more dependent children; and
- Just over half of the 15,000 cohabiting couple families where the youngest dependent child was aged 12 or over[55].

7.18 There is provision in England and Wales which allows step parents to obtain parental responsibilities by agreement with the parent or both parents if both have parental responsibilities. This is provided for in section 4A of the Children Act 1989.

7.19 The then Scottish Executive considered establishing a step parents PRRs agreement in 2004 as part of a consultation on Improving Family Law in Scotland. The results from that consultation were that 54% of respondents were in favour of introducing a responsibilities and rights agreement for step parents and 42% were against[56]. However, as a number of consultees did express serious reservations about how to safeguard children's views and interests this was not taken forward.

7.20 If a step parents parental responsibilities and rights agreement should be established in Scotland, it could be registered in the Books of Council and Session operated by Registers of Scotland. There would be a fee charged for registering an agreement in the Books of Council and Session.

Pros/Cons

7.21 There are a number of pros and cons of establishing a PRRs agreement for step parents. Arguments in favour are:

- A PRRs agreement for step parents could reduce the number of court cases where step parents are seeking PRRs; and
- A PRRs agreement for step parents could also enhance the role of the step parent and acknowledge that they might play an important role in the life of the child.

[55] http://www.scotlandscensus.gov.uk/news/census-2011-detailed-characteristics-population-and-households-scotland-release-3e

[56] http://www.gov.scot/Publications/2004/10/20057/44653 (see part 7)

7.22 Arguments against are:

- As consultees indicated previously, the proposal may not take full account of the views of the child on whether the step parent should have PRRs. This goes against the aims of the reforms of the 1995 Act. In a court case, the court is required to consider the welfare of a child and consider the views of a child, where appropriate;
- A PRRs agreement for step parents could mean both parents as well as a step parent having PRRs which may not be in the best interests of the child;
- We would need to define exactly who would be regarded as "step parents" for the purpose of being eligible to complete and register an agreement; and
- A step parent can already apply to the court to obtain PRRs.

Question 16): Should a step parents parental responsibilities and rights agreement be established so that step parents could obtain PRRs without having to go to court? Yes ☐ No ☐ Why did you select your answer above?

Changing terminology of PRRs

Background

7.23 As discussed in the introduction to this section, a person has parental rights to enable them to fulfil their parental responsibilities. We are seeking your views on whether to remove the term "rights" and just refer to "responsibilities".

7.24 In England and Wales, the term "parental responsibility" is used. This covers all the rights, powers and duties which a guardian of a child's estate would have had in relation to the child and his property.

7.25 The term "parental responsibility" is also used in the Brussels IIa Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility. Further information on Brussels IIa is in Annex D of this consultation.

Pros/Cons

7.26 There are advantages and disadvantages of removing the term "right". The main advantage is that this would be in line with our policy intention of ensuring that the child is at the centre of the process. By emphasising the word "responsibilities", we would be making it clear that people have these duties for the benefit of the child.

7.27 However, any change would have significant implications for other pieces of legislation in relation to children and young people in Scotland. In addition, the change is semantic rather than a change of substance. In some cases, the use of the word "right" may help parents and others when dealing with an arm of the state, such as social work.

Question 17): Should the term "parental rights" be removed from the 1995 Act? Yes ☐ No ☐ Why did you select your answer above?

Changing terms "contact" and "residence"

Background

7.28 The 1995 Act uses the terms "contact" and "residence" to describe two of the types of orders that a court may make. We have received comments that the terms could suggest that one parent has a better position in relation to a child than the other parent. We are therefore seeking views on whether to replace the terms "contact" and "residence". A possible alternative in Scotland might be "child's order."

7.29 In England and Wales, the terms "contact" and "residence" were replaced in 2014 with the term "Child Arrangements Order". The reason for this was to encourage parents to focus on their child's needs rather than their own rights. In New Zealand and Australia, the term "parenting order" is used.

Pros/Cons

7.30 The replacement of the terms "contact" and "residence" may be in line with our policy intention of ensuring that the child is at the centre of any court case under section 11 of the 1995 Act. It may also encourage parents to focus on the children's best interests if the words are changed to be more child centric.

7.31 However, as with the option to remove the term "rights", it would have significant implications for other pieces of legislation in relation to children and young people in Scotland. In addition, it is not clear that a change of terminology would lead to a change in practice.

7.32 Finally, in paragraphs 4.34-4.42 and paragraphs 7.102 -7.107 we have discussed the potential need to amend section 11 of the 1995 Act to make it clear that when the court makes a contact order, it does not necessarily have to award PRRs as well. Moving away from the terms "contact" and "residence" might cut across this proposal.

Question 18): Should the terms “contact” and “residence” be replaced by a new term such as “child’s order”?

Yes ☐
No ☐
Why did you select your answer above?

If you answered yes what terms should be used?

PRRs for all fathers

Background

7.33 We are seeking your views on whether all fathers should automatically have PRRs in the same way as mothers without having to go through a court process. It is unlikely this could be retrospective. Instead, it could apply in relation to births in Scotland from a specific date in the future.

7.34 PRRs for all fathers was recommended by the SLC in their report on Family Law in 1992[57]. Amongst other points, the SLC argued at the time that:

- An unmarried father may be just as motivated to care for and protect his child as a married father, or indeed the mother of the child;
- PRRs are conferred not for the benefit of the parents but for the benefit of the child;
- The answer to parental involvement which is against the child’s welfare is for a court to remove or regulate parental rights; and
- Article 9(3) of the UNCRC obliges States Parties to respect the child’s right to contact with both parents. Article 18(1) of the UNCRC obliges States Parties to use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child.

7.35 This recommendation by the SLC was not implemented. The 2006 Act made provision so that unmarried fathers could obtain PRRs by jointly registering the birth of the child with the mother.

7.36 In relation to the proposal that all fathers should obtain PRRs, the Policy Memorandum prepared by the then Scottish Executive for the Bill which led to the 2006 Act said in paragraph 47:
“The Scottish Ministers consider that this approach would not be appropriate. It would not be fair if women who had suffered trauma such as rape, or had become pregnant as a result of a casual liaison then had to go to court to have PRRs removed from the father. Scottish Ministers believe that some evidence of commitment to joint parenting such as the

[57] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235744/0004.pdf (see paragraphs 2.36 to 2.51)

joint registration of the child's birth should be required before a man gains PRRs."[58]

7.37 NRS publish statistics on live births, numbers and percentages, by marital status and type of registration[59].These statistics show that in recent years the sole registration rate has been in slow decline and in 2016 was 4.3%. In 2016, out of 54,488 live births there were 2,321 cases of sole registration suggesting that 2,321 fathers did not receive PRRs automatically.

7.38 We warmly welcome the work of registrars across Scotland who work with parents and provide them with valuable information when parents are registering the birth of their child.

Pros/Cons

7.39 All fathers having PRRs automatically has a number of potential advantages. Research has shown that a child may benefit from their father being involved in their upbringing. For example, the Scottish Government's Growing Up in Scotland study on father-child relationships and child socio-emotional wellbeing found that children with poor father-child relationships are more likely to have higher levels of behavioural and emotional problems and poor school adjustment than children with good father-child relationships[60].

7.40 All fathers having PRRs automatically may also encourage more fathers to be involved in their child's upbringing and may reflect societal trends about fathers becoming more involved in parenting.

7.41 All fathers having PRRs automatically might reduce the number of court cases where fathers are seeking PRRs.

7.42 Against that, however, there might be an increase in the number of court actions raised by women seeking orders to have PRRs removed.

7.43 There are also potential disadvantages to all fathers having PRRs automatically. Some children may be born following sexual assault (although as the SLC noted in 1992, rape can occur in marriage and rapist fathers in these circumstances would obtain PRRs).

7.44 In addition, figures from the Scottish Government's Domestic Abuse Recorded by the Police in Scotland 2016-17 statistics[61] show that 79% of victims of domestic abuse reported to the Police were women and abusers were men. Some fathers who domestically abused their partners

[58] The Policy Memorandum for the Bill which led to the 2006 Act is at http://www.parlamaid.scot/S2_Bills/Family%20Law%20(Scotland)%20Bill/b36s2-introd-pm.pdf
[59] The NRS statistics on births are at https://www.nrscotland.gov.uk/files//statistics/vital-events-ref-tables/16/3-birth/ve-ref-tabs-16-tab3.02.xlsx
[60] http://www.gov.scot/Resource/0051/00515142.pdf
[61] http://www.gov.scot/Publications/2017/10/3700

may use the fact they have PRRs to continue the domestic abuse. As domestic abuse can start at any point in a child's life, and if a father has automatic PRRs, it would be the responsibility of the mother to apply to the court for the PRRs to be revoked. This may cause the mother additional stress.

7.45 There is an argument that, as the then Scottish Executive said at the time, some evidence of commitment to joint parenting such as the joint registration of the child's birth should be required before a man gains PRRs. It can also be argued that the current law is successful, given that the vast majority of fathers now obtain PRRs automatically.

7.46 There may also be an argument that all fathers having PRRs automatically could lead to disinterested fathers having an adverse effect on a child's life. For example, where both parents have PRRs, both need to consent to a change in name through NRS' change of name service. We discuss this further in part 12 of this consultation. We receive occasional correspondence from mothers seeking to change their child's name and where the father has PRRs but is not in contact. As matters stand, such mothers need to go to court to seek removal of PRRs held by the father. The number of cases of this nature could increase if all fathers have PRRs automatically.

Question 19): Should all fathers be granted PRRs?
Yes ☐ No ☐ Why did you select your answer above?

Joint birth registration and PRRs – backdating

Background

7.47 This consultation seeks your views on whether the provision that fathers can obtain PRRs by jointly registering the birth should be back dated.

7.48 As indicated in paragraph 7.08, the Family Law (Scotland) Act 2006 (the 2006 Act) made provision so that fathers obtain PRRs when they jointly register the birth with the mother. This came into force on 4 May 2006. The provision was not made retrospective. In the Policy Memorandum for the Bill which led to the 2006 Act, the then Scottish Executive said in paragraphs 48 and 49:
"It would also be possible to make the new arrangement retrospective, i.e. apply to unmarried fathers who have already jointly registered a birth. The advantage of this approach would be that automatic PRRs would not depend on an accident of the calendar and fathers would have PRRs for both existing and future children, i.e. they would not be placed in a situation where they have PRRs for one child but not for an older sibling.

The Scottish Ministers do not favour retrospection since the law should be clear, precise and predictable. They consider that it would be inappropriate for parents who had registered the birth of their child on the basis of one set of legal consequences then to find that subsequent legislation had materially changed those legal consequences. In addition, there is a need to protect families whose arrangements had already been settled by courts. It would not be in anyone's interests to re-open such cases. Although this would mean that children already registered prior to that date would not benefit from the change, it would avoid any interference in both the child's and the mother's family life. Fathers who did want to play an active part would be able to acquire PRRs by the existing methods, which involve either the consent of the mother or a decision by the court."

Pros and cons

7.49 As the then Scottish Executive said at the time, backdating this provision would mean that automatic PRRs would not depend on an accident of the calendar and fathers would have PRRs for both existing and future children, i.e. they would not be placed in a situation where they have PRRs for one child but not for an older sibling.

7.50 However, the then Scottish Executive noted that it would be inappropriate for parents who had registered the birth of their child on the basis of one set of legal consequences then to find that subsequent legislation had materially changed those legal consequences.

7.51 In addition, of course, time has now passed. PRRs apply generally until the child obtains the age of 16. Therefore, from 2022 [ie 16 years from 2006] there will no longer be any fathers who did not receive PRRs by jointly registering the birth. It could be argued, therefore, that the passage of time means that no changes are required.

Question 20): Should the law allowing a father to be given PRRs by jointly registering a birth with the mother be backdated to pre 2006?

Yes ☐
No ☐
Why did you select your answer above?

Compulsory joint birth registration

Background

7.52 As indicated above, since 2006 one of the ways that an unmarried father can obtain PRRs is by jointly registering a child's birth with the mother. We are seeking your views on whether joint birth registration should be compulsory. In other words, the person registering the birth would be obliged to name both parents.

7.53 The Welfare Reform Act 2009 made amendments to the Births and Deaths Registration Act 1953 to allow for mandatory joint registration of births in England and Wales. However, this has not yet been implemented. Other countries such as New Zealand and Australia have introduced compulsory joint birth registration.

Pros/Cons

7.54 Compulsory joint birth registration offers both advantages and disadvantages. An advantage is that it would reduce the number of court cases where a father is seeking to be named on a child's birth certificate.

7.55 Naming both parents on the birth register may also promote father /child relationships. Evidence mentioned in paragraphs 7.33-7.46 in the discussion about whether to extend PRRs to all fathers suggests that children benefit from fathers being involved in their upbringing. Naming both parents on the birth certificate could also further compliance with article 7 of the UNCRC which says that:
"the child shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents."

7.56 However, compulsory birth registration could have the drawbacks of leading to perpetrators of domestic abuse or sexual assault being listed on a birth certificate which could give them automatic PRRs. A mother may also not necessarily know who the father of the child is.

7.57 One option to overcome these drawbacks is to have exemptions. In England and Wales, the proposed exemptions are where[62]:

- It is impossible to identify who the father is;
- It is impracticable because the whereabouts of the father are unknown or he cannot attend the register office or is unable to sign a statutory declaration of paternity; or
- There are unreasonable circumstances for example in cases of men who have received a conviction for rape or in the case of a vulnerable mother where a social worker or medical practitioner advises it would

62 http://webarchive.nationalarchives.gov.uk/20100612055002/http:/www.dwp.gov.uk/docs/birth-registration-wp.pdf

not be in the mother's or child's best interest to register the father. Unreasonable circumstances could also include where it would be unreasonable to expect registrars to take excessive steps to trace a father.

7.58 Consideration would need to be given as to the process if a mother refuses to jointly register a birth. Furthermore, enforcement of compulsory joint birth registration would not be straightforward.

Question 21): Should joint birth registration be compulsory?
Yes ☐ No ☐ Why did you select your answer above?

Joint registration of births overseas

7.59 We are seeking views on whether fathers who jointly register the birth of a child with the mother of the child in a country where joint registration leads to PRRs should have their PRRs recognised in Scotland.

7.60 The 2006 Act made provision so that fathers who jointly register the birth with the mother obtain PRRs. The amendments made by the 2006 Act cover joint birth registration in Scotland, England and Wales and Northern Ireland but not overseas.

7.61 When the Bill leading to the 2006 Act was introduced, it included provision giving the Scottish Ministers the power to make regulations to give parental responsibilities and parental rights to fathers who were never married to the child's mother and who are not registered as the child's father in one of the UK jurisdictions. This was intended to be used to recognise PRRs of fathers with children whose births were registered outwith the UK.

7.62 The Scottish Parliament's Subordinate Legislation Committee noted that the intention of the Bill was to allow for PRRs to be granted to fathers who registered as the child's father under equivalent legislation in other countries. However, it appeared to the Subordinate Legislation Committee that it would be possible for regulations made under the new power not only to amend the list of enactments for the purposes indicated in the Policy Memorandum, but also to extend PRRs to a father who had not registered anywhere as the father of the child[63].

[63] http://archive.scottish.parliament.uk/business/committees/justice1/reports-05/j1r05-08-vol01-02.htm#otherissues (see paragraph 227)

7.63 Following comments by the Subordinate Legislation Committee, the then Scottish Executive moved an amendment at Stage 2 of the Bill to remove this regulation-making power. This amendment was agreed[64].

7.64 The question now is whether this should be revised. Any new Bill could give the Scottish Ministers a power to make regulations so that registration as a child's father under equivalent overseas legislation listed in Scottish regulations could, when appropriate, also confer PRRs in respect of a child subject to the law of Scotland.

Pros/Cons

7.65 Clearly, this power would not be needed if all fathers automatically receive PRRs as is discussed in paragraphs 7.33-7.46 of this consultation. If that change is not made, the main advantage of this proposed regulation-making power is that unmarried fathers who have obtained PRRs through joint birth registration overseas would continue to be able to do so if they move to Scotland. This is likely to be in the best interests of the child.

7.66 However, arguments against are:

- It may not be straightforward in practical terms to find equivalents overseas to the procedures in Scotland for joint birth registration and to PRRs;
- Any list of countries laid down in regulations made by the Scottish Ministers would need to be reviewed from time to time to reflect any changes in procedures in law by overseas jurisdictions;
- The number of fathers affected is likely to be low; and
- Consideration would need to be given as to whether any change could be retrospective i.e. cover children whose birth is registered before any regulations come into effect.

Question 22): Should fathers who jointly register the birth of a child in a country where joint registration leads to PRRs have their PRRs recognised in Scotland?

Yes ☐
No ☐
Why did you select your answer above?

[64] See comments of the then Minister Hugh Henry at columns 2257-2258 http://archive.scottish.parliament.uk/business/committees/justice1/or-05/j105-3602.htm#Col2235

Courts should presume that a child benefits from both parents being involved in their life: shared parenting

Background

7.67 We are seeking views on whether to legislate to lay down that in contact and residence cases courts should presume that a child benefits from both parents being involved in their life. This presumption would be in line with arguments that children benefit from a shared parenting arrangement.

7.68 Other jurisdictions have introduced legislation that encourages shared parenting. For example, the Family Law Act in British Columbia[65] creates a presumption that each parent will exercise "parental responsibilities with respect to the child in consultation with the child's other parent, unless consultation would be unreasonable or inappropriate in the circumstances."

7.69 In Belgium, there is a system of joint exercise of parental responsibilities incorporating the idea that both parents are responsible for their children and should jointly make key decisions.

7.70 In England and Wales, section 1 of the Children Act 1989 provides that the court should presume, unless the contrary is shown, that involvement of both parents in the life of the child concerned will further the child's welfare.

7.71 Evidence generally shows that children benefit from both parents being involved in their lives. For example, research by the Nuffield Foundation in 2013 found that children benefit from the quality of parenting they receive and the quality of the relationship between parents[66]. Research also shows that more frequent and regular contact is associated with closer relationships with non-resident parents and fewer adjustment problems in children[67].

Pros/Cons

7.72 As mentioned above, the main benefit of introducing the presumption that both parents should be involved in a child's life, unless the contrary is proved, is that there is evidence to show that shared parenting can benefit a child.

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[65] http://www.bclaws.ca/civix/document/id/lc/statreg/11025_01

[66] Caring for children after parental separation: would legislation for shared parenting time help children? University of Oxford May 2011. http://www.nuffieldfoundation.org/sites/default/files/files/Would%20legislation%20for%20shared%20parenting%20time%20help%20children)OXLAP%20FPB%207.pdf

[67] See for example Bauserman, R. (2002). Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review. *Journal of Family Psychology.* 16(1): 91-102.

7.73 This presumption may also be in line with article 9 of the UNCRC which provides that children should have the right to maintain personal relations and direct contact with both parents on a regular basis when a child is separated from one or both parents, except if it is contrary to the child's best interests.

7.74 However, there will be cases where a child does not benefit from both parents being involved in their life (the presumption would, of course, be rebuttable).

7.75 In addition, any presumption in favour of shared parenting might cut across the key principle in section 11(7)(a) of the 1995 Act that the court shall regard the welfare of the child concerned as its paramount consideration. We do not wish to take any steps which could detract from that key principle.

Question 23): Should there be a presumption in law that a child benefits from both parents being involved in their life? Yes ☐ No ☐ Why did you select your answer above?

Provision laying down that courts should not presume that a child benefits from both parents being involved in their life

Background

7.76 We are seeking views on whether primary legislation should be made laying down that courts should not presume that a child benefits from both parents being involved in their life. This is the opposite to the presumption above.

7.77 A study from Belgium shows that there has been little evidence that children's well-being in shared residence is higher than children living with one parent. There is also evidence that it might be more stressful for a child to live alternately with both parents[68]. Evidence also shows that if parental conflict is high and on-going, then shared parenting is associated with lower child well-being compared to sole residence .[69]

[68] Sodermans AK, and Matthijs K 2014 Joint physical custody and adolescents' subjective well-being: a personality x environment interaction. *Journal of Family Psychology* vol 28, No 3 p345-356

[69] Vanassche, S 2017 Alternating residence for children after parental separation: recent findings from Belgium. *Family Court Review* vol 55 issue 4

Pros/Cons

7.78 One potential justification for legislative provision laying down that a court should not presume that it is in the best interests of a child for both parents to be involved in a child's life results from the evidence mentioned above.

7.79 As discussed in part 9 of this consultation, research suggests that domestic abuse is a feature of around half of all court actions over contact. Therefore, a presumption of this nature in the legislation may reflect the reality of many situations. It may not be in the child's best interest for both parents to be involved in their life if there are allegations of domestic abuse.

7.80 However, any provision of this nature might cut across the key principle in section 11(7)(a) of the 1995 Act that the court shall regard the welfare of the child concerned as its paramount consideration. We do not wish to take any steps which could detract from that key principle.

Question 24): Should legislation be made laying down that courts should not presume that a child benefits from both parents being involved in their life?
Yes ☐ No ☐ Why did you select your answer above?

Involvement of non-resident parent in education decisions/provision of information to non-resident parent about their children's learning

Background

7.81 We are seeking views on how best to ensure that non-resident parents are kept informed by schools. In particular, we are seeking comments on pupil enrolment and annual updates to schools about information on pupils.

7.82 The Scottish Schools (Parental Involvement) Act 2006 established a framework for parental involvement in schools. This Act only applies to state schools. This Act applies the definition of "parent" that is set out in the Education (Scotland) Act 1980 which includes "guardian and any person who is liable to maintain or has parental responsibilities (within the meaning of section 1(3) of the 1995 Act) in relation to, or has care of a child or young person".

7.83 This definition includes non-resident parents who have PRRs and also people who have no PRRs but fall within one of the other aspects of the definition such as "care of a child or young person". The Scottish Government proposes to bring forward an Education Bill in 2018, dealing with a range of governance matters including parental involvement and engagement. Any new legislative provisions would be likely to be

accompanied by revised statutory guidance which would be subject to public consultation.

7.84 Non-resident parents have the same rights as a resident parent to access their child's educational record. Regulation 5(2) of the Pupils' Educational Records (Scotland) Regulations 2003 (SSI 2003/581) provides that upon the request by a parent for disclosure of their child's education records, the school must do so. These regulations cover all schools in Scotland. The regulations provide for exceptions for sensitive personal data, or if the school believes that the disclosure of the educational records would likely cause significant distress or harm to the pupil or any other person, they may withhold the information.

7.85 There could be cases where it may not be in the best interests of the child for schools to share information with non-resident parents. An example might be where domestic abuse has occurred. We believe that the exemption in the Pupils' Educational Records (Scotland) Regulations 2003 would allow for information not to be shared in these circumstances.

7.86 Each local authority has a different pupil enrolment form and some local authorities do not request details of the non-resident parent. In addition, we understand that the annual update form may be only sent to one parent. This parent would then have the responsibility for deciding whether to enter the contact details of the other parent if they no longer live together.

7.87 There are two options to help ensure that non-resident parents are more involved in education decisions and are provided with appropriate information to engage with their children's learning and progress through school. As the pupil enrolment forms vary between local authorities, the Scottish Government could create a statutory form that would be used by all local authorities. The other option is that the Scottish Government could provide guidance to local authorities on the existing legislation, and Scottish Government could carry out work to improve the consistency of forms across local authorities. In addition, the Scottish Government could explore further steps to support broader culture change, awareness levels and approach across schools.

<u>Pros/Cons</u>

7.88 The first potential option of creating a statutory pupil enrolment form would have the benefit of ensuring that information on non-resident parents would routinely be gathered. However, any statutory form would only be for state schools.

7.89 It would also only cover information on parents who were a non-resident parent at the time a child is registered in primary school. It would not cover those parents who become non-resident after the child starts primary school.

7.90 The Scottish Government would need to make it compulsory that the annual update form is to be sent to both parents in order to ensure that the information is kept up to date. The Scottish Government would need to consider the practical difficulties in some cases where for example, information about a non-resident parent may not be provided (for whatever reason) or where details may not be known.

7.91 The second option of providing guidance would have the benefit of not requiring primary legislation and therefore could be done more quickly.

7.92 In addition, it could cover all schools in Scotland and not just state schools. Guidance could also be used to encourage schools to maintain updated contact details for non-resident parents. However, guidance may not reduce the level of discrepancy between schools in the information they gather on non-resident parents.

7.93 Guidance could also cover the surname used to register a child. There are cases where a parent may register a child at school with a different surname to that on the birth certificate.

Question 25): Should the Scottish Government do more to encourage schools to involve non-resident parents in education decisions?
Please select only one answer.

a) Yes – put the pupil enrolment form and annual update form on to a statutory basis. ☐
b) Yes – issue guidance on the enrolment form and annual update form. ☐
c) Yes – other (please specify). ☐
d) No – no further action by the Scottish Government is required. ☐

Why did you select your answer above?

Involvement of non-resident parent in health decisions

Background

7.94 We are seeking views on how best to ensure that non-resident parents are kept informed by health boards and GP surgeries.

7.95 The British Medical Association has produced guidance on confidentiality and the disclosure of health records[70]. This explains that children who are aged 12 or over are generally expected to have capacity to give or withhold their consent to the release of information.

7.96 If the child has the capacity to give or withhold consent to a treatment or to the release of information from their health records, health professionals should respect their wishes. Anyone with PRRs has the

[70] https://www.bma.org.uk/-/media/files/pdfs/practical%20advice%20at%20work/ethics/accesstohealthrecords_aug2014.pdf?la=en

right to ask for their child's records. However, a child with capacity can refuse access. Access can also be refused when it is not in the child's best interests.

7.97 There are two options to ensure that non-resident parents should be kept informed of health decisions. The first is through legislation. The second is through guidance.

Pros/Cons

7.98 Introducing legislation would ensure that across Scotland, anyone with PRRs has the right to ask for their child's records. However, a child with capacity can refuse access. Access can also be refused when it is not in the child's best interest. In order to fulfil their parental responsibilities anyone with PRRs has the right to access to the child's medical records as long as the child agrees if they have capacity and it is in the best interests of the child. Therefore, additional legislation may not be necessary.

7.99 The second option of providing guidance to health practitioners would have the benefit of not requiring primary legislation and therefore could be done more quickly.

7.100 Guidance could also cover information on the surname to be used when registering a child. There are cases where a surname other than that listed on the birth certificate has been used to register a child.

7.101 A drawback of providing guidance is that it may not reduce the level of discrepancy.

Question 26): Should the Scottish Government do more to encourage health practitioners to share information with non-resident parents if it is in the child's best interests?
Please select only one answer.

a) Yes – legislation. ☐
b) Yes – guidance. ☐
c) Yes – other (please specify). ☐
d) No – no further action is required. ☐
Why did you select your answer above?

Not all section 11 orders granting PRRs

Background

7.102 We are seeking views on whether section 11 of the 1995 Act should be clarified to provide that orders, apart from orders in relation to residence, or to PRRs themselves, do not automatically lead to PRRs or to a change

in PRRs. The key aim would be to make it clear that a contact order does not have to grant PRRs.

7.103 As mentioned in the introduction to this part of the consultation, section 11 of the 1995 Act lays down orders that a court may make. We are aware that there may be confusion as to whether section 11 orders automatically grant PRRs to individuals.

7.104 Our understanding of the 1995 Act from case law is that:

- Section 11(12) of the 1995 Act makes specific provision so that when a residence order is made, the person receives (some) PRRs unless the court makes provision to the contrary;
- There is no equivalent provision in the 1995 Act awarding automatic PRRs when a contact order is granted; and
- In some cases (e.g. a court order depriving a person of PRRs), it is clear that an order under section 11 does not also award PRRs.

7.105 This issue has links with the issue covered in paragraphs 4.34- 4.42 regarding sibling contact. However, this issue is wider as there may be cases where it is in the child's best interest for them to have contact with an individual other than a sibling and it is not necessary for that individual to have PRRs.

Pros/Cons

7.106 A clarification of the law could benefit a child as a person could be granted contact without being given PRRs. The key tests in section 11 in relation to the welfare of the child and no order being made unless that is better for the child would, of course, remain in place. Provisions on the voice of the child would also remain in place, subject to any changes following this consultation.

7.107 However, it can be argued that the law is already clear enough and therefore further legislation is not necessary.

Question 27): Does section 11 of the 1995 Act need to be clarified to provide that orders, except for residence orders, or orders on PRRs themselves, do not automatically grant PRRs?

Yes ☐
No ☐
Why did you select your answer above?

Turning a child against a parent

Background

7.108 There may be cases where children are put under pressure by one parent to reject the other parent. This can include:

- A parent constantly badmouthing or belittling the other;
- Limiting contact;
- Forbidding discussion about them; and
- Creating the impression that the other parent dislikes or does not love the child.

7.109 This can be referred to as “parental alienation” but that term can give rise to disputes and disagreements. Therefore, it may, perhaps, be better not to use that particular term but instead to refer to the types of activity involved.

7.110 In this consultation, we are seeking views on what action, if any, we should take to try and stop children being put under pressure by one parent to reject the other parent.

7.111 Research has suggested that putting pressure on a child to reject another parent can have a negative impact on the wellbeing of the child ranging from mental health disorders (eg depression, anxiety, substance abuse and conduct disorders) to declines in academic performance and even suicide[71]. Turning a child against a parent can also have a negative impact on the wellbeing of the parent involved.

7.112 In England and Wales, CAFCASS is trialing new guidelines for practitioners on identifying cases of parental alienation and ensuring that the child’s best interests remain at the centre of any contact or residence case. CAFCASS are also trialing a new strategy with a focus on allowing the child to maintain a relationship with both parents, but if the alienating parent fails to improve their behaviour, their contact with the child could be restricted or, in the most serious cases, refused.

7.113 There are a number of options to try and ensure that a parent does not encourage a child to reject another parent. Potential actions include adding the issue to:

- Any new welfare checklist for the court to consider in section 11 cases (see paragraphs 10.17 - 10.20 of the consultation); or
- The training for child welfare reporters (see paragraphs 2.54 - 2.75 of the consultation).

Pros/Cons

7.114 There are a number of benefits to ensuring that children are not deliberately turned against one of their parents. Firstly, as mentioned above there is evidence to show that this can have a negative impact on the wellbeing of the child. There are also arguments that it is in the best interests of the child to have both parents involved in their upbringing. A parent not seeing their child may also have negative impacts on the health of the parent.

[71] Harman.J, Leder-Elder.S, Biringen.Z 2016 Prevalence of parental alienation drawn from a representative poll. *Children and Youth Services Review* vol 66 p62-66.

7.115 Secondly, Article 9(3) of the UNCRC provides that: “States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests.”

7.116 However, a parent may appear to be turning a child against another parent, but they are actually trying to protect the child. An example could be in cases where there are allegations of domestic abuse.

Question 28): Should the Scottish Government take action to try and stop children being put under pressure by one parent to reject the other parent? Yes ☐ No ☐ Why did you select your answer above? If you selected yes, what should be done?

Removal of PRRs if a parent is found guilty of a serious criminal offence

Background

7.117 We have received correspondence about parents who have been convicted of serious criminal offences and whether it is appropriate for them to retain PRRs.

7.118 We are seeking your views on whether a parent found guilty of a serious criminal offence could have their PRRs removed by the criminal court. There are two potential ways this could be done:

- An application could be made to the criminal court following a conviction to remove that person’s PRRs; or
- The criminal court could be given a duty to consider the removal of PRRs when a person is convicted of certain types of offences.

Pros/Cons

7.119 In certain circumstances it might be in a child’s best interests for a parent who has been convicted of a serious criminal offence not to have PRRs and for these PRRs to be removed quickly.

7.120 However, there are a number of drawbacks to this proposal, as outlined below:

- There may be cases where a child wishes for a parent to still be involved in their life despite any conviction for a serious criminal offence;

- The criminal court is unlikely to be in a good position to obtain the views of the child. If the child had to appear in a criminal court this could have a negative impact on the child;
- If an application had to be made to the criminal court, it is not clear who would make any such application (which would be about a civil matter rather than a criminal matter);
- The proposal may also lead to more cases in the criminal courts as the procedure for the criminal court removing PRRs may be a separate procedure from the original criminal case;
- The proposal may also lead to higher legal aid costs as criminal cases could take longer and include appeals against the removal of PRRs (against that, there might be fewer civil cases as there could be a drop in the number of civil cases seeking the removal of PRRs from a person);
- Under the proposal, a number of solicitors may have to be involved as individuals may have different solicitors acting for them in criminal and civil cases;
- There would need to be further consideration of what is meant by a "serious criminal offence". It could be difficult to establish exactly what types of offences would justify the criminal court considering the removal of PRRs;
- Any proposal that required the removal of PRRs may infringe on a person's rights under Article 8 of the ECHR which provides a right to respect for one's private and family life, home and correspondence; and
- A parent can already apply to the civil courts for PRRs to be removed from the other parent if the other parent is convicted of a serious criminal offence.

Question 29): Should a person convicted of a serious criminal offence have their PRRs removed by the criminal court?
Please select only one answer.

a) Yes – by an application to the criminal court following a conviction to remove that person's PRRs. ☐
b) Yes – by giving the criminal court a duty to consider the removal of PRRs when a person is convicted of certain types of offences. ☐
c) No – leave as a matter for the civil courts. ☐
d) No – another way (please explain). ☐

Why did you select your answer above?

Part 8: Child Abduction by parents

Introduction

8.01 In this section of the consultation, we are seeking views on how civil and criminal child abduction by parents can be further prevented.

8.02 The Central Authority for Scotland team, which is part of the Justice Directorate with the Scottish Government, has produced the statistics below on the number of Parental Child Abduction cases handled by them under the Hague Convention and Brussels IIA. See Annex D for further information on Brussels IIA.

Year	Incoming	Outgoing
2007	6	2
2008	7	10
2009	10	12
2010	12	10
2011	15	9
2012	6	16
2013	26	16
2014	17	13
2015	25	16
2016	13	20

8.03 The Central Authority for Scotland's role in relation to Hague Convention abduction cases is to ensure all necessary information is transmitted to the appropriate parties and to monitor progress once legal representation has been arranged for the applicant in incoming cases and to liaise with the other Central Authority and the applicant in outgoing cases.

8.04 SLAB data shows that in 2016/17 they received 21 applications for child abduction cases under the Hague Convention. Of these 19 applications were granted, one was refused and one was abandoned.

Civil procedure

8.05 There may be a need for a minor change to Section 2 of the 1995 Act.

8.06 Section 2(3) of the 1995 Act provides that:

"Without prejudice to any court order, no person shall be entitled to remove a child habitually resident in Scotland from, or to retain any such child outwith, the United Kingdom without the consent of a person described in subsection (6) below."

8.07 Section 2(6) of the 1995 Act provides that:

"The description of a person referred to in subsection (3) above is a person (whether or not a parent of the child) who for the time being has and is exercising in relation to him a right mentioned in paragraph (a) or (c)

of subsection (1) above [relating to residence and contact]; except that, where both the child's parents are persons so described, the consent required for his removal or retention shall be that of them both".

8.08 One reason why a person is not "exercising" their rights as defined in section 2(6) of the 1995 Act may be because the child is now outwith the United Kingdom. Given this, it may be helpful to change the reference to "exercising" (or define "exercising") so that a person unable to exercise rights because of a removal is not excluded.

Question 30): Should the reference in section 2 of the 1995 Act to "exercising" parental rights be changed to reflect that a person may not be exercising these rights because the child is now outwith the UK? Yes ☐ No ☐ Why did you select your answer above?

Criminal procedure

Background

8.09 In Scotland, there is a common law offence (one not defined in statute) of plagium. This is a crime of child stealing which may be committed against children below the age of puberty. It is also a crime (abduction) to carry off or confine any person against their will without lawful authority. Further information on these two offences can be found in the SLC report of 1987[72]. Annex E gives further details of statistics on child abduction and plagium.

8.10 There are also specific statutory offences in the Child Abduction Act 1984 (the 1984 Act). This extends to England and Wales and Scotland, but makes different provision for Scotland.

8.11 Section 1 of the 1984 Act makes it a criminal offence in the law of England and Wales for a person connected with a child under the age of 16, such as a parent, to take or send the child out of the United Kingdom without the appropriate consent.

8.12 Section 6 of the 1984 Act makes it a criminal offence in the law of Scotland for a person connected with a child under 16 to take or send the child out of the United Kingdom without the appropriate consent, but only

[72] https://www.scotlawcom.gov.uk/files/8712/7989/6603/rep102.pdf. The SLC's prior discussion paper (number 67) is at https://www.scotlawcom.gov.uk/files/2813/1419/8658/cm67.pdf This report has not been implemented. The then Scottish Executive outlined its reasons for not implementing the report in a written answer to a Parliamentary Question on 23 January 2002: http://www.parliament.scot/parliamentarybusiness/28877.aspx?SearchType=Advance&ReferenceNumbers=S1W-21642&ResultsPerPage=10

where there is a court order from a court in the UK on custody or from a court in England, Wales or Northern Ireland making the child a ward of court. In addition, under section 6 of the 1984 Act, it is a criminal offence in Scotland to take a child out of the United Kingdom if there is an order from a court in the UK prohibiting the removal of the child from the UK or any part of it.

8.13 Following recent representations, we are considering whether section 6 of the 1984 Act needs to be amended to make it a criminal offence in Scotland, as in England and Wales, for a person connected with a child to remove that child without the appropriate consent.

8.14 Our proposals would not alter the existing offence in Scotland of removing a child from the UK or any part of it contrary to a specific court order prohibiting such removal. However, the references in section 6 of the 1984 Act to court orders awarding custody or residence to a person and to court orders making the child a ward of court would be repealed and replaced with a more general offence about removing a child without the appropriate consent.

Pros/Cons

8.15 Amending the legislation could benefit a child as it would mean a court order is not required for it to be an offence to remove them from Scotland without appropriate consent. However, any change would require further consideration of a number of issues.

8.16 Firstly, whether the offence in any revised section 6 should apply to taking a child out of Scotland or out of the United Kingdom without appropriate consent.

8.17 We are aware that cross-UK border family cases involving children are not always straightforward. There is discussion on this in part 5 of this consultation. However, it appears to us that it is appropriate for the criminal offence to continue to relate to taking or sending the child out of the United Kingdom as:

- It is possible to obtain an interdict to stop a child being removed from Scotland. Please see section 35 of the Family Law Act 1986 (the 1986 Act) and section 11(2)(f) of the 1995 Act.
- There may be regular, lawful and day to day cross-border traffic across the border between Scotland and England.
- Section 6 of the 1984 Act as it stands makes it a criminal offence in the law of Scotland to remove a child from any part of the UK contrary to a court order. It seems appropriate for any offence on taking a child out of Scotland to continue to relate to a specific breach of a court order, rather than introduce a wider criminal offence.

8.18 Secondly, further consideration would be needed as to who could be accused and convicted of the offence. Both section 6 and section 1 of the 1984 Act refer to a person “connected with a child”. The relevant

provisions then reflect the different legislation in place in Scotland and in England and Wales. In our view, the offence is aimed at prohibiting parental child abduction when the child subject to the law of Scotland is taken out of the UK without the appropriate consent.

8.19 However, the offence could be committed by somebody other than a parent – eg by somebody who has PRRs in relation to the child. It is possible that a person connected with the child may have obtained (the equivalent of) PRRs elsewhere in the UK (the current drafting of section 6 of the 1984 Act recognises that court orders may have been made elsewhere in the UK) or from overseas (either within the EU or outwith the EU).

8.20 Since the 1984 Act was drafted, the EU Regulation 2201/2003 [Brussels IIa] on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility has come into force (and is currently being renegotiated) [73]. In addition, families are becoming increasingly international. Therefore, we consider that if section 6 of the 1984 Act is amended, any revised offence of taking or sending a child out of the UK without the appropriate consent could be committed by:

- A parent or guardian of the child; or
- A person who has (any) PRRs and has been awarded these in Scotland; or
- A person who has obtained the equivalent of (any) PRRs for the child in a jurisdiction other than Scotland. We would need to consider how the parental responsibility status in another country would be proved as this could potentially be difficult.

8.21 The third area for further consideration is whose consent is needed to remove a child from Scotland. We consider that the logical approach here is to align the criminal offence at section 6 of the 1984 Act with the civil law at section 2 of the 1995 Act.

8.22 Therefore, to take a child out of the UK, consent would be needed from either any person exercising PRRs in relation to residence or contact or from both parents, if both are exercising PRRs. Again, the legislation could reflect PRRs awarded in Scotland or in another country. We would need to consider how the parental responsibility status in another country would be proved as this could potentially be difficult.

Question 31): Should section 6 of the Child Abduction Act 1984 be amended so that it is a criminal offence for a parent or guardian of a child to remove that child from the UK without appropriate consent?

[73] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32003R2201

Yes ☐
No ☐
Why did you select your answer above?

Part 9: Domestic Abuse

Introduction

9.01 In this section of the consultation, we are seeking your views on a number of topics in relation to protecting victims of domestic abuse and their children during court proceedings. These include:

- Banning of personal cross examination of victims of domestic abuse;
- Protection of victims and vulnerable parties in child welfare hearings;
- Protection of children from abuse or risk of abuse;
- Preventing repeated litigation;
- Ensuring the civil courts are provided with information on domestic abuse in actions under section 11 of the 1995 Act;
- Promoting the use of domestic abuse risk assessments; and
- Improving interaction between criminal and civil courts in the context of domestic abuse.

9.02 The Policy Memorandum for the Bill leading to the Domestic Abuse (Scotland) Act 2018[74] defines domestic abuse as physical violence and threats and psychological and emotional abuse.

9.03 We are aware of initiatives such as the Safe and Together model and Barnahus concept which can be used to support and help victims of domestic abuse and their children. The Safe and Together model focuses on keeping a child safe and together with the non-offending parent. This is done by encouraging parenting with the non-offending parent as the default position and working with the other parent to reduce risk and harm to the child. The Barnahus concept is an interdisciplinary and multi-agency service for child victims and witnesses of abuse and other serious crimes used in some other countries.

9.04 There is research showing that domestic abuse was alleged in half of all court actions over contact. When a child was not seeing their non-resident parent, this was allegedly due to violence upon the mother in half of the cases and due to alleged violence upon the child in 18% of the cases[75]. Research by CAFCASS and Women's Aid in 2017 shows that in England and Wales, domestic abuse was alleged in 62% of cases with fathers more likely to be the subject of allegations than mothers. Cases featuring allegations of domestic abuse were more likely to result in an order for no direct contact than cases without[76]. Research undertaken by the Ministry of Justice in 2009 showed that 53% of the contact and

[74] http://www.parliament.scot/Domestic%20Abuse%20Scotland%20Bill/SPBill08PMS052017.pdf

[75] :McKay K 2013 The treatment of the views of children in private law child contact disputes where there is a history of domestic abuse https://www.cypcs.org.uk/ufiles/views-of-children-and-domestic-abuse.pdf

[76] https://www.cafcass.gov.uk/download/2124/

residence cases in England and Wales involved allegations of domestic abuse or concerns about abduction or harm to children[77].

9.05 According to the Scottish Crime and Justice Survey[78] in 2014/15, 39.4% of those who experienced partner abuse in the last 12 months said that children were living in their household when the most recent incident took place. In addition, in 63.7% of cases where children were living in the household the children were present during the most recent incident.

Personal cross examination of victims of domestic abuse

Background

9.06 The Scottish Government's Programme for Scotland for 2017-18[79] included a commitment to consult on banning personal cross examination of domestic abuse victims in contact and residence cases as there is evidence that this could be used to prolong domestic abuse.

9.07 There are currently not many contact and residence cases where this is an issue at the moment as relatively few contact cases go to proof. However, the work by the Family Law Committee of the Scottish Civil Justice Council on case management may mean more cases are likely to go to proof (see paragraph 9.22).

9.08 Banning cross examination of domestic abuse victims in family proceedings in England and Wales was included in the Prison and Courts Bill which was introduced to the UK Parliament in February 2017[80]. The Bill fell following the calling of the General Election in May 2017. The UK Government have recently indicated that they remain committed to legislating on this for England and Wales[81].

9.09 The Australian Government consulted last year on proposals to introduce similar legislation[82]. In New Zealand, legislation introduced in 2016 means that an individual who has allegations against them of domestic abuse may not cross examine a complainant or a child witness unless a judge gives permission[83]. This extends to both civil and criminal cases.

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[77] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217368/family-justice-childrens-proceedings.pdf

[78] http://www.gov.scot/Publications/2016/05/2505/downloads

[79] http://www.gov.scot/Publications/2017/09/8468

[80] Clause 47 of the Prisons and Courts Bill contains the relevant provision: https://publications.parliament.uk/pa/bills/cbill/2016-2017/0170/cbill_2016-20170170_en_6.htm#pt2-pb8-l1g47

[81] https://consult.justice.gov.uk/homeoffice-moj/domestic-abuse-consultation/supporting_documents/Transforming%20the%20response%20to%20domestic%20abuse.pdf

[82] https://www.ag.gov.au/Consultations/Pages/Family-violence-cross-examination-amendments.aspx

[83] http://www.legislation.govt.nz/act/public/2016/0044/latest/DLM6488750.html

9.10 One option in contact and residence cases in Scotland would be to ban a person from cross examining a victim of domestic abuse if:

- The person has a criminal conviction relating to domestic abuse; or
- The person is the subject of a civil protection order against domestic abuse; or
- The court directs that the person should not be allowed to carry out personal cross examination based on some evidence of domestic abuse.

9.11 We propose that any ban on personal cross examination of a victim of domestic abuse would also extend to the personal cross examination of any child involved in the case.

Pros/Cons

9.12 Banning personal examination would mean that victims of domestic abuse do not suffer further abuse by a perpetrator who is using this method to prolong the abuse.

9.13 This would also bring the civil courts in line with the criminal courts where personal cross examination of a domestic abuse victim is already scheduled to be banned under the provisions of the Domestic Abuse (Scotland) Act 2018.

9.14 However, in order to have a fair trial the person who has or is alleged to have domestically abused another person would need to have a legal representative who would be able to examine and cross examine the other party. These cases would need to be specified in the Legal Aid (Scotland) Act 1986 as a case where a person gets automatic legal aid. This would lead to increased legal aid costs.

9.15 A ban on personal cross examination could have wider implications on how the whole case is conducted by the person who has or is alleged to have domestically abused another person.

Question 32: Should personal cross examination of domestic abuse victims be banned in court cases concerning contact and residence?

Yes ☐
No ☐
Why did you select your answer above?

Protection of victims and vulnerable parties in child welfare hearings

Background

9.16 Child Welfare Hearings are designed to be informal hearings in residence and contact cases. They are aimed at helping to resolve the dispute. Provision on the procedure for Child Welfare Hearings is made in Rules of Court.

9.17 We have received representations about domestic abuse victims concerned at having to sit at the same table as their abusers in Child Welfare Hearings. This matter was discussed in the FLC's sub-committee on case management in family actions which reported in October 2017[84].

9.18 The sub-committee sought further information from the SCTS as to the steps that courts currently take to protect parties at child welfare hearings where there is a background of alleged or proven domestic abuse. This information has been obtained by the SCTS and published[85].

9.19 The SCTS information is based on a short survey of 15 courts of various sizes throughout Scotland. A third of the courts surveyed indicated that there was an automatic separation of parties at all Child Welfare Hearings whilst the remainder said that suitable arrangements would be made if advised by solicitors or parties in advance of the hearing. The courts rely on parties bringing to their attention any possible issue in relation to domestic abuse. More than half the courts surveyed did not receive any formal applications by parties not to appear in a child welfare hearing because of alleged/proven domestic abuse. Only two of the 15 courts surveyed had received applications from individuals to use a live television link to avoid being in the same room as the other individual.

9.20 We are very grateful to the SCTS for carrying out this survey and are also very grateful to those who took part.

9.21 Following on from the survey we are seeking views on whether section 11 of the 1995 Act should be amended to provide that the court can, if it sees fit, give directions to protect domestic abuse victims and other vulnerable parties at any hearings.

9.22 The FLC sub-committee on case management in family actions made a number oF recommendations. The SCJC plan to consult on the report. One recommendation (see 4.8 (f) of the report) was that an initial case

[84] See paragraph 3.5 of the report at http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/flc-meeting-files/flc-meeting-papers-23-october-2017/paper-5-1a---report-by-flc-sub-committee-on-case-management-in-family-actions-(revised)--private.pdf?sfvrsn=2

[85] Family Law Committee meeting 05 February 2018

management hearing should function as a triage hearing. At this hearing, the sheriff would seek to establish whether the case is (i) of a complex, or potentially high-conflict, nature which will require proactive judicial case management leading up to a proof ("the proof track"); or (ii) a more straightforward case where the issues in dispute appear to be capable of being resolved by a series of Child Welfare Hearings without the need for a proof ("the fast track").

9.23 This might help protect victims of domestic abuse as "proof track" cases would not be required to go through a succession of Child Welfare Hearings.

Pros and cons

9.24 Amending section 11 of the 1995 Act to allow the court if it sees fit to give directions to protect domestic abuse victims could give further protection to victims.

Question 33): Should section 11 of the 1995 Act be amended to provide that the court can, if it sees fit, give directions to protect domestic abuse victims and other vulnerable parties at any hearings heard as a result of an application under section 11? Yes ☐ No ☐ Why did you select your answer above?

Protection of children from abuse or risk of abuse

Background

9.25 Sub-sections (7A) to (7E) of section 11 of the 1995 Act were added by the Family Law (Scotland) Act 2006 (the 2006 Act). They provide a list of matters that a court shall have regard to when considering the welfare of a child. This includes the need to protect the child from any abuse or risk of abuse.

9.26 During its post legislative scrutiny of the 2006 Act, the Justice Committee considered that there is a lack of evidence as to the extent to which these subsections have made children any safer[86].

9.27 This consultation seeks views on whether to keep, amend or remove sub-sections (7A) to (7E) of section 11 of the 1995 Act.

[86] See paragraphs 62 to 69 and 86 of the report by the Justice Committee: http://www.parlamaid.scot/parliamentarybusiness/CurrentCommittees/97604.aspx#m

Pros and Cons

9.28 The main benefit of sub-sections (7A) to (7E) is that they can be a powerful tool to protect victims of domestic abuse.

9.29 However, there is also a view that the sub-sections can provide an incentive for conflict between parents as they could encourage parties who are wishing to exclude a non-resident parent to say there has been domestic abuse.

Question 34): Should subsections (7A)-(7E) of section 11 of the 1995 Act containing a list of matters that a court shall have regard to be kept?
Please select only one answer.

a) Yes –retain as currently. ☐
b) Yes– but amend (please give details). ☐
c) No– remove these provisions. ☐
Why did you select your answer above?

Repeated litigation

Background

9.30 We are aware that there are cases where individuals have raised repeated cases regarding contact and residence for the same child.

9.31 In England and Wales, section 91(14) of the Children Act 1989 provides that:
"On disposing of any application for an order under this Act, the court may (whether or not it makes any other order in response to the application) order that no application for an order under this Act of any specified kind may be made with respect to the child concerned by any person named in the order without leave of the court."

9.32 This consultation seeks your views about whether provision of this nature should be added to section 11 of the 1995 Act.

Pros and cons

9.33 Introducing a provision which requires the court to give permission for any repeated litigation in section 11 cases could reduce the risk of such litigation being used as a way of continuing domestic abuse. Introducing a provision could also benefit children and young people as repeated litigation may not be in their best interests and could lead to extended periods of uncertainty. It could also have cost savings in reducing unnecessary litigation.

9.34 On the other hand, a provision of this nature could lead to litigators seeking leave of the court to raise a further action under section 11 and

could lead to cases becoming longer as leave would have to be sought before a fresh action could be raised.

9.35 It might also be difficult to enforce this provision in practice.

Question 35): Should section 11 of the 1995 Act be amended to lay down that no further application under section 11 in respect of the child concerned may be made without leave of the court? Yes ☐ No ☐ Why did you select your answer above?

Information provided to the civil courts on domestic abuse in actions under section 11 of the 1995 Act.

Background

9.36 This consultation seeks your views on what more, if anything, should be done to ensure the civil courts have information on domestic abuse when considering a case under section 11 of the 1995 Act.

9.37 We believe that information on domestic abuse should be provided to the courts in cases being heard under section 11 of the 1995 Act. This enables the courts to take full account of domestic abuse when considering the case. This consultation discusses, at paragraphs 9.25-9.29, sub-sections 11(7A) to (7E) of section 11 of the 1995 Act, which are designed to provide protection from abuse.

9.38 In some instances, one of the parties to a section 11 case may have criminal convictions in relation to domestic abuse or there may be criminal proceedings taking place. In other cases, a party in a section 11 case may have a civil protection order (eg an interdict) to protect them from domestic abuse. And in other section 11 cases, there may have been domestic abuse, or allegations of domestic abuse, but there may be no relevant criminal convictions or civil protection orders in place.

9.39 Parties may indicate in their initial pleadings or defences that they have been subjected to domestic abuse. In addition, a child welfare report may note any allegations of domestic abuse. However, there is no guarantee that information on domestic abuse is available to the court when they are dealing with a contact or residence case.

9.40 In England and Wales, a practice direction was issued in 2017 which says that the family court must at all stages of the proceedings consider whether domestic abuse is raised as an issue, either by the parties or by CAFCASS or otherwise[87]. The practice direction goes on to list the actions the court should follow in these cases.

[87] https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_12j#1a

9.41 For Scotland, there are a number of potential options – both legislative and non-legislative – to ensure that the courts are aware of domestic abuse that has taken place when they are considering a case under section 11 of the 1995 Act. Potential options include:

- No further action and just continuing to rely on relevant information being provided in the initial pleadings and defences provided in a section 11 case[88];
- Placing a proactive duty in primary legislation on the civil courts to establish if there has been domestic abuse;
- If, as discussed in part 2, powers are taken to regulate child welfare reporters the primary legislation setting out the functions of the child welfare reporter could provide that they must consider in each case whether there is evidence of domestic abuse and, if so, report on it accordingly. This would be in line with existing practice of child welfare reporters;
- Including domestic abuse in any welfare checklist for the courts to consider in section 11 cases (see paragraphs 10.17-10.20) Any such checklist would build on the existing provisions in sub-sections 11 (7A) to (7E) on protection from abuse; or
- Discuss with the Law Society of Scotland and the Family Law Association whether guidance for practitioners would be helpful. Any such guidance could reflect that knowledge about the dynamics of domestic abuse is improving.

9.42 It would, of course, be possible to take both non-legislative action (eg guidance for practitioners) and legislative action (eg duties on courts and on child welfare reporters).

Pros/Cons

9.43 It can be argued that the existing system and procedures should ensure that information on domestic abuse is provided to the courts. However, some stakeholders say that it does not. Therefore, this consultation is seeking views on whether action should be taken and, if so, whether any such action should be legislative or non-legislative.

[88] The report of the Family Law Committee sub-committee on case management in family actions considered issues on pleadings generally: http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/flc-meeting-files/flc-meeting-papers-23-october-2017/paper-5-1a---report-by-flc-sub-committee-on-case-management-in-family-actions-(revised)--private.pdf?sfvrsn=2 (see paragraphs 3.11 and 4.12).

Question 36): Should action be taken to ensure the civil courts have information on domestic abuse when considering a case under section 11 of the 1995 Act?

Yes ☐
No ☐
If yes, what action should be taken?
Please select all answers that apply.

a) Introducing a duty in legislation on the civil courts to establish if there has been domestic abuse. ☐

b) Placing a duty in legislation on child welfare reporters that they must consider in each case whether there is evidence of domestic abuse and, if so, report on it accordingly. ☐

c) Including domestic abuse in any welfare checklist for the courts to consider in section 11 cases. ☐

d) Discussing with the Law Society of Scotland and the Family Law Association whether guidance for practitioners would be helpful. ☐

e) Other (please give details). ☐

Why did you select your answer(s) above?

Domestic abuse risk assessments

Background

9.44 We are seeking your views on whether we should do more to promote domestic abuse risk assessments once a contact and residence case is in court.

9.45 Domestic abuse risk assessments could provide an assessment of the risks posed by a perpetrator of domestic abuse to a child and to a non-abusive parent. It would be important to:

- Ensure those carrying out any such assessment are fully trained;
- Hold the perpetrator of domestic abuse to account; and
- Ensure the court has sufficient information to reach an informed decision on the contact and residence case it is dealing with but is not overloaded.

9.46 One option might be to ensure that child welfare reporters have the necessary training to carry out their duties. The regulation of child welfare reporters is discussed at paragraphs 2.54 to 2.75 in this consultation.

Question 37): Should the Scottish Government do more to promote domestic abuse risk assessments?
Yes ☐
No ☐

If yes what should be done?
Why did you select your answer above?

Improving the interaction between criminal and civil courts in the context of domestic abuse

Background

9.47 This consultation seeks your views on whether we should explore the possibility of improving the interaction between the criminal and civil courts where there has been an allegation of domestic abuse.

9.48 The potential to improve engagement between courts considering criminal and civil issues where there has been an allegation of domestic abuse was raised during the parliamentary debates on the Domestic Abuse (Scotland) Act 2018.

9.49 Integrated courts dealing with both criminal and civil matters exist in other jurisdictions such as New York[89] where there have been integrated Domestic Violence Courts since 2001. In these courts, a single judge deals with all the civil, criminal and family matters for a single family.

9.50 Toronto has a similar model where there is a criminal allegation of domestic violence and the accused is also involved in a related law case concerning child custody and access, child support, spousal support or a restraining order.

9.51 This would be a significant change from current practice in Scottish Courts where criminal and civil matters are dealt with separately. However, civil courts dealing with child contact matters in Scotland are required, by subsections (7A) to (7E) of the 1995 Act, to consider whether there is a context of domestic abuse, even if no criminal case has been progressed.

9.52 The types of civil cases that would be relevant to better interaction could include contact cases where domestic abuse is alleged and cases where a civil protection order (such as an interdict) to protect against domestic abuse is being sought.

9.53 Evidence from the Scottish Crime and Justice Survey confirms that not all domestic abuse incidents result in an alleged crime being reported to

[89] https://www.nycourts.gov/courts/family-violence/dv/index.shtml

the police or prosecuted. Victims will often experience multiple incidents of abuse before reporting abuse to the police. Any arrangements for improving interaction between criminal and civil courts where there is a criminal case involving domestic abuse would only cover a proportion of civil cases where domestic abuse might be a relevant factor for the court.

9.54 The standards of proof for criminal and civil matters are fundamentally different.

9.55 Under the Judiciary and Courts (Scotland) Act 2008, the Lord President has statutory responsibility for making and maintaining arrangements for securing the efficient disposal of business in the Scottish Courts. Any proposed changes in this area would, therefore, need to be developed in close dialogue with the Lord President and the Sheriffs Principal.

9.56 The existing system in Scotland, with sheriffs hearing both criminal and civil cases, means that in some instances a single sheriff may already deal with a criminal case and a civil case which cover the same incidents of domestic abuse. However, there are no active arrangements for ensuring that a single sheriff considers both civil and criminal matters involving allegations of domestic abuse.

Pros/Cons

9.57 A potential advantage of better interaction between civil and criminal courts is that a victim of domestic abuse could be providing evidence and information to the same sheriff which should reduce stress.

9.58 Evidence from the model for integrated courts used in New York (where a criminal allegation is the requirement for entry into the integrated court with related cases in two of the three following matters – family, criminal and matrimonial) is mixed. Some research has shown that an integrated court has the advantages of reducing inconsistent orders, and improving access to information, communication and collaboration and the availability of services. However, there is also evidence which suggests that many integrated courts actually required more court appearances overall and a longer time to case decision than separate courts.[90]

9.59 Options for formal integration of courts in Scotland raise a number of major issues:

- If a criminal accusation of domestic abuse is a prerequisite for entry into an integrated court, it is not clear what would happen if a party was found not guilty or not proven in the criminal case;
- If an integrated court only dealt with cases where there is a criminal element, there could still be many civil contact cases where domestic abuse may be alleged but there have been no criminal proceedings;

[90] Civil protective orders in integrated domestic violence court: An empirical study 2010 https://dash.harvard.edu/bitstream/handle/1/4772900/rickardcivilprotection.pdf?sequence=1

- There would need to be clarity as to whether an integrated court would also deal with other family matters. This could include, for example, divorce;
- There would also need to be clarity about what would happen if allegations of domestic abuse were raised in a civil case (on, for example, contact) after it had started. We would need to consider if such a case would be transferred from the ordinary courts to the integrated court;
- A single integrated court could require new rules of procedure, a new appeals process, consideration of the existing differences in the standard of proof in criminal and civil cases and consideration of how party-party expenses would be dealt with;
- A criminal case involves the Crown Office and Procurator Fiscal Service whereas a civil case does not;
- A single integrated court could also require a new body to regulate proceedings as this is unlikely to fall within the remit of the SCJC or the Criminal Court Rules Council;
- Legal Aid rules are different for both the criminal and civil courts so further work would need to be done on establishing the levels of legal aid;
- Further evaluation of the effectiveness of an integrated court structure would need to be undertaken;
- Many parties have different solicitors acting for them in criminal and civil cases. If only one solicitor is required, then this could have implications on the civil, criminal and children's legal assistance registers held by SLAB. In addition, the different requirements for professional indemnities means that civil solicitors pay more than criminal firms;
- There are also a number of sheriffs who focus only on family law work and therefore may not be able to hear criminal cases; and
- The maximum penalty envisaged by the Domestic Abuse (Scotland) Act 2018 is fourteen years' imprisonment. A sentence of this nature could not be imposed by the sheriff, but only by the High Court. This would create another layer of complexity about civil and criminal cases being handled by the same court.

9.60 The list above shows that there are a number of detailed practical issues to consider. In addition, we would want to carry out research on the experience of other jurisdictions which have integrated courts or other forms of arrangements for interaction between the criminal and civil courts, to learn from their experience.

9.61 Therefore, we do not consider that integrated courts could be established quickly. It would, though, still be useful to know whether you think this is an issue which we should explore further, bearing in mind that work in this area could take some considerable time.

Question 38): Should the Scottish Government explore ways to improve interaction between criminal and civil courts where there has been an allegation of domestic abuse?

Yes ☐
No ☐
Why did you select your answer above?

Part 10: Court Procedure

Introduction

10.01 We are seeking your views in this part on a number of topics in relation to court procedure. The specific areas are:

- Timing of cases;
- The type of court for hearing cases under section 11 of the 1995 Act; and
- A checklist of factors in section 11 for the courts to consider.

Timing of cases

Background

10.02 Research carried out by Scottish Government in 2010[91] shows that there was considerable variation in the length of contact cases. 71 of the 182 cases that were examined were still active after 18 months, but only 42 of those had been heard in court within the preceding six months. Most of the individuals that were surveyed for this research felt that their cases had gone on much longer than they had expected.

10.03 Data from SLAB shows that currently cases where parties received legal aid last the following length of time:

	Contact (%)	Residence (%)	Total (%)
Up to 6 months	15	21	17
6-12 months	24	30	26
12 – 18 months	17	17	17
18-24 months	13	10	12
2-3 years	17	12	15
3-4 years	7	5	7
4-5 years	4	2	3
Over 5 years	3	2	3

10.04 The SLAB data only covers those cases where individuals are granted Legal Aid. There is no information on cases which are privately funded. The figures cover the period from the date of the grant to the date of the final account. Therefore, the actual court time may be slightly less.

10.05 As noted in paragraph 9.22 of this consultation, the FLC established a sub-committee on case management in family actions and this sub-committee has produced a report. The SCJC intends to consult on the recommendations in this report.

[91] Understanding Child Contact Cases in Scottish Sheriff Courts. K.Laing & G.Wilson Newcastle University 2010. Available at: http://www.gov.scot/Resource/Doc/334161/0109246.pdf

10.06 In other jurisdictions including Australia and England and Wales, there are provisions in primary legislation on avoiding undue delay in family cases. In England and Wales, section 1(2) of the Children Act 1989 provides:

"In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child".

10.07 We are seeking your views on whether a similar provision to section 1(2) of the 1989 Act should be added to section 11 of the 1995 Act.

10.08 We also considered whether the 1995 Act could be amended to make provision in primary legislation laying down time limits for the courts when dealing with section 11 cases. However, we do not consider this to be appropriate. Cases under section 11 will vary in their nature and laying down time limits in primary legislation could not reflect their varied nature. In addition, it is not clear how time limits of this nature could be enforced.

Pros/Cons

10.09 The FLC considered at its meeting on 13 February 2017 whether or not court rules should be amended to include a provision about avoiding delay in family actions. The FLC agreed that the rules should not be amended to include a provision about avoiding delay[92]. However, one suggestion was made that any such provision should be included in primary legislation rather than rules. The argument for a provision of this nature in primary legislation is it would emphasise that undue delay is contrary to the welfare of the child.

10.10 It is widely accepted that undue delay in family cases can prejudice the welfare of the child. Undue delay may also expose children to more risk as the court has not ruled on the best interests of the child. Undue delay in court cases can also lead to increased stress for parties as it may lead to longer periods of uncertainty. Undue delay may also have cost implications for parties, for the legal aid budget and for the courts.

10.11 The arguments against are that any such provision may:

- Be unnecessary as the courts are already aware of the need to avoid undue delay in family actions; and
- Not have any practical effect.

[92] http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/flc-meeting-files/flc-13-february-2017/approved-minutes-13-february-2017.pdf?sfvrsn=2 (Paragraphs 17 to 19 refer).

Question 39): Should the Scottish Government introduce a provision in primary legislation which specifies that any delay in a court case relating to the upbringing of a child is likely to affect the welfare of the child?

Yes ☐
No ☐
Why did you select your answer above?

Type of court for hearing cases under section 11 of the 1995 Act

Background

10.12 Currently, a person can choose to apply to either the Court of Session or the Sheriff Court for an order in relation to a child.

10.13 In practice, 99% of cases are heard in the first instance by the Sheriff Court. The Civil Justice Statistics in Scotland 2015/16 indicate that in 2015-16 there were only eight cases that were initiated in the Court of Session on parental responsibilities and rights[93]. The way in which these statistics are collated may underestimate the number of cases relating to PRRs in the Court of Session. However, overall numbers in the Court of Session will be low compared with the volume of cases in the Sheriff Court.

10.14 We are seeking views on whether the 1995 Act and the Courts Reform (Scotland) Act 2014 should be amended to provide that cases under section 11 of the 1995 Act should only be heard in the Sheriff Court.

Pros/Cons

10.15 The advantages of having section 11 cases heard in just the Sheriff Court could be:

- It seems odd that jurisdiction can rest in two types of court. This could lead to "forum shopping" (a person choosing to raise proceedings in one court rather than another); and
- There could be a reduction in costs. For example, a person may face higher costs if the action is heard in the Court of Session rather than in the Sheriff Court. We understand that if a request for legal aid for taking a case to the Court of Session is made to SLAB they may ask whether the case could be heard in the Sheriff Court.

10.16 However, arguments against any changes are:

- There may be complexities in an individual case which make the Court of Session the most appropriate forum for a case to be heard;
- An application for an order under section 11 of the 1995 Act may be part of a wider family action seeking, for example, divorce, financial

[93] http://www.gov.scot/Publications/2017/03/5915/22

provision on divorce and a civil protection order. If the Court of Session did not have jurisdiction in section 11 cases, this could adversely affect its ability to hear wider family actions; and
- This is not a major issue as the vast majority of these cases are already being dealt with in the Sheriff Court.

Question 40): Should cases under section 11 of the 1995 Act be heard exclusively by the Sheriff Court? Yes ☐ No ☐ Why did you select your answer above?

Checklist of factors in section 11 for the courts to consider

Background

10.17 This consultation seeks your views on whether to establish a welfare checklist of factors for the courts to consider when dealing with a case under section 11.

10.18 Section 1(3) of the Children Act 1989 prescribes such a checklist in England and Wales. Any checklist for the courts in Scotland to consider could include a wide range of factors such as:
- Domestic abuse;
- Whether there are any relevant criminal convictions or prosecutions that the civil court should take into account; and
- Whether there is any evidence of one parent unreasonably trying to influence the child against another parent.

Pros/Cons

10.19 The arguments for a checklist are:
- It may make it more transparent to all what factors the court has to consider.
- It appears in line with Paragraph 50 of General Comment 14(2013) by the United Nations Committee on the Rights of the Children[94].
- It could build on subsubsections (7A) to (7E) of section 11 of the 1995 Act. This provides a list of matters that a court shall have regard to when considering the welfare of a child; and
- It could take full account of domestic abuse.

10.20 The arguments against a checklist are:

94 http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsqIkirKQZLK2M58RF%2f5F0vEAXPu5AtSWvliDPBvwUDNUfn%2fyTqF7YxZy%2bkauw11KCqUdkLyII8YvUE61eGa71i4uSXdRmekRNnGyo1aEv9QH

- There could be considerable debate about exactly what should be included in any checklist;
- It could be argued that any checklist is unnecessary given that section 11(7)(a) of the 1995 Act already provides that when considering whether to make an order and what order to make the court has to regard the welfare of the child as its paramount consideration;
- It could be argued that any welfare checklist could detract from the key principle that the welfare of the child is paramount;
- A checklist could be seen as encouraging "a box-ticking approach" rather than encouraging assessment of all relevant factors; and
- As the United Nations Committee on the Rights of the Children said, any checklist could not be exhaustive: there could well be other factors to take account of.

Question 41): Should a checklist of factors for courts to consider when dealing with a case be added to section 11 of the 1995 Act?

Yes ☐
No ☐
Why did you select your answer above?

If you answered yes what should be in such a checklist?

Part 11: Alternatives to Court

Introduction

General

11.01 This section of the consultation seeks your views on:

- Whether the Scottish Government should do more to encourage Alternative Dispute Resolution (ADR);
- Mediation and international child abduction cases; and
- Guidance for children and litigants;

11.02 Evidence suggests that court procedure can be costly, lengthy and stressful[95]. In appropriate cases, ADR can help parties settle their dispute outwith court or can reduce the number of issues that have to be taken to court. The Independent Strategic Review of Legal Aid that reported in March 2018 called for mediation to be seen as "a credible, readily available alternative to courts".[96]

11.03 In many cases, parties are able to settle contact and residence issues themselves without going to court or ADR. The Parenting Plan[97], which has recently been revised, is designed to help parents discuss what is best for their children. This has recently been updated to ensure that children are at the centre of agreements of this nature.

11.04 It is crucial to ensure that the views and best interests of children are taken full account of by parents when agreements are made on how children are brought up.

11.05 As well as informal agreements on how to bring a child up, it is also possible in Scotland to make and register legally binding agreements known as minutes of agreement[98].

11.06 ADR is not meant to replace going to courts in all cases, but it can have advantages over going to court. The main advantages are that it can be more flexible, solve the issue faster, be less stressful, provide a longer lasting solution and be cheaper than attending court.

11.07 However, there are cases where ADR is not appropriate. Scottish Women's Aid have recently said that:

"There is quite a sizeable evidence base that shows that women and children can be put at risk and, in fact, harmed in the mediation process when domestic abuse is part of the picture"[99].

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[95] See for example Understanding Child Contact Cases in Scottish Sheriff Courts. K.Laing & G.Wilson Newcastle University 2010. Available at: http://www.gov.scot/Resource/Doc/334161/0109246.pdf

[96] http://www.gov.scot/Resource/0053/00531705.pdf

[97] https://beta.gov.scot/publications/parenting-plan/

[98] Research on minutes of agreement is at http://www.crfr.ac.uk/projects/current-projects/all-settled-a-study-of-legally-binding-separation-agreements-in-scotland/

[99] http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11399

11.08 There are various forms of ADR available for family law cases. The main types which we are aware of are mediation, arbitration, collaborative law, family group conferencing and family group therapy. These are outlined briefly below.

Mediation

11.09 Mediation is a joint decision making process where individuals are invited to cooperate with each other to find mutually satisfactory agreements on a range of topics, including contact and residence, in front of an independent third party. The focus on mediation is in finding the middle ground between individuals.

11.10 Section 1 of the Civil Evidence (Family Mediation) (Scotland) Act 1995 makes provision so that no information as to what occurred during family mediation conducted by a person accredited as a mediator in family mediation to an organisation approved for the purposes of the 1995 Act by the Lord President is admissible as evidence in any civil proceedings. There are some exceptions in section 2 of the Civil Evidence (Family Mediation) (Scotland) Act 1995[100].

11.11 The two organisations approved by the Lord President for the purposes of the 1995 Act are the Law Society of Scotland (for lawyer mediators) and Relationships Scotland[101]. Lawyer mediators have an organisation called Comprehensive Accredited Lawyer Mediators Scotland[102].

11.12 Sheriff Court Ordinary Cause Rule 33.22 provides that:
"In any family action in which an order in relation to parental responsibilities or parental rights is in issue, the sheriff may, at any stage of the action, where he considers it appropriate to do so, refer that issue to a mediator accredited to a specified family mediation organisation".

11.13 There are similar provisions in the Ordinary Cause Rules for civil partnership actions and in the Court of Session Rules.

11.14 Relationships Scotland figures for 2015/16 show that there were 153 court referrals to their organisation for family mediation. This is 6% of the total number of mediation referrals to Relationship Scotland bodies. 33% of mediation referrals come from solicitors or the courts. It does appear that some solicitors will encourage their clients to go to mediation prior to going to court, on the basis that the sheriff/judge will refer them at a later stage if not. So the number of referrals as a consequence of the rule is higher than the 6% which come directly from the courts.

[100] https://www.legislation.gov.uk/ukpga/1995/6/section/2
[101] https://www.relationships-scotland.org.uk/
[102] http://www.calmscotland.co.uk/

11.15 Article 48 of the Convention on Preventing and Combating Violence against Women and Domestic Violence[103] (the Istanbul Convention) prohibits the use of mandatory alternative dispute resolution processes including mediation and conciliation, in relation to all forms of violence covered by the scope of the convention. This aims to highlight the negative impact of ADR being used instead of court procedure in cases involving domestic abuse. In cases involving domestic abuse, individuals should have access to adversarial court proceedings presided over by a neutral judge.[104]

11.16 In the light of Article 48 of the Istanbul Convention, the Scottish Government are considering whether to prepare a Policy Paper for the FLC. This Policy Paper would ask the FLC whether any changes are needed to Sheriff Court Ordinary Cause Rule 33.22 (and equivalent rules in relation to civil partnership actions and actions in the Court of Session) to lay down that referrals to mediation should not take place when there has been domestic abuse.

Arbitration

11.17 Arbitration is a more formal process than mediation as the parties enter into an agreement under which they appoint a suitably qualified person to adjudicate a dispute and make an award. On entering into the Agreement to Arbitrate, the parties agree to be bound by the Arbitrator's determination. The arbitrator in family cases is usually a family lawyer who has received special training.

11.18 The Arbitration (Scotland) Act 2010 made provision for arbitration. In Scotland, Family Law Arbitrators in Scotland have established the Family Law Arbitration Group Scotland[105].

Collaborative Law

11.19 Collaborative law is based on principled negotiations. In contrast to mediation, where both parties meet with one neutral mediator, in collaborative law, each party has their own solicitor and issues are resolved in meetings of all four of them (the two parties and their solicitors) with topics planned in advance.

11.20 Consensus Collaboration Scotland is an organisation of Scottish lawyers, family consultants and financial specialists which offers collaborative law[106].

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[103] https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210

[104] The Preventing and Combating Violence Against Women and Domestic Violence (Ratification of Convention) Act 2017 requires the UK Government to take all reasonable steps as soon as reasonably practicable to enable the UK to become compliant with the Istanbul Convention. This Act extends to Scotland. It is available at: https://www.legislation.gov.uk/ukpga/2017/18/contents

[105] http://www.flagsarb.com/

[106] http://www.consensus-scotland.com/

Family Group Conferencing

11.21 Family Group Conferencing (FGC) involves an extended family meeting to resolve issues of child welfare concerns. FGC generally incorporates four stages:

- Referral. Family members agree that FGC is required and an independent coordinator is appointed;
- Preparation. The coordinator identifies family network. Meets with people attending to discuss the reason for the meeting and invite them to participate;
- Meeting. Everyone attends to discuss the situation. Family meets in private to discuss a plan of action and this is agreed by all attendees; and
- Review. Operation of the plan is reviewed and if necessary further meetings are arranged.

Family Group Therapy

11.22 Family Group Therapy involves a therapist. The focus is on ensuring that parties understand they have different relationships with the different parties involved. Family therapy's key objective is that any work carried out with a family must fulfil the needs of the child.

Whether the Scottish Government should do more to encourage ADR

Background

11.23 We are seeking your views on whether we should be doing more to encourage ADR as an alternative to going to court.

11.24 The Justice Committee of the Scottish Parliament in their post legislative scrutiny of the Family Law (Scotland) Act 2006 (the 2006 Act) suggested that cases would benefit from increased use of mediation[107].

11.25 There are a number of existing steps taken to encourage use of ADR in family actions. These include:

- The court rules referred to at paragraphs 11.12 and 11.13 above;
- Paragraph 4.38 of SLAB's Civil Legal Aid Handbook indicates that the Board will ask an applicant for civil legal aid in a contact case if they have tried mediation[108]; and
- Signposting by the Scottish Government[109].

[107] http://www.parlamaid.scot/parliamentarybusiness/CurrentCommittees/97604.aspx#n (paragraph 87)

[108] https://www.slab.org.uk/handbooks/Civil%20handbook/wwhelp/wwhimpl/js/html/wwhelp.htm#href=Part%20IV%20LA/IV%204%20merits.html

[109] For an example of current signposting by the Scottish Government to ADR to resolve a family dispute please see https://www.mygov.scot/family-mediation/

Mediation Information and Assessment Meetings (MIAMs) in England and Wales

11.26 One potential option to encourage ADR in family cases is to ensure that, in appropriate cases, parties have sufficient information on it before going to court. That is broadly the system in place in England.

11.27 In England and Wales, a person has to attend a Mediation Information and Assessment Meeting (MIAM) prior to making an application to a court for a child arrangements order (the broad equivalent in England and Wales of contact and residence orders) and for certain other orders. This meeting is to see whether mediation could be used to resolve the issues without going to court. The meeting is between the individual concerned and a mediator and does not necessarily have to involve the other individual.

11.28 There are situations in England and Wales where a person does not have to attend a MIAM before going to court[110]. These include:

- There is evidence of domestic violence;
- There are child protection concerns;
- An application to the court needs to be made urgently because, for example, there is a risk to the life or safety of the person who is making the application or their family;
- There has been attendance at a MIAM or another form of non-court dispute resolution within the last four months;
- The prospective applicant or other parties to the case are subject to a disability or other inability that would prevent attendance at a MIAM unless appropriate facilities can be offered by an authorised mediator;
- The prospective applicant or other parties to the case are in prison or subject to other restrictions;
- The prospective applicant or other parties to the case are not habitually resident in England and Wales;
- A child is one of the prospective parties to the case;
- There is not a mediator within 15 miles of where the person lives or having checked with three mediators there is no appointment available within 15 working days; or
- A mediator shows on the court form that mediation is not suitable.

11.29 If we should introduce legislation creating an equivalent of MIAMs in Scotland, any such legislation would also need to make provision so that, as is the case in England and Wales, there would be exemptions from any requirement to attend a MIAM before going to court.

[110] The exemptions to the MIAM requirement in England and Wales are contained in Chapter 3 to Part 3 of the Family Procedure Rules for England and Wales. This is available at: https://www.justice.gov.uk/courts/procedure-rules/family/parts/part_03

Evidence on mediation

11.30 The UK Government's Report of the Family Mediation Task Force in June 2014 said:

"Australia, New Zealand and Canada have all had success in promoting mediation and their experience reinforces the hypothesis that the potential for out of court dispute resolution is around 30% of divorcing and separating couples. In achieving that level, Canada has seen a reduction in couples resorting to using the court from 10% to 5%, Australia has seen a 32% reduction in the number of final hearings in children's cases; and New Zealand has seen an increasing reduction in family matters needing court disposal. Norway estimates that fewer than 10% of cases now go to court".[111]

Options for encouraging ADR in family cases in Scotland

11.31 We have identified three potential options for encouraging ADR in family cases in Scotland:

- The first is no further action, on the basis that steps to encourage ADR in appropriate cases are already in place;
- The second is legislation to try and ensure parties are aware of ADR before going to court. This would involve legislation to introduce to Scotland something similar to MIAMs; and
- The third would not be legislative but would involve more signposting to appropriate services. Paragraphs 11.41 - 11.48 discuss generally whether we should prepare more guidance and information for potential litigants and children involved in family cases.

Pros/Cons

11.32 The benefit of using ADR is that as mentioned in the introduction to this part, it may be quicker, cheaper, more flexible and less stressful than going to court. However, we are aware that ADR would not be appropriate in all circumstances for example where there has been domestic abuse.

11.33 If we were to encourage further use of ADR in family cases (eg by using legislation), we would need to ensure that there was a specific exclusion for victims of domestic abuse in line with the Istanbul Convention on preventing and combating violence against women and domestic violence.

11.34 If we were to encourage further use of ADR in family cases, we would also need to consider how well ADR allows for the views of the child to be heard. The topic of how the voice of the child can be heard is discussed in more detail in part 2 of the consultation.

[111] http://www.justice.gov.uk/downloads/family-mediation-task-force-report.pdf

11.35 The option of adopting a MIAM style approach in Scotland has the benefit of making parties aware of the availability of ADR as an alternative to court. However, research by the UK Government published in 2015 suggested that the applicant only attended a MIAM in 19% of cases[112].

11.36 The options of raising awareness of alternatives to court and providing guidance to parties would give people the chance to use ADR, but leaves it to the individual to decide if this is the best option for their situation. The drawback is that there is no guarantee that people seeking to raise family actions in court will read guidance encouraging the use of ADR.

Question 42): Should the Scottish Government do more to encourage Alternative Dispute Resolution in family cases?
Please select as many options as you want.

a) Yes – introduce Mediation Information and Assessment Meetings in Scotland. ☐
b) Yes – better signposting and guidance. ☐
c) Yes – other (please give details). ☐
d) No – no further action required. ☐
Why did you select your answer(s) above?

Mediation and international child abduction cases

Background

11.37 As indicated in paragraph 11.10 above, section 1 of the Civil Evidence (Family Mediation) (Scotland) Act 1995 provides that:
"no information as to what occurred during family mediation to which this Act applies shall be admissible as evidence in any civil proceedings".

11.38 In June 2015, there was an international child abduction case in the Outer House of the Court of Session[113]. In paragraph 17 of its opinion, the Court said:
"In my view the arguments for the proposition that the 1995 Act does not apply to mediations about cross-border abductions have the edge".

11.39 Section 1 of the Civil Evidence (Family Mediation) (Scotland) Act 1995 makes provision on the descriptions of family mediation to which it applies. Under section 1(2)(e), the Scottish Ministers may make regulations to lay down other descriptions of family meditation which the Civil Evidence (Family Mediation) (Scotland) Act 1995 should apply to.

112 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/399573/miams-report.pdf

113 https://www.scotcourts.gov.uk/search-judgments/judgment?id=5ea1eea6-8980-69d2-b500-ff0000d74aa7

Any such regulations would be subject to the negative procedure in the Scottish Parliament.

11.40 We are seeking views as to whether the Scottish Ministers should make such regulations to clarify that confidentiality of mediation extends to cases involving cross border abduction of children. The regulations would clarify that mediation in these cases would benefit from the same level of confidentiality as mediation in other types of family cases.

Question 43): Should Scottish Government make regulations to clarify that confidentiality of mediation extends to cases involving cross border abduction of children?
Yes ☐
No ☐
Why did you select your answer above?

Guidance for children and litigants.

Background

11.41 We are seeking views on whether we should produce and publish more guidance for children and litigants in relation to family cases. This guidance could cover cases where parents are not together and there is disagreement on contact and residence.

11.42 There is already some guidance available in this type of area, published by a number of bodies. Any further guidance produced and published by us could cover areas such as:

- The law generally on contact and residence;
- Alternatives to court (such as ADR); and
- What the court experience is like.

11.43 Any guidance about the court experience may need to manage the expectations of those planning to raise a family action in court. In particular, any guidance could point out that a civil court case on contact and residence might:

- Not be good for the child;
- Not be good for relations between the parents;
- Be lengthy;
- Be expensive;
- Be very stressful; and
- Not have the outcome which the prospective litigant is seeking.

11.44 We could also provide more guidance on a parent using section 7 of the 1995 Act to appoint a guardian to a child in the event of the parent dying.

Pros/Cons

11.45 Any guidance would not require legislation and could help improve litigants and children's experience of the court process. Further guidance might also be helpful to party litigants (people representing themselves).

11.46 Guidance for children could also help to put the child at the centre of the court case as they could be more aware of the procedure. This would link in with the recommendation of *Power Up/Power Down* that children want to know what is happening during the court process.

11.47 However, guidance is not a substitute for independent legal advice and cannot cover every individual circumstance.

Question 44) Should Scottish Government produce guidance for litigants and children in relation to contact and residence? Yes ☐ No ☐ Why did you select your answer above?

Part 12: Birth Registration

Introduction

12.01 This section of the consultation is on the topic of registration of births in Scotland. In particular, we are seeking your views on:

- Applying for a change of name on birth certificates;
- Seeking child's views on changes of name on a birth certificate; and
- Registration of births by unmarried fathers.

12.02 We are also providing an update on changes we propose to make to section 20(1)(d) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 (the 1965 Act).

12.03 A child's mother or father has a duty to register the birth of any child born in Scotland. A father who is not married to the mother can only be named in the register as the father if:

- He jointly signs the register with the mother; or
- He and the mother sign declarations that he is the father; or
- A court declares that he is the father and the mother registers the birth.

12.04 A woman who is not married to, or in a civil partnership with, the mother can only register the birth and be named in the register as parent if the provisions of the Human Fertilisation and Embryology Act 2008 (the 2008 Act) apply to them and

- She jointly signs the register with the mother; or
- She and the mother sign declarations (these are available from the registrar) that she is the parent; or
- A court declares that she is the parent and the mother registers the birth.

Applying for a change of name on birth certificates

Background

12.05 Currently, any person whose birth is registered in Scotland or who is the subject of an entry in the Adopted Children Register, the Parental Order Register or the Gender Recognition Register can apply to NRS to have a change of name recorded[114]. There is no requirement in Scotland for a person to record a name change on their birth entry to be able to use or go by a new name.

12.06 If the person is under 16 years of age, the application must be made by a person with parental responsibilities for that child. This person is known as the "qualified applicant" and is defined in section 43(9A) of the 1965 Act as where:

[114] https://www.nrscotland.gov.uk/registration/recording-change-of-forename-and-surname-in-scotland

- Only one parent has parental responsibilities in relation to the child, that parent;
- Both parents have such responsibilities in relation to the child, both parents; or
- Neither parent has such responsibilities, any other person who has such responsibilities.

12.07 Only one change of forename and one change of surname may be recorded for a child under 16 years of age. For a child under the age of two, only a change of forename may be recorded.

12.08 Figures from NRS suggests that there are on average 1,400 applications each year by qualified applicants to record a change of name of a person under 16 in the birth register.

12.09 The form that is currently used for applications to record a change of name for a person under the age of 16 does not ask the applicants whether they have sought the views of the young person[115].

12.10 We are considering whether young people under 16 with capacity should be able to apply to record a change of name themselves. If young people under 16 with capacity were allowed to apply, this could be instead of the current right of a person with PRRs to apply to record a change of name. Any child who is seeking to apply to record a change of name for themselves would be encouraged to seek the views of their parents and of anybody else who has PRRs.

12.11 The test of capacity could potentially be done, for example, by a practising solicitor or medical practitioner. Capacity in this context would be understanding generally what it means to record a change of name and understanding what it would mean to record the specific change of name that is being proposed.

12.12 A person with PRRs would retain the right to apply to record a change of name for a child who does not have capacity to make the application themselves. A person with PRRs seeking to apply to record a change of name for a child could be encouraged to obtain the views of the child where that child has sufficient age and maturity to express a view.

Pros/Cons

12.13 The main advantage of allowing a young person under the age of 16 who has capacity to record a change of name is they would be able to apply for the change themself rather than have to rely on another person. This would grant that young person greater autonomy.

[115] Further information on the form is available at: https://www.nrscotland.gov.uk/registration/recording-change-of-forename-and-surname-in-scotland

12.14 This could also lead to a reduction in the number of court cases where one parent - if both have PRRs - is refusing to permit a change in a child's name.

12.15 However, there would need to be further consideration of:

- Whether solicitors and medical professionals could be responsible for assessing whether a young person under 16 has the appropriate level of capacity to apply for a recorded change of name; and
- The degree to which any assessment would be binding on NRS, the body responsible for recording changes of name and appropriate mechanisms for sharing data on such assessments.

12.16 There may also be cases where one or both parents may not agree with the child's decision to change their name on their birth certificate.

12.17 One view is that if people under 16 with capacity are allowed to apply to record a change of name, their view would prevail over any opposing view held by the parent(s) or by any other person with PRRs.

12.18 The form used by those under 16 with capacity could provide (non-binding) information on the views held by the parent(s) or by anybody else with PRRs. This could encourage the young person to consult with them.

Question 45): Should a person under 16 with capacity be able to apply to record a change of their name in the birth register?

Yes ☐
No ☐
Why did you select your answer above?

Seeking child's views on the application for a change of name on a birth certificate

Background

12.19 As mentioned above, the form that is currently used for applying to record a change of name for a person under the age of 16 does not seek the views of the young person.

12.20 We are seeking views on whether the form should be modified to require the qualified applicant to seek the views of the child when applying to have a change of name recorded, so long as that child has sufficient age and maturity to express a view.

12.21 If young people under 16 with capacity are allowed to apply to record a change of name, then the applicant would only need to obtain the views

of the child when the child lacks capacity to apply on their own behalf to have a change of name recorded.

Pros/Cons

12.22 The benefit of this option would be that it would further compliance with UNCRC and would ensure that the child's views are sought on decisions that will affect them.

12.23 However, further consideration would need to be given as to what would happen if a child did not want to have their name changed, but the parent(s) wished to proceed.

Question 46): Should a person who is applying to record a change of name for a young person under the age of 16 be required to seek the views of the young person? Yes ☐ No ☐ Why did you select your answer above?

Registration of birth by unmarried fathers

Background

12.24 Where the name and surname of the father of a child has not been entered into the birth register, the Registrar General may record that name and surname by causing an appropriate entry to be made in the Register of Corrections Etc. if in relation to the person:

- A court has granted a decree of paternity; or
- The mother has produced a declaration saying that the person is the father and the person has produced a statutory declaration acknowledging himself to be the father; or
- The person has produced a declaration saying that he is the father and a statutory declaration by the mother that the person is the father; or
- If the mother is dead or cannot be found or is not capable of making the necessary declaration or statutory declaration, the sheriff orders the Registrar General to make an appropriate entry in the Register of Corrections Etc.

12.25 Therefore, where an unmarried father has a declarator of parentage that can be entered in the Register of Corrections Etc. This will result in an annotation of the birth register entry.

12.26 Section 20 of the 1965 Act also allows re-registration in the birth register if the unmarried father has PRRs (S.S.I. 2007/54 reg. 2(4)[116]). However, S.I. 1965/1838 requires an informant as defined in section 14

[116] https://www.legislation.gov.uk/ssi/2007/54/contents/made

of the 1965 Act to sign the re-registration entry. This excludes unmarried fathers. Therefore, S.I. 1965/1838 may need to be amended so that a father who has a declarator of parentage and has PRRs can re-register the birth showing him on the birth certificate.

Question 47): Should S.I. 1965/1838 be amended so that a father who has a declarator of parentage and has PRRs can re-register the birth showing him on the birth certificate? Yes ☐ No ☐ Why did you select your answer above?

Re-registration: second female parent: marriage

12.27 We intend to amend section 20(1)(d) of the 1965 Act to refer to marriage as well as civil partnership. Section 20(1)(d) of the 1965 Act refers to:

"the entry relating to the child in the register of births has been made so as to imply that the person, other than the mother, recorded as a parent of the child is so by virtue of section 43 of the 2008 Act and the mother and that person have subsequently become parties to a civil partnership with each other and…"

12.28 The Marriage and Civil Partnership (Scotland) Act 2014 allows same sex couples to marry. Following this, the 2008 Act was amended by the Marriage and Civil Partnership (Scotland) Act 2014 and Civil Partnership Act 2004 (Consequential Provisions and Modifications) Order (2014/3229) [see paragraph 18 of Schedule 5] to refer to a mother being either in a civil partnership or a marriage with another woman. Section 20(1)(d) needs to be amended to reflect this.

Part 13: Children's Hearings

Background

13.01 We are seeking your views in this section on a number of topics in relation to Children's Hearings. The specific areas where we are seeking views are on:

- The Principal Reporter right of appeal from the Sheriff Court: Relevant Persons;
- Amendments to allow modernisation of the Children's Hearings System through enhanced use of available technology;
- Local authorities as a recipient of certain papers; and
- Personal cross examination of vulnerable witnesses and children.

13.02 The fundamental principles of the Children's Hearings System are that the welfare of the child is the paramount consideration and that children and young people who offend and those who require care and protection are equally deserving and should be considered as children in need.

Principal Reporter right of appeal from the Sheriff Court: Relevant Persons

Background

13.03 Under the Children's Hearings (Scotland) Act 2011 (the 2011 Act), a pre-hearing panel or a Children's Hearing can decide whether an individual either is or is not to be deemed as a relevant person. To be a deemed relevant person, an individual must have (or recently had) a significant involvement in the upbringing of a child. Being granted deemed relevant person status brings with it a number of rights within the system, including the right to be involved in proceedings and to receive all relevant information and reports.

13.04 There are appeal rights in relation to the decisions made by a pre-hearing panel or Children's Hearing on deemed relevant person status. Section 160 of the 2011 Act provides a right to appeal such decisions to a sheriff. Under section 164 of the 2011 Act, there is also a further right of appeal to the sheriff principal or the Court of Session against the decision of the sheriff. This appeal right is restricted to the individual requesting deemed relevant person status, the child, a relevant person in relation to the child, or a combination of those persons acting jointly.

13.05 Section 163[117] of the 2011 Act already allows the Principal Reporter a right of appeal in certain cases where a sheriff does not confirm a

[117] Section 163(3) of the 2011 Act specifies the Principal Reporter has rights of appeal against a number of a sheriff's determinations, including for example, appeals against decisions of a children's hearing under section 163(1)(a)(iii).

children's hearing decision[118], but does not currently give the Principal Reporter a right to appeal the decision of a sheriff in an appeal against deemed relevant person status in the same way. Situations can arise where there appear to be grounds to appeal the sheriff's decision, but the child or family does not take this step. This can be for a number of reasons, including that they are not aware that there is a basis for a challenge, or to appeal would add to conflict between family members. Failure to appeal could result in a deemed relevant person being party to all Children's Hearings proceedings when they have not met the test of having significant involvement in the child's life, or alternatively not being involved in the proceedings when they should be. We are seeking views on whether to extend the Principal Reporter's right of appeal, similar to the right in section 163, to appeals relating to deemed relevant person status.

Pros/Cons

13.06 There are pros and cons to adding the Principal Reporter to the list of individuals who may appeal a sheriff's decision on the deemed relevant person status.

13.07 The inappropriate deeming of a relevant person and all of the rights that this status brings can have important legal implications. If there is an error in law, it would be in the interests of the child for this to be reviewed and clarified by an appeal court. This amendment will ensure that the Principal Reporter has the power to intervene where necessary and therefore protect the best interests of the child. The Principal Reporter already has rights of appeal in relation to other Sheriff Court appeals and the extension to cover relevant person appeals is likely to lead to such appeals only rarely. Between February 2017 and February 2018, there were forty four children's hearing cases involving relevant person status appeals made to a sheriff, with only two of those being appealed further.

13.08 In some cases, however, the Principal Reporter may consider it necessary to challenge a decision when the child and one or all of the relevant persons are content with the decision made, despite there being a possible legal error. The additional stress of a further court decision could, in the short term, cause uncertainty for the child or the adults involved in the case.

[118] Section 163(5) states that the Principal Reporter may not appeal against a determination by the sheriff confirming a decision of a children's hearing.

Question 48): Do you think the Principal Reporter should be given the right to appeal against a sheriff's decision in relation to deemed relevant person status?

Yes ☐
No ☐
Why did you select your answer above?

Amendments to allow modernisation of the Children's Hearings System through enhanced use of available technology

Background

13.09 It may in future be possible for young people and families to be able to participate in hearings in different ways such as remote-link and to share digitally pre-recorded views. Facilitating such change could require changes to the 2011 Act and the procedural rules for Children's Hearings. Any changes would fit within the Children's Hearings System Digital Strategy.

13.10 The Children's Hearings System Digital Strategy[119] is being taken forward by the Scottish Government in partnership with SCRA and Children's Hearings Scotland. Children's Hearings Scotland are a public body who supports the National Convener. The National Convener has responsibility for the delivery of functions related to the recruitment, selection, appointment, training, retention and support of Children's Panel members.

13.11 The strategy aims to improve meaningful participation at and around children's hearings and to transform how we think, engage and interact with those involved in children's hearings through the use of digital tools. It is focussed on improving the current provision of children's hearings by enhancing the ways in which views can be given to a children's hearing and the ways in which Children's Hearings can proceed to have a discussion and make a decision.

13.12 However, the basic principles of a Children's Hearing will remain unchanged, keeping the child at the centre.

Pros/Cons

13.13 Allowing for elements of digitisation in Children's Hearings should improve the experiences and opportunities of children and young people in the system particularly around the issues of engagement, attendance and the provision of information.

[119] http://www.scra.gov.uk/wp-content/uploads/2016/06/The-Digital-Strategy-2016.pdf

13.14 Changes allowing the modernisation of the Children's Hearings System through the enhanced use of available technology could also offer the potential to support participation, safety and wellbeing, and in particular, where there are concerns about domestic abuse. This could allow vulnerable participants to communicate with the hearing remotely.

13.15 However, such changes would require suitable technology to be made available and would raise issues of data protection, information security, information retention and confidentiality. In addition, careful consideration would need to be given to terminology around papers and paperwork and the physical presence of individuals.

Question 49): Should changes be made which will allow further modernisation of the Children's Hearings System through enhanced use of available technology? Yes ☐ No ☐ Why did you select your answer above?

Local authority as a recipient of certain papers

Background

13.16 Currently in Children's Hearings, the local authority will provide a report to the hearing setting out a summary of the child's circumstances taking into account information known to them. Children's Hearings can also receive reports from other sources that will include information that may not be known to the local authority that could be relevant and material to their decision about the child.

13.17 Local authorities are currently not legally entitled to receive copies of any of the information that is provided[120] to the child, relevant person(s); panel members and safeguarders in advance of a Children's Hearing. This can mean that a child's social worker may only learn of new information, assessments and recommendations made by others, including professionals, as the hearing takes place.

13.18 Recent research conducted on behalf of the Scottish Government on the role of the safeguarder in the Children's Hearings System highlighted this issue. An extract from the research is below:

"At interview, some stakeholders also indicated that allowing the social worker to have sight of the safeguarder report in advance of the hearing would be beneficial in focussing the discussion at the hearing. The social worker will also have to implement a substantive decision taken by the

[120] Rule 26 of the Children's Hearing's Scotland Act 2011 (Rules of Procedure in Children's Hearings)Rules 2013 sets out who is to receive information about a child prior to a children's hearing.

children's hearing which may follow a safeguarder recommendation. Social workers have no current right to see the report as they are not parties to the proceedings. At the social worker focus group, it was pointed out that, where a safeguarder recommendation was accepted, it could change the child's plan. In terms of effective planning, then, it may be valuable for the social workers to receive the safeguarder report in advance of the children's hearing. The *Practice Standards for Safeguarders* (2015: 10) do currently indicate that it would be best practice for safeguarders to share their *recommendations* with "relevant persons and representatives from services and agencies in advance of hearings, to allow appropriate preparation and minimise potential distress and delay, in particular for the child" and this is reiterated in the *Practice Notes for Safeguarders on Reports* (2017: 18-19). Currently, it is not legally possible to share the actual report and consideration should be given to whether it would be beneficial to the process for social workers to see recommendations in the context of the whole report in advance. At interview, panel members, reporters and social workers indicated that they thought that sharing the full report would be appropriate, though safeguarders tended to think that sharing recommendations was both sufficient and more important." [121]

Pros / Cons:

13.19 Providing for safeguarder and other independent reports to be given to the local authority at the same time as other participants of a children's hearing could reduce the likelihood of disagreements in front of the child and allow the local authority to better prepare and plan for a child's case. This could lead to cases being dealt with more quickly and avoid some deferred hearings.

Question 50): Should safeguarder reports and other independent reports be provided to local authorities in advance of Children's Hearings in line with other participants? Yes ☐ No ☐ Why did you select your answer above?

Personal cross examination of vulnerable witnesses, including child witnesses

13.20 We are seeking, in this section of the consultation, your views on whether to ban the personal cross examination of vulnerable witnesses, including children, in applications to the sheriff to determine whether

[121] Executive Summary p11, The Role of the Safeguarder in the Children's Hearings System; C. McDiarmid, M. Barry, M. Donnelly, S. Corson; University of Strathclyde, Glasgow. http://www.gov.scot/Resource/0052/00526444.pdf

grounds of referral[122] are established under sections 93, 94 or 110[123] of the 2011 Act or in appeals to the sheriff against children's hearing decisions under that Act ("2011 Act proceedings"). In these proceedings sheriffs may hear evidence from vulnerable witnesses in making their decision.

13.21 Measures to protect children and other vulnerable witnesses in 2011 Act proceedings may involve a ban wider than the proposed ban in child contact and residence cases described in paragraphs 9.06-9.15. 2011 Act proceedings can relate to a variety of matters specified in the grounds of referral, and a party to the proceedings can seek to personally examine a child or other vulnerable witness in circumstances which are likely to be highly distressing to the witness. For example, at the moment, it is possible for a party to the proceedings to personally examine a child or other vulnerable witness against whom they are said to have committed offences of a sexual or violent nature, or where they are said to have failed to care for the child.

13.22 We are proposing putting in place protections for vulnerable witnesses to cover: a child witness who is the subject of the 2011 Act proceedings; any other child witness; or any other vulnerable witness as defined in section 11 of the Vulnerable Witnesses (Scotland) Act 2004.

13.23 Two options for regulating personal cross-examination of vulnerable witnesses in 2011 Act proceedings would be to introduce:

- A mandatory ban on self-representation in certain defined circumstances, for example , where the evidence of the witness or the grounds of referral relates to certain matters such as sexual offences, offences under Schedule 1 of the Criminal Procedure (Scotland) Act 1995 Act, domestic abuse, forced marriage or lack of parental care and
- A discretionary ban in other circumstances on the application of any party or on the courts own motion

13.24 Such prohibitions against self-representation could be similar to the equivalent provisions for criminal proceedings. Sections 288C to 288F of the Criminal Procedure (Scotland) Act 1995 sets out the protections for child and vulnerable witnesses involved in criminal proceedings.

<u>Pros and cons</u>

13.25 Banning cross-examination of vulnerable witnesses in specific circumstances would bring the protection of witnesses in line with the protection given in criminal cases. It would also assist vulnerable

[122] Section 67 of the Children Hearing(Scotland) Act 2011 lists the 16 grounds for which a child can be referred to a Children's hearing(add link?).
[123] Section 93 and 94 arise where a children's hearing refer a child's case to the sheriff to make a determination of whether the grounds of referral. Section 110 is where the sheriff is reviewing a grounds determination.

witnesses to give their best evidence, which is in the interests of the child who is the subject of the 2011 Act proceedings.

13.26 However, consideration would need to be given to measures to ensure fairness to the person banned from cross examination. This may include allowing a person banned from cross examination to receive legal aid for a legal representative. These cases may need to be specified in the Legal Aid (Scotland) Act 1986 as a case where a person gets automatic legal aid. A ban on personal cross examination would have wider implications on how the whole case is conducted by the person. This could have cost implications and would need to be considered further.

Question 51): Should personal cross examination of vulnerable witnesses, including children, be banned in certain Children's Hearings (Scotland) Act 2011 proceedings? Yes ☐ No ☐ Why did you select your answer above?

Part 14: Domicile of persons under 16

Background

14.01 We are seeking views on whether section 22 of the Family Law (Scotland) Act 2006 (the 2006 Act), on domicile of persons under 16, needs to be clarified. This follows written evidence provided to the Justice Committee of the Scottish Parliament when it carried out post-legislative scrutiny on the 2006 Act.

14.02 Section 22 of the 2006 Act provides that where the parents of a child are domiciled in the same country as each other and the child has a home with a parent or homes with both of them then the child shall be domiciled in the same country as their parents. It goes on to provide that where this is not the case, the child shall be domiciled in the country with which the child has for the time being the closest connection.

14.03 In the post legislative scrutiny of the 2006 Act carried out by the Justice Committee, written evidence was submitted on section 22. This noted that there had been no reported case on the interpretation and operation of section 22 of the 2006 Act[124]. In addition, the evidence noted that the 2006 Act makes no reference to "domicile of origin" and "domicile of choice". The evidence also said the time at which the section 22 rule is to take effect was uncertain.

Pros/Cons

14.04 The benefit of amending the legislation is that any changes could help clarify the position which could be in the best interests of the child. However, as these provisions have not, so far as we are aware, been tested in court it may be premature to make any changes.

Question 52): Should section 22 of the Family Law (Scotland) Act 2006 which prescribes where a child is deemed to be domiciled be amended?

Yes ☐
No ☐
Why did you select your answer above?

124 http://www.parliament.scot/S4_JusticeCommittee/Inquiries/FL8._Carruthers_and_Crawford.pdf

Part 15: Conclusion

Impact Assessments

15.01 In accordance with usual practice, the Scottish Government has prepared a number of impact assessments in relation to the development of policy in this area.

15.02 The Scottish Government considers that the changes proposed or considered in this consultation have minimal impact on the environment. Accordingly, the Scottish Government has sent a pre-screening exemption from Strategic Environmental Assessment (SEA) to the usual SEA consultation authorities.[125]

15.03 A partial Business and Regulatory Impact Assessment (BRIA) is attached at Annex G. This provides details of the estimated cost of adopting various options discussed in the consultation.

15.04 A partial Child Rights and Wellbeing Impact Assessment (CRWIA) is attached at Annex H. This considers which Articles of the UNCRC are engaged by the proposals and policy options identified for people under 18. The CRWIA also sets out the evidence that the Scottish Government has identified so far as relevant to the assessment of these options.

15.05 A partial Data Protection Impact Assessment (DPIA) has also been undertaken and is attached at Annex I.

15.06 The changes proposed to the law would have impacts in relation to equalities. A partial Equality Impact Assessment (EQIA) is attached at Annex J.

Question 53):

Do you have any comments about, or evidence relevant to:

a) The partial Business And Regulatory Impact Assessment;
b) The partial Child Rights and Wellbeing Impact Assessment;
c) The partial Data Protection Impact Assessment; or
d) The partial Equality Impact Assessment?

Yes ☐
No ☐

If yes, please provide your comments below.

[125] The SEA consultation authorities are: the Scottish Environment Protection Agency, Scottish National Heritage, and Historic Environment Scotland.

Any further comments

15.07 The Scottish Government recognises that in order to develop well informed policy and legislation, it is important that we receive responses reflecting the range of views held on this subject.

15.08 Consultees are welcome to make any other comments relating to this consultation.

Question 54): Do you have any further comments?

Yes ☐
No ☐
If you have answered yes please provide your comments below.

Annex A: RESPONDENT INFORMATION FORM

Please Note this form **must** be completed and returned with your response if you are responding by post.

Full name or organisation's name

Phone number

Address

Postcode

Email

Are you responding as an individual or an organisation?

☐ Individual

☐ Organisation

Where are you resident? (Please select one of the options below)

Scotland ☐ Rest of the UK ☐ Rest of the World ☐

If you are responding as an organisation and want to tell us more about your organisation's purpose and its aims and objectives, you can do so here.

Information for organisations:

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

☐ Publish response with name

☐ Publish response only (without name)

☐ Do not publish response

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

☐ Yes

☐ No

Annex B: Consultation questions

Question 1):

Should the presumption that a child aged 12 or over is of sufficient age and maturity to form a view be removed from sections 11(10) and 6(1) of the 1995 Act and section 27 of the Children's Hearings (Scotland) Act 2011?
Please select only one answer.

a) Yes – remove the presumption and do not replace it with a different presumption. ☐
b) Yes – remove the presumption and replace with a new presumption based on a different age. ☐
c) No – leave the presumption in. ☐

Why did you select your answer above?

Question 2):

How can we best ensure children's views are heard in court cases?
Please select as many answers as you want.

a) The F9 form. ☐
b) Child welfare reporters. ☐
c) Speaking directly to the judge or sheriff. ☐
d) Child support workers. ☐
e) Another way (please specify). ☐

Why did you select your answer(s) above?

Question 3):

How should the court's decision best be explained to a child?
Please select only one answer.

a) Child support worker. ☐
b) Child welfare reporter. ☐
c) Another option (please specify). ☐

Why did you select your answer above?

Question 4):

What are the best arrangements for child welfare reporters and curators *ad litem*?
Please select only one answer.

a) There should be no change to the current arrangements. ☐
b) A new set of arrangements should be put in place that would manage and provide training for child welfare reporters. ☐
c) The existing arrangements should be modified to set out minimum standards for child welfare reporters and allow the Lord President and Sheriffs Principal to remove them from the list if the reporters cease to meet the necessary standards. ☐
d) Another option (please specify) ☐

Why did you select your answer above?

Question 5):

Should the law be changed to specify that confidential documents should only be disclosed when in the best interests of the child and after the views of the child have been taken into account?

Yes ☐
No ☐
Why did you select your answer above?

Question 6):

Should child contact centres be regulated?

Yes ☐
No ☐
Why did you select your answer above?

Question 7):

What steps should be taken to help ensure children continue to have relationships with family members, other than parents, who are important to them?

Question 8):

Should there be a presumption in law that children benefit from contact with their grandparents?

Yes ☐
No ☐
Why did you select your answer above?

Question 9):

Should the 1995 Act be clarified to make it clear that siblings, including those under the age of 16, can apply for contact without being granted PRRs?

Yes ☐
No ☐
Why did you select the answer above?

Question 10):

What do you think would strengthen the existing guidance to help a looked after child to keep in touch with other children they have shared family life with?

Question 11):

How should contact orders be enforced?
Please select only one answer.

a) no change to existing procedure. ☐
b) alternative sanctions (eg unpaid work, attending a parenting class or compensation). ☐
c) making a breach of a contact order a criminal offence with penalties including non custodial sentences and unpaid work. ☐
d) another option (please specify). ☐

Why did you select your answer above?

Question 12):

Should the definition of “appropriate court” in the Family Law Act 1986 be changed to include the Sheriff Court as well as the Court of Session?

Yes ☐
No ☐
Why did you select your answer above?

Question 13):

Are there any other steps that the Scottish Government should be taking on jurisdictional issues in cross-UK border family cases?

Yes ☐
No ☐
Why did you select your answer above?

Question 14):

Should the presumption that the husband of a mother is the father of her child be retained in Scots law?

Yes ☐
No ☐
Why did you select your answer above?

Question 15):

Should DNA testing be compulsory in parentage disputes?

Yes ☐
No ☐
Why did you select your answer above?

Question 16):

Should a step parents parental responsibilities and rights agreement be established so that step parents could obtain PRRs without having to go to court?

Yes ☐
No ☐
Why did you select your answer?

Question 17):

Should the term “parental rights” be removed from the 1995 Act?

Yes ☐
No ☐
Why did you select your answer above?

Question 18):

Should the terms “contact” and “residence” be replaced by a new term such as “child’s order”?

Yes ☐
No ☐
Why did you select your answer above?

If you answered yes what terms should be used?

Question 19):

Should all fathers be granted PRRs?

Yes ☐
No ☐
Why did you select your answer above?

Question 20):

Should the law allowing a father to be given PRRs by jointly registering a birth with the mother be backdated to pre 2006?

Yes ☐
No ☐
Why did you select your answer above?

Question 21):

Should joint birth registration be compulsory?

Yes ☐
No ☐
Why did you select your answer above?

Question 22):

Should fathers who jointly register the birth of a child in a country where joint registration leads to PRRs have their PRRs recognised in Scotland?

Yes ☐
No ☐
Why did you select your answer above?

Question 23):

Should there be a presumption in law that a child benefits from both parents being involved in their life?

Yes ☐
No ☐
Why did you select your answer above?

Question 24):

Should legislation be made laying down that courts should not presume that a child benefits from both parents being involved in their life?

Yes ☐
No ☐
Why did you select your answer above?

Question 25):

Should the Scottish Government do more to encourage schools to involve non-resident parents in education decisions?
Please select only one answer.

a) Yes – put the pupil enrolment form and annual update form on a statutory basis. ☐
b) Yes- issue guidance on the enrolment form and annual update form. ☐
c) Yes – other (please specify). ☐

d) No – no further action by Scottish Government is required. ☐

Why did you select your answer above?

Question 26):

Should the Scottish Government do more to encourage health practitioners to share information with non-resident parents if it is in the child's best interests? Please select only one answer

a) Yes – legislation. ☐
b) Yes – guidance. ☐
c) Yes – other (please specify). ☐

d) No – no further action is required. ☐

Why did you select your answer above?

Question 27):

Does section 11 of the 1995 Act need to be clarified to provide that orders, except for residence orders, or orders on PRRs themselves do not automatically grant PRRs?

Yes ☐
No ☐

Why did you select your answer above?

Question 28):

Should the Scottish Government take action to try and stop children being put under pressure by one parent to reject the other parent?

Yes ☐
No ☐
Why did you select your answer above?

If you selected yes what should be done?

Question 29):

Should a person convicted of a serious criminal offence have their PRRs removed by the criminal court?
Please select only one answer.

a) Yes – by an application to the criminal court following a conviction to remove that person's PRRs. ☐
b) Yes – by giving the criminal court a duty to consider the removal of PRRs when a person is convicted of certain types of offences. ☐
c) No – leave as a matter for the civil courts. ☐
d) No – another way. (please explain). ☐

Why did you select your answer above?

Question 30):

Should the reference in section 2 of the 1995 Act to "exercising" parental rights be changed to reflect that a person may not be exercising these rights because the child is now outwith the UK?

Yes ☐
No ☐
Why did you select your answer above?

Question 31):

Should section 6 of the Child Abduction Act 1984 be amended so that it is a criminal offence for a parent or guardian of a child to remove that child from the UK without appropriate consent?

Yes ☐
No ☐
Why did you select your answer above?

Question 32):

Should personal cross examination of domestic abuse victims be banned in court cases concerning contact and residence?

Yes ☐
No ☐
Why did you select your answer above?

Question 33):

Should section 11 of the 1995 Act be amended to provide that the court can, if it sees fit, give directions to protect domestic abuse victims and other vulnerable parties at any hearings heard as a result of an application under section 11?

Yes ☐
No ☐
Why did you select your answer above?

Question 34):

Should subsections (7A)-(7E) of section 11 of the 1995 Act containing a list of matters that a court shall have regard to be kept?
Please select only one answer.

a) Yes – retain as currently. ☐
b) Yes – but amend (please give details). ☐

c) No – remove these provisions. ☐
Why did you select your answer above?

Question 35):

Should section 11 of the 1995 Act be amended to lay down that no further application under section 11 in respect of the child concerned may be made without leave of the court?

Yes ☐
No ☐
Why did you select your answer above?

Question 36):

Should action be taken to ensure that the civil courts have information on domestic abuse when considering a case under section 11 of the 1995 Act?

Yes ☐
No ☐

If yes, what action should be taken?
Please select all answers that apply.

a) Introducing a duty in legislation on the civil courts to establish if there has been domestic abuse. ☐
b) Placing a duty in legislation on child welfare reporters that they must consider in each case whether there is evidence of domestic abuse and, if so, report on it accordingly. ☐
c) Including domestic abuse in any welfare checklist for the courts to consider in section 11 cases. ☐
d) Discussing with the Law Society of Scotland and the Family Law Association whether guidance for practitioners would be helpful. ☐
e) Other (please give details). ☐

Why did you select your answer(s) above?

Question 37):

Should the Scottish Government do more to promote domestic abuse risk assessments?

Yes ☐
No ☐

If yes what should be done?

Why did you select your answer above?

Question 38):

Should the Scottish Government explore ways to improve interaction between criminal and civil courts where there has been an allegation of domestic abuse?

Yes ☐
No ☐
Why did you select your answer above?

Question 39):

Should the Scottish Government introduce a provision in primary legislation which specifies that any delay in a court case relating to the upbringing of a child is likely to affect the welfare of the child?

Yes ☐
No ☐
Why did you select your answer above?

Question 40):

Should cases under section 11 of the 1995 Act be heard exclusively by the Sheriff Court?

Yes ☐
No ☐
Why did you select your answer above?

Question 41):

Should a checklist of factors for courts to consider when dealing with a case be added to section 11 of the 1995 Act?

Yes ☐
No ☐

Why did you select your answer above?

If you answered yes what should be in such a checklist?

Question 42): Should the Scottish Government do more to encourage Alternative Dispute Resolution in family cases?
Please select as many options as you want.

a) Yes – introduce Mediation Information and Assessment Meetings in Scotland. ☐
b) Yes – better signposting and guidance. ☐
c) Yes – other (please give details). ☐

d) No – no further action required. ☐

Why did you select your answer(s) above?

Question 43):

Should the Scottish Government make regulations to clarify that confidentiality of mediation extends to cases involving cross border abduction of children?

Yes ☐
No ☐

Why did you select your answer above?

Question 44):

Should Scottish Government produce guidance for litigants and children in relation to contact and residence?

Yes ☐
No ☐
Why did you select your answer above?

Question 45):

Should a person under the age of 16 with capacity be able to apply to record a change of their name in the birth register?

Yes ☐
No ☐
Why did you select your answer above?

Question 46):

Should a person who is applying to record a change of name for a young person under the age of 16 be required to seek the views of the young person?

Yes ☐
No ☐
Why did you select your answer above?

Question 47):

Should SI 1965/1838 be amended so that a father who has a declarator of parentage and has PRRs can re-register the birth showing him on the birth certificate?

Yes ☐
No ☐
Why did you select your answer above?

Question 48):

Do you think the Principal Reporter should be given the right to appeal against a sheriff's decision in relation to deemed relevant person status?

Yes ☐
No ☐
Why did you select your answer above?

Question 49):

Should changes be made which will allow further modernisation of the Children's Hearings System through enhanced use of available technology?

Yes ☐
No ☐
Why did you select your answer above?

Question 50):

Should safeguarder reports and other independent reports be provided to local authorities in advance of Children's Hearings in line with other participants?

Yes ☐
No ☐
Why did you select your answer above?

Question 51):

Should personal cross examination of vulnerable witnesses, including children, be banned in certain Childrens (Hearings) Scotland Act 2011 proceedings?

Yes ☐
No ☐
Why did you select your answer above?

Question 52):

Should section 22 of the Family Law (Scotland) Act 2006 which prescribes where a child is deemed to be domiciled be amended?

Yes ☐
No ☐
Why did you select your answer above?

Question 53):

Do you have any comments about, or evidence relevant to:
a) The partial Business and Regulatory Impact Assessment;
b) The partial Child Rights and Wellbeing Impact Assessment;
c) The partial Data Protection Impact Assessment; or
d) The partial Equality Impact Assessment?

Yes ☐
No ☐
If yes please provide your comments below.

Question 54):

Do you have any further comments?

Yes ☐
No ☐
If you have answered yes please provide your comments below.

Annex C: Handling of Personal data

The data protection legislation is changing and a new Data Protection Bill is progressing through the UK Parliament. It will give you greater powers to protect your own privacy, and place greater responsibility on those processing your data for any purpose. The following is to explain your rights and give you the information you will be entitled to under the new legislation. Please note that this section only refers to your personal data (your name, address and anything that could be used to identify you personally) not the content of your response to the consultation.

The identity of the data controller and contact details of our Data Protection Officer

The Scottish Government is the data controller. The Data Protection Officer for the Scottish Government can be contacted at dpa@gov.scot.

Why we are collecting the data

Your personal data is being collected as an essential part of the consultation process, so that we can contact you regarding your response and for statistical purposes. We may also use it to contact you about related matters.

Legal basis for processing the data

Part 2 of the Data Protection Bill (subject to change before it becomes an Act) provides that as a government department, the Scottish Government may process personal data as necessary for the effective performance of a task carried out in the public interest eg. a consultation.

With whom we will be sharing the data

We will not be sharing personal data outside of the Scottish Government.

Your rights, e.g. access, rectification, erasure

The data we are collecting is your personal data, and you have considerable say over what happens to it. You have the right:

a) To see what data we have about you
b) To ask us to stop using your data, but keep it on record
c) To have all or some of your data deleted or corrected
d) To lodge a complaint with the independent Information Commissioner (ICO) if you think we are not handling your data fairly or in accordance with the law. You can contact the ICO at https://ico.org.uk/, or telephone 0303 123 1113.

Scottish Government will not send your personal data outwith the European Economic Area. This data will not be used for any automated decision making. This data will be stored in a secure government IT system.

Annex D: EU Regulations affecting family law

1. This consultation is not about European Union (EU) provisions on family law. However, consultees may find it helpful to have a brief note on key EU provisions which affect family law in Scotland. The Scottish Government very much welcomes EU involvement in family law as this helps families where there are disputes which cross EU borders. We will argue for continued and close civil judicial co-operation with our EU partners.

Brussels IIA

2. Regulation 2201/2003[126], also known as Brussels IIa, has applied since 1 March 2005.

3. It establishes rules on jurisdiction in matrimonial proceedings (mainly divorce) and provides for mutual recognition and enforcement of judgements from such proceedings. It also covers jurisdiction and recognition and enforcement of orders relating to parental responsibility (including residence and contact) and provides rules on the return of children abducted to, or wrongfully retained in other Member States. These rules supplement the 1980 Hague Child Abduction Convention[127] which provides a worldwide mechanism for the return of children abducted to, or wrongfully retained in participating countries.

4. Our understanding is that Brussels IIa does not extend to same sex relationships. However, provision has been made in domestic Scottish legislation to replicate, as far as Scotland can, the effect of Brussels IIa for same sex relationships[128].

5. In April 2014, the European Commission published a report on the operation of Brussels IIa in practice and considered necessary amendments[129].

6. On the back of the 2014 report the European Commission undertook further policy evaluation of the existing rules and their impact on EU citizens. They also ran a public consultation.

7. As a result of the further policy evaluation and consultation in 2016, the European Commission identified six areas for change in the area of parental responsibility[130]:
   (1)The return procedure for abducted children following a return order;
   (2) Mandatory consent for all cross-border care placements;
   (3) Abolition of *exequatur* and the automatic recognition of judgments;

[126] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003R2201:EN:HTML
[127] https://www.hcch.net/en/instruments/conventions/full-text/?cid=24
[128] http://www.legislation.gov.uk/ssi/2014/362/contents/made and http://www.legislation.gov.uk/ssi/2005/629/contents/made
[129] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0225&from=EN
[130] https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-411-EN-F1-1.PDF

(4) A number of changes relating to hearing the child;
(5) Improvements to the enforcement procedure; and
(6) Better cooperation between central authorities.

8. Negotiations on changes to Brussels IIa are continuing.

The Maintenance Regulation

9. Regulation 4/2009[131], also known as the Maintenance Regulation, deals with jurisdiction and enforcement of cases relating to maintenance and child maintenance. It is designed to enable an individual to whom maintenance is owed or alleged to be owed easily to obtain in one Member State a decision that will be automatically enforceable in another.

Regulation on mutual recognition of protection measures in civil matters

10. Regulation 606/2013[132] on mutual recognition of protection measures in civil matters came into force on 11 January 2015. It relates to civil protection measures (such as interdicts to protect against domestic abuse).

11. This Regulation allows a person who has a civil law protection order to have this recognised in other Member States for up to 12 months by presenting a certificate.

Regulation on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union

12. Regulation EU 2016/1191 will apply as from 16 February 2019[133]. This regulation aims to facilitate the authentication of certain public documents and reduce the costs for their translation.

13. The regulation will cover public documents whose primary purpose is to establish one of the following facts: birth, death, name, marriage, divorce, legal separation or marriage annulment, registered partnership, dissolution of registered partnership, legal separation or annulment of a registered partnership, parenthood, adoption, domicile and/or residency or nationality.

[131] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:007:0001:0079:EN:PDF
[132] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013R0606
[133] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R1191

Annex E: Statistics on Child Abduction and Plagium

Plagium recorded by the police, Scotland 2007-08 to 2016-17

	2007-08	**2008-09**	**2009-10**	**2010-11**	**2011-12**	**2012-13**	**2013-14**	**2014-15**	**2015-16**	**2016-17**
Plagium	9	11	8	3	2	3	3	1	2	4
Child Abduction	284	319	269	260	219	227	253	234	228	230

Persons convicted in Scottish Courts for offences of abduction and plagium by charge, Scotland, 2006-07 to 2015-16

	2006-07	**2007-08**	**2008-09**	**2009-10**	**2010-11**	**2011-12**	**2012-13**	**2013-14**	**2014-15**	**2015-16**
Plagium	3	1	1	0	0	1	0	0	0	0
Attempted Plagium	0	0	0	0	0	0	0	0	0	1
Child Abduction Act 1984 Section 6(1)(A)(1)	2	0	0	1	0	0	0	0	0	0
Child Abduction Act 1984 Section 6(1)(B)	0	0	0	0	0	0	0	1	0	0

ANNEX F: Improving Statistics and Wider Evidence in Family Justice

The need for statistics and wider evidence in Family Justice.

Evidence around family justice, including statistics, is used within the Scottish Government to inform decisions and policy-making and to monitor the impact of policies following their implementation. It is also used for a variety of purposes outwith the Scottish Government, including supporting resource allocation decisions by the SCTS, supporting third sector activity, informing the public about the business of Scottish courts, and facilitating academic research.

Current Statistical publications

The Scottish Government currently publishes the annual Civil Justice Statistics Bulletin[134], based on detailed information from the SCTS. The primary focus of this bulletin is on civil law cases in Sheriff Courts and the Court of Session. Civil justice statistics from SLAB and the Scottish Crime and Justice Survey are also mentioned to provide further context.

On family cases, it includes information on divorces and dissolutions; applications relating to parental responsibilities and rights; interdicts preventing a party from making specific contact or coming within close proximity to another; and exclusion orders that suspend the rights of an individual to live in the family home. In addition, there are also Sheriff Courts statistics on summary applications relating to adoption and Children's Hearings.

However, there are a variety of family justice data needs which go beyond the information contained in this Bulletin. In addition, there are some improvements required to the way in which family justice statistics are collected and presented. For example, statistics presented in this Bulletin currently relate only to the principal crave of the case. This means that the statistics on certain case types, such as contact and residence, do not reflect the total number of actions brought to court as these issues are often ancillary craves in a case where the principal crave is for another matter, such as divorce.

Planned action to improve statistics and the wider evidence base

Working together with our key partners, the Scottish Government is committed, as part of the Family Justice Modernisation Strategy, to improve the quality of family law statistics and the wider evidence base in Scotland.

We will carry out a broad assessment of the way in which data on family justice is collected, analysed, and disseminated. This will include working with SCTS to explore the potential of the new Integrated Case Management

[134] http://www.gov.scot/Publications/2017/03/5915

System (e.g. around the scope to provide information on both primary and ancillary craves); identifying the potential of data sources from other agencies (e.g. the Scottish Legal Aid Board, advice agencies, and mediation bodies); and looking at options around publication and dissemination of family justice data.

After this consultation, the Scottish Government will publish the Family Justice Modernisation Strategy which will include proposals around the future provision of evidence on family justice in Scotland

May 2018

Annex G: Partial Business and Regulatory Impact Assessment

Partial Business and Regulatory Impact Assessment

Title of Proposal

Review of Part 1 of the Children (Scotland) Act 1995 and creation of a Family Justice Modernisation Strategy.

1. Purpose and intended effect

- **Background**

1.1 The Children (Scotland) Act 1995 (the 1995 Act) is centred on the needs of children and their families. The review is about reforms to part 1 of the 1995 Act which covers parental responsibilities and rights and about creating a Family Justice Modernisation Strategy. It also covers other matters relating to family law such as aspects of the Children's Hearings System.

- **Objective**

1.2 The main aims of the consultation are to:

- Further compliance with the United Nations Convention on the Rights of the Child (UNCRC);
- Ensure that the child's best interest is at the centre of any contact or residence case or children's hearing;
- Ensure that the voice of the child is heard in cases; and
- Ensure that cases and hearings are dealt with in an efficient way.

- **Rationale for Government intervention**

1.4 A number of the options for amending the 1995 Act and creating a Family Justice Modernisation Strategy would require an Act of the Scottish Parliament.

1.5 The policy contributes to the following National Outcomes:

- Our young people are successful learners, confident individuals effective contributors and responsible citizens;
- Our children have the best start in life and are ready to succeed;
- We have improved the life chances for children, young people and families at risk; and
- We live our lives safe from crime, disorder and danger.

2. Consultation

2.1 In preparing the consultation, the Scottish Government's Family and Property Law Team have worked with:

Within Scottish Government

- The Directorate for Children and Families

- Justice Analytical Services
- Communities Analytical Services
- National Records of Scotland
- Registers of Scotland
- Crown Office and Procurator Fiscal Service

Courts

- Scottish Courts and Tribunals Service

- **Public Consultation**

2.3 This partial BRIA forms part of a public consultation which will run for 12 weeks.

- **Business**

2.4 Scottish Government conducted interviews with representatives from the following organisations to prepare for the BRIA:

- CALM Scotland
- Children and Young People's Commissioner
- Children 1st
- Clan Child Law
- Faculty of Advocates
- Families need Fathers Scotland
- Family Law Association
- Grandparents Apart UK
- Law Society of Scotland
- Relationships Scotland
- Scottish Courts and Tribunals Service
- Scottish Legal Aid Board
- Scottish Women's Aid

2.5 In addition, the Scottish Government interviewed some family law academics.

2.6 The notes of these meetings are being published at the link below: http://www.gov.scot/Topics/Justice/law/17867/review-of-children-scotland-act-1995/1995-Act-review-BRIA-interviews

3. Options

3.1 This section focuses on the key options that are considered in the consultation. The consultation document itself lists all the options we are considering.

3.2 Option 1: **How the court considers the views of the child and representation of the child**

- How the voice of the child is heard in court cases;
- Whether the presumption that a child 12 years of age or more is of sufficient age and maturity to form a view should be retained;

- How the court provides feedback to the child; and
- How child welfare reporters and curators *ad litem* should be managed.

3.3 Option 2: **How confidential information provided by a child is shared with the court**

3.4 Option 3: **Who a child should have contact with and how contact should happen**

- Whether child contact centres should be regulated;
- How child contact with family members generally should be promoted;
- Whether there should be a presumption that children benefit from contact with grandparents and siblings;
- How to promote contact between children who are looked after away from home; and
- How contact orders should be enforced.

3.5 Option 4: **Who is a parent**

- Whether the presumption that the husband of a mother is the father of her child continues to be relevant; and
- Whether DNA testing in parentage disputes should be compulsory.

3.6 Option 5: **What are Parental Responsibilities and Rights (PRRs) and who should have them**

- Whether Step Parents should be able to obtain PRRs without going to court;
- The use of the terms PRRs and contact and residence;
- Whether all fathers should be granted PRRs;
- Whether joint birth registration should be compulsory;
- Whether children benefit or not from both parents being involved in their life;
- The involvement of a non resident parent in education and healthcare decisions;
- Clarification that not all orders made under section 11 of the 1995 Act automatically grant PRRs;
- How to ensure that a parent does not turn a child against another parent unnecessarily;
- Whether father who jointly register their child's birth overseas in a country that gives men who jointly register a birth PRRs should have this recognised in Scotland; and
- Whether PRRs could be removed from an individual by the criminal courts if they have been convicted of a serious criminal offence.

3.7 Option 6: **How international parental child abduction can be prevented**

3.8 Option 7: **How children and victims of domestic abuse can be protected**

- Whether the personal cross examination of victims or alleged victims of domestic abuse should be banned;
- How parties can be protected in cases where domestic abuse is alleged;
- Whether the 1995 Act adequately protects children from domestic abuse or risk of abuse;
- How civil courts can be made more aware of relevant criminal convictions;
- Whether repeated litigation should be banned;
- Whether Scottish Government should do more to promote domestic abuse risk assessments; and
- Improving the interaction between criminal and civil courts in the context of domestic abuse.

3.9 Option 8: **How court procedure can be improved**

- Ensuring cases are dealt with efficiently;
- Whether all cases should be heard in the Sheriff Court; and
- Whether there should be a checklist of factors the court should take into account.

3.10 Option 9: **Alternatives to court**

- Whether to promote the use of alternative dispute resolution;
- Whether to introduce legislation on mediation and international child abduction; and
- Whether to produce further guidance for children and litigants.

3.11 Option 10: **Amendments to birth registrations**

- Whether young people under the age of 16 with capacity could apply to record a change of their name on their birth certificate themselves;
- Whether a person applying to record a change of name for a person under the age of 16 should be required to seek the views of the young person; and
- Reregistration of births by unmarried fathers.

3.12 Option 11: **Procedural changes to the Children's Hearings System**

- Whether the Principal Reporter should be given the right of appeal on the matter of Relevant Persons;
- Whether changes can be made to allow modernisation of the Children's Hearings System through enhanced use of available technology;
- Whether the local authority should be a recipient of safeguarder and

independent reports; and
- How to protect vulnerable witnesses and children.

Sectors and groups affected

3.14 We consider the following groups or sectors will be affected by the options being considered:

- Child welfare reporters and Curators *ad litem*
- Children and young people
- Children's Reporters
- The Courts
- Crown Office and Procurator Fiscal Service
- Faculty of Advocates
- Family lawyers
- Family mediators and arbitrators
- Family members
- Grandparents
- Health Boards and GP surgeries
- Individuals seeking to be declared a parent of a child
- Law Society of Scotland
- Local authorities
- National Records of Scotland
- Organisations supporting parents, families and children
- Parents
- Registers of Scotland
- Relationships Scotland and the four independent contact centres in Scotland
- Schools
- Scottish Children's Reporter Administration
- Scottish Courts and Tribunals Service
- Scottish Legal Aid Board
- Siblings
- Step parents

Benefits

Give details of all benefits associated with each option you are considering.

31.15 The main benefits of all the options are:

- Further compliance with the UNCRC;
- Ensuring that the child's best interest is at the centre of any contact or residence case or children's hearing;
- Ensuring that the voice of the child is heard in cases; and
- Ensuring that cases and hearings are dealt with in an effective and efficient way.

3.16 This is a partial BRIA and further consideration will be given to the

benefits of each option in the detailed BRIA which will accompany any Family Law Bill.

Costs

Give details of all costs (additional and savings) associated with each option you are considering.

3.17 We have estimated that if all the options were adopted it could cost approximately £0.5m in set up costs and approximately £5.3m in ongoing running costs. The largest costs are listed below:

- Children's support workers – approx. £3.2m per year based on two per local authority;
- Regulation of child welfare reporters and curators *ad litem* – approx. £1m per year;
- Regulation of contact centres –approx. £0.5m set up costs and £0.5m annual running costs; and
- Banning of personal cross examination of victims of domestic abuse – approx. £0.6m per year.

3.18 The costs currently identified at 3.17 do not cover any increased costs to SCTS should certain options be taken forward.

4. Scottish Firms Impact Test

4.1 To appreciate the impact that the proposed legislation may have on businesses operating in Scotland, we met with organisations including CALM Scotland Mediation, the Faculty of Advocates, the Family Law Association, Law Society of Scotland, Relationships Scotland and Scottish Courts and Tribunals Service.

4.2 All the organisations were asked questions on each of the topics in the consultation.

4.3 A number of family lawyers are also curators *ad litem* and child welfare reporters and therefore the options to regulate curators *ad litem* and child welfare reporters could impact on them.

4.4 Members of the Faculty of Advocates and Law Society of Scotland may be affected by a number of the options as any changes could affect the people that they would represent in court.

4.5 Options around mediation may affect family mediators and arbitrators.

4.6 The Scottish Courts and Tribunals Service will be affected by a large number of the options as they concern how a court case is run.

4.7 Relationships Scotland and the four independent contact centres will be affected by the option to regulate contact centres.

5. Competition Assessment

5.1 We do not expect the options to have an impact on competition as they

will not:

- Limit the number or range of suppliers.
- Limit the ability of suppliers to compete.
- Limit suppliers' incentives to compete vigorously.
- Limit the choice and information available to consumers.

5.2 We would welcome any comments during the consultation as to whether any of the options would have an impact on competition.

6. Test run of business forms

6.1 We do not envisage that any new forms will be introduced for businesses by Scottish Government as a result of our policies.

7. Legal Aid Impact Test

7.1 The independent strategic review of legal aid[135] noted that in 2016/17 60% of the civil legal assistance budget goes on family cases (£18m). Of the £18m, £9m goes on legal aid for contact/parentage cases and £3.3m for cases regarding residence.

7.2 There could potentially be costs for the Scottish Legal Aid Board in relation to a number of the options. In particular:

- Banning personal cross examination of domestic abuse victims and vulnerable parties in contact and residence cases as parties may be entitled to have a lawyer who would need to be funded by legal aid;
- A single court hearing both criminal and civil cases in relation to domestic abuse and family law could increase costs as there is a difference in legal aid rules between the civil and criminal courts. In addition, many people have different solicitors acting for them in criminal and civil cases and this could affect the legal assistance registers held by the Scottish Legal Aid Board;
- Introducing the presumption that it is in the child's best interests for them to have contact with their grandparents and siblings could increase the number of grandparents and siblings who apply to the court for contact with a child; and

7.3 Some of our policy options could lead to savings for the Scottish Legal Aid Board. In particular:

- Regulation of child welfare reporters could lead to some standardisation of costs of child welfare reports. It would also remove the costs of child welfare reports from the legal aid budget;
- Reducing repeated litigation would reduce the number of court cases; and
- Encouraging the use of Alternative Dispute Resolution.

[135] http://www.gov.scot/About/Review/legal-aid-review

7.4 A number of the options that are being considered in the consultation document could have both positive and negative impacts on legal aid. For example, the options to give all fathers PRRs and making joint birth registration compulsory may lead to a reduction in the number of cases by fathers applying for PRRs. However, this could lead to an increase in cases by mothers applying to have a father's PRRs removed.

8. Enforcement, sanctions and monitoring

8.1 Using detailed information provided by the Scottish Courts and Tribunals Service (SCTS), we publish annual Civil Justice Statistics bulletins which includes specific information on family law cases. Working together with our key partners, we are committed, as part of the Family Justice Modernisation Strategy, to improve the quality of family law statistics in Scotland. This will help in relation to monitoring of the outcomes of the policy options.

8.2 This is a partial BRIA and further consideration of the enforcement, sanctions and monitoring of policy will be done in the detailed BRIA which will accompany any Family Law Bill.

9. Implementation and delivery plan

9.1 The consultation will influence our decisions about next steps and the content of any Family Law Bill, any other regulation or any non-legislative changes that can be made. This BRIA would be finalised for any Family Law Bill, taking account of points made by consultees. The final version of the BRIA would be published on the Scottish Government website.

Post-implementation review

9.2 Any Family Law Act would be reviewed in line with the usual approach to post-legislative scrutiny.

10. Summary and recommendation

10.1 We are seeking views on whether and how the 1995 Act should be amended and what should be in a Family Justice Modernisation Strategy. This section will be completed in the final BRIA when we have considered the responses from this consultation.

- **Summary costs**

We have estimated that if all the options were adopted it could cost approximately £0.5m in set up costs and approximately £5.3m in ongoing running costs. The largest costs are listed below:

- Introduction of child's support workers – approx. £3.2m per year based on two per local authority;
- Regulation of child welfare reporters and curators *ad litem*– approx. £1m per year;
- Regulation of contact centres –approx. £0.5m set up costs and £0.5m annual running costs; and
- Banning of personal cross examination of victims of domestic abuse –

approx. £0.6m per year.

The costs currently identified above do not cover any increased costs to SCTS should certain options be adopted.

May 2018

Annex H: Partial Child Rights and Wellbeing Impact Assessment

CRWIA front sheet	
Policy/measure **A general description of the policy/measure**	The commitment in the Programme for Government 2017/18 to consult upon on a review of part 1 of the Children (Scotland) Act 1995. To create a Family Justice Modernisation Strategy.
Project initiation document **Add link to the document**	
Initiating department **The responsible team or division. If this is a cross-cutting policy, name the team that has overall responsibility**	Family and Property Law
Policy aims **What the policy or measure is trying to achieve; what are the expected outcomes**	This is a partial CRWIA and is focussing on the main themes and desired outcomes of the review of the Children (Scotland) Act 1995 (the 1995 Act) and Family Justice Modernisation Strategy. A further more detailed CRWIA will be completed to accompany any Family Law Bill. The main aims of any Bill would be to: • Further compliance with the United Nations Convention on the Rights of the Child; • Ensure that the child's best interests are at the centre of any contact or residence case or Children's Hearing; • Ensure that the voice of the child is heard in cases; and • Ensure that cases and hearings are dealt with in an effective and efficient way. To meet these aims we are seeking your views on the following main topics: • How the court considers the views of the child and representation of the child;

	• Who a child should have contact with and how contact should happen; • Who is a parent; • Who has Parental Responsibilities and Rights; • How international parental child abduction can be prevented; • How children and victims of domestic abuse can be protected; • How court procedure can be improved in proceedings affecting children and young people; • What alternatives there are to court; • Amendments to birth registration; and • Procedural changes to the Children's Hearings System.
Timetable **What is the time frame for a policy announcement/ consultation/ implementation?**	Scottish Government is holding a public consultation and will consider the outcome of the consultation later in 2018.
Date	
Signature	

CRWIA Stage 1
Screening - key questions

1. **What aspects of the policy/measure will affect children and young people up to the age of 18?**

The Articles of the UNCRC and the wellbeing indicators under the Children and Young People (Scotland) 2014 apply to all children and young people up to the age of 18, including non-citizen and undocumented children and young people.

We expect all of the aspects of our policy to affect children and young people.

2. **What likely impact - direct or indirect - will the policy/measure have on children and young people?**

'Direct' impact refers to policies/measures where children and young people are directly affected by the proposed changes e.g. in early years, education, child protection or looked after children (children in care). 'Indirect' impact refers to policies/measures that are not directly aimed at children but will have an impact on them. Examples include: welfare reforms, parental leave, housing supply or local transport schemes.

We expect a large number of the policies will have a direct impact on children and young people.

3. **Are there particular groups of children and young people who are more likely to be affected than others?**

Under the UNCRC 'children' can refer to: individual children, groups of children, or children in general. Some groups of children will relate to the groups with protected characteristics under the Equality Act 2010. It may be possible to align the CRWIA with the EQIA in these cases. 'Groups' can also refer to children by age band or setting, or those who are eligible for special protection or assistance e.g. pre-school children, children in hospital, children in rural areas, looked after children, young people who offend, victims of abuse or exploitation, child asylum-seekers, or children living in poverty.

We consider that the policies are more likely to affect younger children, those who are victims of domestic abuse, those involved in court proceedings about the arrangements for their upbringing and children and young people involved in the Children's Hearings System

4. Who else have you involved in your deliberations?
Have you included all policy leads who may have an interest in these developments?

Yes we have discussed the CRWIA with relevant colleagues including those in Children and Families Directorate, Criminal Justice and Violence Against

Women team.	
5. Will this require a CRWIA? Explain your reasons Yes as the majority of policies either directly or indirectly affect children.	
CRWIA Declaration	
Tick relevant section, and complete the form.	
CRWIA required	**CRWIA not required**
Yes	
Authorisation	
Policy lead Name, title, division	**Date**
Deputy Director or equivalent Deputy Director, Civil Law and Legal System	**Date**

CRWIA Stage 2
Scoping - key questions

1. What children's rights are likely to be affected by the policy/measure?
List all relevant Articles of the UNCRC and Optional Protocols (see Annex 1). All UNCRC rights are underpinned by the four general principles: non-discrimination; the best interests of the child; the right to life; survival and development; and the right to have children's views given due weight.

The consultation will seek views on a wide range of issues. Below we have listed which articles of the UNCRC we think are relevant to the issues we're going to consult on.

Article 2
Article 2(1) is relevant when considering whether all fathers should automatically have Parental Responsibilities and Rights (PRRs) in the same way as mothers.

Being married may be classified as an "other status" under Article 2(1) and this would be relevant when considering the presumption that the husband of a woman is the father of her child and issues surrounding fathers with PRRs who are not married to the mother.

Article 3
Article 3 is key as our policy intention is that the child's best interests are the priority in court cases around contact and residence.

Article 3(3) is relevant to the proposals to regulate child contact centres and child welfare reporters.

Article 5
This article of the Convention is key in relation to the following issues:

- Extending PRRs to all biological fathers in the same way as mothers;
- The presumption that both parents should be involved in their child's upbringing unless this is contrary to the child's best interests; and
- Whether to introduce a Step Parents Parental Responsibilities and Rights Agreement.

In addition, article 5 is relevant to the issue of whether children and young people under the age of 16 with capacity should be able to apply to register a change of name on their own birth certificate without parental consent.

Article 6
Article 6 is relevant in relation to the following issues:

- How to further protect children and young people from domestic abuse;
- Whether the criminal court could remove PRRs from someone who is found guilty of a serious criminal offence; and
- How to prevent a parent from turning a child against another parent.

Article 7
Article 7(1) is relevant in relation to:

- Whether we should introduce compulsory joint birth registration;
- Whether all fathers should get PRRs automatically the same way as all mothers;
- Re-registration of births to take into account the female spouse of a mother;
- Whether we should make DNA testing compulsory in parentage disputes; and
- Amendments to the registration process for unmarried fathers registering the birth of their child.

Article 8
Article 8 is relevant in relation to the option to establish a Step Parents Parental Responsibilities and Rights Agreement so that step parents with whom children may have significant relationships, could obtain PRRs without having to go to court.

This article is also relevant to the option in relation to a child's relationship with grandparents and siblings as they are considered family relations in the implementation handbook for the Convention[136], published by UNICEF.

Article 9
Article 9(1) is key to the options on:

- Protecting children from domestic abuse;
- Preventing international child abduction; and
- Shared parenting.

It may also be relevant in relation to the enforcement of orders made under section 11 of the 1995 Act.

Article 9(2) is relevant in relation to ensuring that the voice of the child is considered in cases under section 11 of the 1995 Act.

It is also relevant to the question of whether the Principal Reporter should be given the right to challenge a sheriff's decision in relation to deemed relevant person status.

Article 9(3) is relevant in relation to:

- Whether we give PRRs to biological fathers in the same way as mothers;
- Enforcement of contact orders; and
- Regulation of contact centres.

Article 10
Article 10(2) is relevant to whether:

136 https://www.unicef.org/publications/files/Implementation_Handbook_for_the_Convention_on_the_Rights_of_the_Child_Part_1_of_3.pdf

- Section 2(6) of the 1995 Act regarding the removal of a child from the UK requires the consent of a person who would be exercising one of the PRRs but can't currently exercise these as the child has been removed from the UK;
- The Child Abduction Act 1984 needs to be amended to specify that it is a criminal offence to remove a child from the UK whether there is a court order in place or not; and
- The PRRs of an unmarried father who acquired them abroad, through joint birth registration, should be recognised in Scotland.

Article 11
Article 11 is particularly relevant in relation to the part of the consultation seeking views on international child abduction.

Article 12
Article 12 is key to ensuring that the voice of the child is considered in cases under section 11 of the 1995 Act. It is also relevant in relation to:

- Whether to introduce child support workers;
- Whether a child with capacity can have the right to apply to record a change of name on their birth certificate;
- How the court should hear the views of the child in contact and residence cases;
- How the court should hear the views of other children, such as siblings; and
- Whether to make changes to allow modernisation of the Children's Hearings System through enhanced use of available technology.

Article 13
Article 13 is relevant to the following issues:

- Whether to introduce guidance for children on the court process;
- Whether we should introduce child support workers;
- How the voice of the child should be heard in cases under section 11 of the 1995 Act;
- How feedback should be provided to a child about the court's decision in cases under section 11 of the 1995 Act; and
- Whether to make changes to allow modernisation of the Children's Hearings System through enhanced use of available technology.

Article 14
Article 14 is relevant to any steps which would increase joint decision making, including in relation to a child's health and education.

Article 15
Article 15(1) links to proposals to protect children and young people from domestic abuse where they may be coercively controlled.

Article 16
Article 16 is relevant to:

- Any steps to further protect children and young people from domestic

abuse;
- The sharing of children's case files in court without their prior knowledge or consent;
- Whether we should introduce child support workers;
- The right of the child to have a meaningful relationship with parents, grandparents, and siblings;
- The regulation of contact centres;
- The enforcement of contact orders;
- Changes to allow modernisation of the Children's Hearings System through enhanced use of available technology; and
- The local authority as a potential recipient of safeguarder and independent reports.

Article 17
Article 17 is relevant to options for any guidance for litigants and children about court proceedings, and the option to introduce child support workers.

Article 18
Article 18 is key in relation to whether fathers should get automatic PRRs and questions on shared parenting. Article 18 is also relevant to the regulation of contact centres and the option to introduce child support workers.

Article 19
Article 19(1) is relevant when considering options to protect children and young people from domestic abuse and whether the criminal courts could remove PRRs from a person who has been found guilty of a serious criminal offence.

Article 19 is also relevant when considering whether mediation is in the best interests of a child as in some cases mediation may expose a child to domestic abuse.

The article is also relevant in considering the issue of where one parent is turning a child against another parent and whether contact centres should be regulated.

Article 23
Article 23 is relevant to the following options:
Ensuring that the voice of the child is heard in contact cases;
Ensuring the welfare of the child is paramount; and
Whether to provide guidance to litigants and children on court procedure.

Article 24
Article 24 is relevant to options on protecting children and young people from domestic abuse.

Article 34
Article 34 is relevant in relation to options to repeal or amend sub sections (7A) to (7E) of section 11 of the 1995 Act.

Article 35
Article 35 is relevant to options on preventing international child abduction.

Article 37
Article 37 is relevant to options on protecting children and young people from domestic abuse.

2. How will the policy/measure affect children's wellbeing as defined by the wellbeing indicators?
List all wellbeing indicators relevant to the policy/measure (see Annex 2). The indicators are: Safe, Healthy, Achieving, Nurtured, Active, Respected, Responsible and Included.

All the wellbeing indicators are relevant.

3. How many children and young people are likely to be affected by the policy or measure?
List potential sources of official and other data, or note the need to locate this information. Are there different levels of impact for different groups of children?

This is a partial CRWIA and is focussing on the main themes and desired outcomes of the review of the Children (Scotland) Act 1995 and creation of a Family Justice Modernisation Strategy. A further more detailed CRWIA will be completed to go with any Family Law Bill.

Number of children in Scotland
Data from National Records of Scotland (NRS) shows that in mid 2016 there were 1.03m children and young people under the age of 18 living in Scotland. 915,917 of the children were under the age of 16[137].

Number of births in Scotland
Data from NRS shows that there were 54,488 births registered in Scotland in 2016[138].

How the court considers the views of the child and representation of the child
There is limited data available on the number of children whose views have been sought by the courts. In 2016/17 figures from Scottish Legal Aid Board (SLAB) showed that it funded approximately 1596 child welfare reports for contact and residence cases.

In Mid 2016 there were 698,876 children under the age of 12 in Scotland who may be affected by the option to remove the presumption that a child of 12 is of a sufficient age and maturity to form a view[139].

[137] https://www.nrscotland.gov.uk/files//statistics/vital-events-ref-tables/16/3-birth/ve-ref-tabs-16-tab3.03.pdf
[138] https://www.nrscotland.gov.uk/files//statistics/high-level-summary/j11198/j1119811.html
[139] https://www.nrscotland.gov.uk/statistics-and-data/statistics/statistics-by-theme/population/population-estimates/mid-year-population-estimates/mid-2016

SLAB data shows that between 2015 and 2017 they funded 32 applications from children for legal aid to appear directly before the judge or sheriff. 30 out of the 32 applications came from children aged 12 or over.

Who a child should have contact with and how contact should happen

In 2017 1427 children used contact centres managed by Relationships Scotland. 39% of the children were 0-4 years old, 34% were 5-8 years old and 18% were 13-16 years old. Only 1% of children using contact centres were over 16.

The 2015/16 Annual Report from VSA in Aberdeen says that 23 families received contact through their organisation. The Paisley Child Contact Centre dealt with 24-30 children each year.

The Inverclyde Child (Family) Contact Centre dealt with 60 children from 53 families in 2016 and 76 children from 58 families in 2017. 25 of these children were 3 and under, 20 were 4-6, 17 were 7-10 and 6 were aged 11 and over.

According to figures from Growing Up in Scotland close to 99% of children aged six in the survey had a least one living grandparent and 80% of children at age six had three or more living grandparents[140]. This gives an indication of the number of children that may be affected by the option to promote contact with grandparents.

Clan Childlaw's latest Annual Report shows that in 2015-16 100 out of the 454 enquiries they dealt with were in relation to contact and residence disputes. In 2017 Citizens Advice Scotland provided advised on 1861 new issues related to parental contact with children. These figures give an indication as to the number of children that may be affected by options regarding who a child has contact with.

What are Parental Responsibilities and Rights and who should have them

According to the Civil Justice Statistics in Scotland[141] in 2015/16 there were 2232 cases initiated in the Sheriff Court in relation to Parental Responsibilities and Rights (PRRs), of which 1039 were contact cases, 712 were in relation to residence and 481 were other cases. These statistics relate only to cases where contact is listed on the initial writ. Therefore, the actual caseload is likely to be higher.

In 2015/16 there were eight cases initiated in the Court of Session in relation to PRRs – three of which were in relation to contact and four of which were in relation to residence. Again, these are only the cases where contact is listed on the initial writ. Data from SLAB indicates that they provided legal aid funding for 1986 contact cases in 2016/17 and 1160 cases in relation to

[140] http://www.gov.scot/Publications/2012/05/6645
[141] http://www.gov.scot/Publications/2017/03/5915/downloads

residence.

The total legal aid funding in 2016/17 was approximately £9m for contact and parentage cases and £3.3m for residence cases. Figures from Scottish Courts and Tribunals Service estimate that there were approximately 13,000 child welfare hearings fixed in 2017. The figures above give an indication of the number of children who might be affected by any changes in relation to PRRs.

The number of children who would be affected by proposals to make joint birth registration compulsory fluctuates year by year. Data from NRS suggests that in 2016 there were 2321 sole birth registrations in Scotland to unmarried parents[142].

Figures from the 2011 census show that of families with dependent children step families made up 8% (26,000) of married couple families and 29% (26,000) of cohabiting couple families. For married couple families, step families made up 8% of families with one dependent child, 6% of families with two dependent children and 12% of families with three or more dependent children. Step families accounted for just over half of the 15,000 cohabiting couple families where the youngest dependent child was aged 12 or over[143]. These figures give an indication on the number of children who might be affected by proposals to give PRRs to step parents.

Data from NRS shows that between 2000 and 2016, there were 53,065 children and young people under the age of 16 whose birth certificate originally only registered the mother as the parent.[144]

Data from Registers of Scotland (RoS) shows that since the year 2000 4456 Parental Responsibilities and Parental Rights Agreements which give fathers PRRs have been registered in the Books of Council and Session. The table below shows that the number of agreements being registered has fallen since 2006 when fathers were able to get PRRs by jointly registering the birth of a child with the mother of the child.

Year	Number of Agreements registered
2000	331
2001	395
2002	397
2003	502
2004	571
2005	543
2006	556

[142] https://www.nrscotland.gov.uk/files//statistics/vital-events-ref-tables/16/3-birth/ve-ref-tabs-16-tab3.03.pdf
[143] http://www.scotlandscensus.gov.uk/news/census-2011-detailed-characteristics-population-and-households-scotland-release-3e
[144] https://www.nrscotland.gov.uk/files//statistics/vital-events-ref-tables/16/3-birth/ve-ref-tabs-16-tab3.03.pdf

2007	400
2008	375
2009	335
2010	315
2011	235
2012	230
2013	156
2014	140
2015	97
2016	71

According to statistics from NRS between 2000 and 2016[145] there were 19,150 re-registrations of birth certificates.

How to prevent international child abduction

In Scotland, there is a common law offence of plagium*:* a crime of child stealing which may be committed against children below the age of puberty. Figures from the Scottish Government's publication on Recorded Crime in Scotland shows that in 2016/17 there was one case of plagium recorded by the police. It is also a crime (abduction) to carry off or confine any person against their will without lawful authority. In 2013/14 there was one conviction for child abduction in Scotland.

The Central Authority for Scotland which is part of the Justice Directorate within the Scottish Government has produced the statistics below on the number of Parental Child Abduction cases handled by them under the Hague Convention of 1980 and Council Regulation (EC) No 2201/2003.

Year	Incoming	Outgoing
2007	6	2
2008	7	10
2009	10	12
2010	12	10
2011	15	9
2012	6	16
2013	26	16
2014	17	13
2015	25	16
2016	13	20

How children and victims of domestic abuse can be protected

Research undertaken by Kirsteen Mackay in 2013 shows that domestic abuse was alleged in half of all court actions over contact. When a child was not

[145] https://www.nrscotland.gov.uk/files//statistics/time-series/2016-birth/births-time-series-tab14.xlsx

seeing their non-resident parent this was allegedly due to violence upon the child in 18% of the cases[146]. Research by CAFCASS and Women's Aid in 2017 shows that in England and Wales domestic abuse was alleged in 62% of cases with fathers more likely to be the subject of allegations than mothers. Cases featuring allegations of domestic abuse were more likely to result in an order for no direct contact than cases without[147]. Research undertaken by the Ministry of Justice in 2009 showed that 53% of the contact and residence cases in England and Wales involved allegations of domestic abuse or concerns about abduction or harm to children[148].

According to the latest Scottish Crime and Justice Survey[149] published in May 2016 in 2014/15, 39.4% of those who experienced partner abuse in the last 12 months said that children were living in their household when the most recent incident took place. In addition in 63.7% of cases where children were living in the household the children were present during the most recent incident.

Amendments that are needed to birth registers
There were 915,917 children in 2016 under the age of 16 who may be affected by proposals to allow them to apply to register a change of name on their birth certificate.

Children's Hearings

In 2016/17, 15,118 children and young people were referred to the reporter and 34,106 Children's Hearings were held. Lack of parental care was the most common ground for referral and the majority of referrals (75%) came from the police[150]. Figures from Children 1st indicate that safeguarders were appointed in 1441 cases in 2016/17.

4. What research evidence is available?
Preliminary identification of the research base for this policy/measure

A range of research was used to justify the policies. There is a list of research into Family Law on the Scottish Government's Family Law Research Page: http://www.gov.scot/Topics/Justice/law/17867/familylawresearch.

We have highlighted below the important research for the key options in the consultation:

How the court considers the views of the child and representation of the

McKay K 2013 The treatment of the views of children in private law child contact disputes where there is a history of domestic abuse https://www.cypcs.org.uk/ufiles/views-of-children-and-domestic-abuse.pdf

147 https://www.cafcass.gov.uk/download/2124/

148 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217368/family-justice-childrens-proceedings.pdf

149 http://www.gov.scot/Publications/2016/05/2505/downloads

150 http://www.scra.gov.uk/wp-content/uploads/2017/10/SCRA-Annual-Report-2016-17.pdf

child

There is evidence to suggest that allowing children to express their views in court cases can lead to better outcomes for the child and can lead to higher rates of satisfaction amongst children of the outcomes[151]. The Scottish Government published research in 2000 on the use of the form F9 in contact and residence cases[152]. There is also research on how the courts consider the views of the child in other countries.[153]

The Power Up Power Down project[154] undertaken by Scottish Women's Aid and the Children and Young People's Commissioner Scotland in relation to children who have experienced domestic abuse made a number of suggestions which have helped inform a number of options including:

- Removing the presumption that only children aged 12 or above are of sufficient age and maturity to form a view in a case;
- Requiring the court to actively consider what is in the best interests of a child;
- The introduction of child support workers; and
- Requiring the court to provide feedback to the child on the outcome of cases.

CLAN Childlaw is currently undertaking a project on using the law and human rights to advance policy. This involves ensuring that the views of children and young people are heard. [155]

The Scottish Government published research in 2010 on the use of child welfare reporters[156]. This research is helpful in considering options for regulating child welfare reporters and curators *ad litem* and establishing the role they play in making court processes more accessible for children and young people.

Who a child should have contact with and how contact should happen

[151] Holt.S (2016) The voice of the child in family law: a discussion paper. *Children and Youth Services Review* (68)
[152] Scottish Government (2000) Monitoring the Children (Scotland) Act 1995: Pilot Study available at: http://www.gov.scot/Resource/Doc/156495/0042016.pdf
[153] Kay,E, Tisdall,M, Bray. R, Marshall K and Cleland A Children's participation in family law proceedings: a step too far or a step too small? (2004) *Journal of Social Welfare and Family Law* 26(1) p17-33.
[154] https://www.cypcs.org.uk/policy/domestic-abuse/power-uppower-down
[155] https://www.clanchildlaw.org/Handlers/Download.ashx?IDMF=6be66e0e-4216-4bad-979b-e5cee781c320
[156] Whitecross, R Child Welfare Hearings: A scoping study of the commissioning, preparation and use of bar reports. 2011 available at http://www.gov.scot/Publications/2011/01/07142042/0

There is evidence to suggest that children benefit from contact with grandparents particularly in times of a family crisis[157].There is also research that shows a close relationship with grandparents can reduce the level of socio-emotional adjustment for a child after a divorce[158]. CLAN Childlaw has produced a report which highlights the importance of child contact with siblings[159].

Research undertaken by the Centre for Research on Families and Relationships in 2006 shows that non compliance with contact orders was very low[160]. Research also shows that imprisonment of a mother can have a negative impact on the child's health[161].

Parentage

It has been suggested by some that relying exclusively on a genetic link to determine who should be considered to have paternal responsibilities for a child may fail to recognize the wide range of social relationships which can form the basis of family life.[162]

What are Parental Responsibilities and Rights and who should have them?

There is research to suggest that children benefit from their father being involved in their upbringing. For example, the Scottish Government's Growing Up in Scotland study found that children with poor father-child relationships are more likely to have higher levels of behavioural and emotional problems and poor school adjustment[163].

There is research which shows that children benefit from both parents being involved in their lives[164]. There is also research from Belgium that says there

[157] Jappens, M and Van Bavel J Parental divorce, residence arrangements and contact between grandchildren and grandparents *Journal of Marriage and Family* vol 78(2) p 451-467
[158] Lussier, G, Deater-Deckard,K, Dunn J and Davies L (2002) Support across two generations: children's closeness to grandparents following parental divorce and remarriage *Journal of Family Psychology* vol 16(3) p363-376.
[159] http://www.clanchildlaw.org/app/uploads/2015/11/Promoting-Sibling-Contact-for-Looked-After-Children.pdf
[160] A survey of sheriff clerks' perspective on child contact enforcement in Scottish sheriff courts 2006 available at: http://www.gov.scot/Resource/Doc/156495/0042016.pdf
[161] Baldwin L & Epstein R. Short but not sweet: A study of the impact of short custodial sentences on mothers and their children 2017
[162] Black G. Identifying the legal parent/child relationship and the biological prerogative: Who then is my parent? *Juridical Review*. April 2018
[163] Growing up in Scotland: Father –child relationships and child socio-emotional wellbeing. 2017. Available at: http://www.gov.scot/Publications/2017/03/5231
[164] Caring for children after parental separation: would legislation for shared parenting time help children? 2011. Available at: http://www.nuffieldfoundation.org/sites/default/files/files/Would%20legislation%20for%20shared%20parenting%20time%20help%20children%29OXLAP%20FPB%207.pdf

has been little evidence that children's well-being in shared residence is higher than children living with one parent[165]. There is research that found that if parental conflict is high and ongoing then shared parenting can be associated with lower child well being compared with sole residence[166]. Research is also available which highlights the negative impact, on a child, of one parent turning the child against another parent[167].

Procedural Changes to the Children's Hearings System

Recent research conducted on behalf of the Scottish Government on the role of the safeguarder in the Children's Hearings System highlighted issues around the sharing of safeguarder reports with social workers[168].

5. Has there been any public or stakeholder consultations on the policy/measure?

Stakeholders include children and young people, parents/carers, children's workforce, NGOs.

Yes. This partial CRWIA will be published along with a public consultation document seeking views on our proposals.

Prior to publication of the consultation, the Scottish Government met the following organisations as part of the Business Regulatory Impact Assessment process:

CALM Scotland
Children and Young People's Commissioner
Children 1st
Clan Child Law
Faculty of Advocates
Families need Fathers Scotland
Family Law Association
Grandparents Apart UK
Law Society of Scotland
Relationships Scotland
Scottish Courts and Tribunals Service
Scottish Legal Aid Board
Scottish Women's Aid

In addition, the Scottish Government interviewed some family law academics.

[165] Sodermans AK, Matthijs K Joint physical custody and adolescents' subjective well-being: a personality x environment interaction 2014 *Journal of Family Psychology* vol 28(3) p346-356
[166] Vanassche S. Alternating residence for children after parental separation: recent findings from Belgium 2017 *Family Court Review* vol 55(4)
[167] Harman, J, Leder-Elder, S and Biringen Z Prevalence of parental alienation drawn from a representative poll 2016 *Children and Youth Services Review* vol 66. P62-66.
[168] The Role of the Safeguarder in the Children's Hearings System; C. McDiarmid, M. Barry, M. Donnelly, S. Corson; University of Strathclyde, Glasgow. Available at: http://www.gov.scot/Publications/2017/11/7936

The notes of these meetings will be published on the Scottish Government website at the link below: http://www.gov.scot/Topics/Justice/law/17867/review-of-children-scotland-act-1995/1995-Act-review-BRIA-interviews
6. Has there been any estimate of the resource implications of the policy/measure? Capital costs, expenditure, recruitment and training costs for the workforce etc. Yes. We have estimated that if all the proposals were adopted it could cost approximately £0.5m in set up costs and approximately £5.3m in ongoing running costs. The largest costs are listed below: • Introducing children's support workers – approx. £3.2m per year based on two per local authority; • Regulation of child welfare reporters and curators *ad litem* – approx. £1m per year; • Regulation of contact centres –approx. £0.5m set up costs and £0.5m annual running costs; and • Banning of personal cross examination of victims of domestic abuse – approx. £0.6m per year. • The costs currently identified above do not cover any increased costs to SCTS should certain proposals be adopted.

CRWIA Stage 3
Data Collection, Evidence Gathering, Involvement of/Consultation with Stakeholder Groups - key questions.

1. What does the evidence tell you?
The evidence base may include demographic information, academic research, service monitoring/inspection reports, service evaluation reports, user surveys etc. Identify any gaps in the evidence base. In particular, look at what the evidence tells you about children and young people's views and experiences of the relevant service(s); and/or what it tells you about children and young people's views of the policy proposal.

The evidence suggests that there needs to be changes to legislation and or practice to ensure:

- Further compliance with the UNCRC;
- That the child's welfare is at the centre of any contact or residence case or children's hearing;
- That the voice of the child is heard in a case; and
- Cases are dealt with in an efficient way.

2. What further data or evidence is required?
Is the evidence up to date, robust and reliable, sufficiently relevant to what is being proposed, or do you need to commission new research?

The Scottish Government welcomes any further evidence on any of the proposals which consultees may have.

3. Has there been any consultation on the development of the proposal(s)?
Public or targeted consultation with children and young people, their parents/carers, the children's workforce - is there enough information on the views of the children and young people who will be affected by the policy/measure?

There will be a full public consultation. This CRWIA forms part of that consultation. We have also met with key organisations that represent children as part of the Business and Regulatory Impact Assessment process.

4. Should children and young people be further involved in the development of this policy? Are there particular groups of children and young people whose views should be sought?
Specify how - outline the purpose, format, timetable and the questions you want to ask.

Yes. The Scottish Government welcomes responses to the consultation from children and young people and will seek to engage further with children and young people during the consultation.

5. Should other stakeholders and experts be further involved in the development of this policy?
Specify how - outline the purpose, format, timetable and the questions you want to ask.
The Scottish Government welcomes responses from any stakeholder.

CRWIA Stage 4
Assessing the Impact and Presenting Options - key questions

1. What likely impact will the policy have on children's rights?
Negative/positive/neutral. For those assessed as having a negative impact, list options for modification or mitigation of the policy/measure, or suggested alternatives to the policy/measure.

Positive as one of the aims of the review of the Children (Scotland) Act 1995 and the creation of a Family Justice Modernisation Strategy is to ensure that the child's best interests are at the centre of any contact or residence case or children's hearing.

2 How will the policy/measure contribute to the wellbeing of children and young people?
Provide any additional assessment using the wellbeing indicators framework.

All the wellbeing indicators are relevant.

3. Are some children and young people more likely to be affected than others?
Which groups of children and young people will be affected by the policy/measure? Are there competing interests between different groups of children and young people, or between children and other groups? List options for modification or mitigation of the proposal.

We consider that the policies are more likely to affect younger children, those who are victims of domestic abuse, those involved in court proceedings about the arrangements for their upbringing and children involved in the Children's Hearings System.

4. Resource implications of policy modification or mitigation
If recommending any changes to the policy/measure, include estimates of cost implications.

We have estimated that if all the proposals were adopted it could cost approximately £0.5m in set up costs and approximately £5.3m in ongoing running costs. The largest costs are listed below:

- Introduction of children's support workers – approx. £3.2m per year based on two per local authority;
- Regulation of child welfare reporters – approx. £1m per year;
- Regulation of contact centres –approx. £0.5m set up costs and £0.5m annual running costs; and
- Banning of personal cross examination of victims of domestic abuse – approx. £0.6m per year.

The costs currently identified above do not cover any increased costs to SCTS should certain options be adopted.
5. How does the policy/measure promote or impede the implementation of the UNCRC and other relevant human rights standards? This will inform Scottish Ministers' duty to report to Parliament on children's rights under the Children and Young People (Scotland) Act 2014. One of the main aims of the review of the Children (Scotland) Act 1995 and the Family Justice Modernisation Strategy is to promote further compliance with the UNCRC.

Annex I: Partial Data Protection Impact Assessment

1. Introduction

1.1 The purpose of this document is to report on and assess against any potential Privacy Impacts as a result of the review of the Children (Scotland) Act 1995 and the creation of a Family Justice Modernisation Strategy.

2. Document metadata

2.1 Name of Project:
Review of Part 1 of the Children (Scotland) Act 1995 and creation of a Family Justice Modernisation Strategy.

2.2 Author of report:
Family and Property Law team, Civil Law and Legal System division.

2.3 Date of report: (to be completed when DPIA is finalised).

2.4 Name of Information Asset Owner (IAO) of relevant business unit:
Deputy Director Civil Law and Legal System.

2.5 Date for review of Data Protection Impact Assessment (DPIA):
This partial DPIA will be reviewed after the public consultation is completed and the Scottish Government has decided on the appropriate next steps.

3. Description of the project

3.1 Description of the work:

The Children (Scotland) Act 1995 (the 1995 Act) is over 20 years old now and the shape of families has changed considerably in that time. We have received a number of comments from stakeholders that certain aspects of the 1995 Act could be reformed. The main aims of the consultation are to:

- Further comply with United Nations Convention on the Rights of the Child;
- Ensure that the child's best interests are at the centre of any contact or residence case or children's hearing,
- Ensure that the voice of the child is heard in cases; and
- Ensure that cases and hearings are dealt with in an effective and efficient way.

The consultation is seeking views on the following main topics:

- How the court considers the views of a child and representation of a child;
- Who a child should have contact with and how contact should happen;
- Who should have Parental Responsibilities and Rights;
- How international parental child abduction can be prevented;
- How children and victims of domestic abuse can be protected;
- How court procedure can be improved;
- What alternatives there are to court;
- Amendments that may be needed to birth registrations; and
- Procedural changes to the Children's Hearings System.

3.2 Personal data to be processed.

Variable	Data Source
One option being considered is to introduce new arrangements on the management and training of child welfare reporters. This could involve responsibility for them transferring from Sheriffs Principal to either the Scottish Government or an organisation which is contracted to do this work. Information would be processed on child welfare reporters. This could include personal data such as contact details, date of birth, employment history, appraisal forms, training records and any records of misconduct.	From the child welfare reporters themselves when they apply to the Scottish Ministers or external organisation.
Confidential information provided by children being used as evidence in court.	Local authorities and other organisations providing confidential service to children.
Changes to allow modernisation of the Children's Hearings System through enhanced use of available technology may result in a range of personal and confidential information being provided and collected differently.	Children and families themselves; papers and reports provided to Children's Hearings.
Confidential information on children's personal lives, possibly including medical information being passed to Local authorities for Children's Hearings.	Safeguarder reports and other reports provided to the Children's Hearing.

3.3 Describe how this data will be processed:

In the first case, personal data on child welfare reporters is currently held by Sheriffs Principal. This includes contact information and employment history. If we take forward the option to regulate child welfare reporters then this information may be gathered by Scottish Government. This work may be contracted out to another organisation. The information will only be accessed by the body who will be responsible for child welfare reporters. The information will be stored in an appropriate manner and disposed of securely when no longer required. The data will be owned by either the Scottish Government or the organisation that is contracted to do this work. Child welfare reporters will be asked to notify any changes to contact details. Child welfare reporters are likely to require regular appraisals and to maintain a training record. Any conduct complaint is likely to be raised directly with either the Scottish Government or the organisation contracted to do this work.

In the second case, personal and private information may be gathered by Local authorities and other organisations during confidential meetings with children. This can be shared with a court if the organisation is requested by either party in a court case. The information will be sent to the court in a separate sealed packet marked “confidential”. A further application to the judge then needs to be made requesting this packet be opened. Children should be made aware when their private or personal information is to be shared with the court and given an opportunity to express their views. Information should only be shared when it is in the child’s best interests. The information will be stored in an appropriate manner and disposed of securely when no longer required.

In the third case, decisions with regard to any changes to how the data is processed will be taken following the public consultation.

In the fourth case, data will initially be gathered and compiled into reports by safeguarders or other professionals such as medical experts. The Scottish Children’s Report Administrator (SCRA) holds copies of reports electronically. SCRA is the data processor and owner. The information will be stored in an appropriate manner and disposed of securely when no longer required.

3.4 Explain the legal basis for the sharing with internal or external partners:

This is not applicable for the first case.

In the second case, the:

- Administration of Justice (Scotland) Act 1972 makes provision on the Court and Session and the sheriff court being able to recover documents which are relevant to an existing case;
- Section 10 of the Court of Session Act 1988 makes some provision on Outer House of the Court of Session granting commission and diligence;
- Chapter 28 of the Sheriff Court Ordinary Cause Rules makes provision on procedures in the sheriff court for recovery of evidence; and

- Chapter 64 of the Court of Session Rules makes provision on applications for an order to recover documents where an action has not already started.

In the third case, rules 23 to 29 of the Children's Hearings (Scotland) Act 2011(Rules of Procedure in Children's Hearings) Rules 2013 provide for the sharing of information.

In the fourth case, rule 89 may need to be amended to add to the information that can be shared to Local authorities under the Children's Hearings (Scotland) Act 2011(Rules of Procedure in Children's Hearings)Rules 2013.

4. Stakeholder analysis and consultation

The partial DPIA is part of the full public consultation on the Review of the Children (Scotland) Act 1995 and the creation of a Family Justice Modernisation Strategy. We are seeking views from all stakeholders on the draft DPIA as part of this process.

4.1 Method used to consult with these groups when making the DPIA.

This is a partial DPIA and we are seeking views in this consultation on the impact of our policies.

4.2 Method used to communicate the outcomes of the DPIA .

A final DPIA will be included in any Family Law Bill.

5. Questions to identify privacy issues

5.1 Involvement of multiple organisations

In the first case, the current arrangements only involve the individual Sheriffs Principal. If we decide to regulate child welfare reporters and contract this work out to another organisation then this organisation would be involved.

In the second case, the local authorities and other organisations who have meetings with children and young people where confidential information may be raised, the Scottish Courts and Tribunals Service, parties in a case and the judges are involved.

In the third and fourth cases the organisations participating in Children's Hearings are involved. This includes SCRA, local authorities and Children's Hearings Scotland.

5.2 Anonymity and pseudonymity

We are not proposing to combine data from two or more sources.

In the first case, we would be transferring responsibility for child welfare reporters and curators *ad litem* from Sheriffs Principal to a new or existing body.

In the second case, we are not proposing to change procedure but to make it clearer that confidential information should only be used in a court case if it is in the best interests of the child and that the child must be made aware that the information may be disclosed.

N/A for the last two cases.

5.3 Technology

Decisions on next steps will be taken following the public consultation.

Children's Hearings are confidential, closed meetings with restricted access to information. Any amendments to modernise the system in relation to new technology must reflect the confidential nature of the meetings and the sensitive nature of the information involved.

5.4 Identification methods

There are no plans to use unique identifiers in each situation as in all cases individuals need to be identified. However, personal data will not be available to the public and would be restricted to:

In the first case, those who require access;
In the second case, to the judge and any parties if the judge deems it in the best interests of the child; and
In the third and fourth cases, to those with the right to access papers for a Children's Hearing.

5.5 Sensitive/Special Category personal data

The Scottish Government's decisions on next steps will be taken following the public consultation. The first option has no impact on sensitive personal data as none of this type of data is likely to be gathered.

In relation to the second and fourth option, information on a child's physical or mental health may be included in evidence shared confidentially with a court or a Children's Hearing by a local authority or other organisation. However,

this information is currently being gathered so any changes would have either a neutral or positive impact on the child involved.

In relation to the third option, decisions on next steps will be taken following the public consultation.

5.6 Changes to data handling procedures

The Scottish Government's decisions on next steps will be taken following the public consultation. In particular, data retention arrangements can only be finalised at that stage. The personal data on child welfare reporters is not publicly available and there are no proposals to make such data available.

The personal data provided by children and young people in the second case is only shared with the judge who decided whether this information should be disclosed. We are proposing that judges should only disclose information if it is in the best interests of the child.

The personal data involved in Children's Hearings is not publicly available. Children's Hearings are confidential, closed meetings with restricted access to information. Any changes to modernise the system in relation to new technology must reflect the confidential nature of the meetings and the sensitive nature of the information involved.

The policy proposals do not involve:

New or changed data collection policies or practices that are unclear or intrusive; or

Changes to data quality assurance, processes and standards that may be unclear or unsatisfactory; or

New or changed data security access or disclosure arrangements that may be unclear or extensive; or

New or changed data retention arrangements that may be unclear or extensive; or

A change in the medium for disclosure of publically available information such that the data becomes more readily accessible than before.

5.7 Statutory exemptions/protection

The first case would not require any statutory exemptions.

In the second case, as personal data is exempt from the non-disclosure provisions in connection with any legal proceedings. However, this is not a change from the current situation.

These do not apply to the third and fourth options.

5.8 Justification

N/A

5.9 Other risks

There are no other risks

6. The Data Protection Act (DPA) and General Data Protection Regulation (GDPR) Principles

The consultation is intended to assist Scottish Government in reaching a view on the appropriate next steps. The content of draft legislation will be finalised after that. The consideration of the principles against the refined policy proposals will be done at that time and on review of this DPIA.

7. Risks identified and appropriate solutions or mitigation actions proposed

Is the risk eliminated, reduced or accepted?

Risk	Ref	Solution or mitigation	Result
Mediation is meant to be confidential and no information should be admissible as evidence in any civil court proceedings. In June 2015, there was an international child abduction case in the Outer House of the Court of Session[169]. In paragraph 17 of its opinion, the Court said: "In my view the arguments for		We are seeking views on whether to make legislation under the Civil Evidence (Family Mediation) (Scotland) Act 1995 to clarify that confidentiality of mediation extends to cases involving cross border abduction of children.	Eliminate

[169] https://www.scotcourts.gov.uk/search-judgments/judgment?id=5ea1eea6-8980-69d2-b500-ff0000d74aa7

the proposition that the 1995 Act does not apply to mediations about cross-border abductions have the edge".			
Private information that a child may provide in confidence to a local authority or other organisation may be shared with parties in a family law case without the child being aware this is happening.		We are consulting on options to clarify that confidential information should only be disclosed in a contact or residence case if it is in the best interests of the child. The child should also be given the opportunity to express their views before the information is disclosed.	Reduced
We anticipate that a regulated system for child welfare reporters would require personal data to be processed by either Scottish Government officials or another organisation if this is contracted out.		Personal information on Child welfare reporters is currently held by Sheriffs Principal and the proposal to regulate child welfare reporters would transfer responsibility from Sheriffs Principal to either Scottish Government or another organisation if this work is contracted out.	Accept

8. Incorporating Privacy Risks into planning

Explain how the risks and solutions or mitigation actions will be incorporated into the project/business plan, and how they will be monitored. There must be a named official responsible for addressing and monitoring each risk.

Risk	Ref	How risk will be incorporated into planning	Owner
Mediation is meant to be confidential and no information should be		We are seeking views on whether to introduce legislation under the Civil Evidence (Family Mediation)	N/A at this stage

admissible as evidence in any court proceedings.		(Scotland) Act 1995 to clarify that confidentiality of mediation extends to cases involving cross border abduction of children.	
Private information that a child may provide in confidence to a local authority or other organisation may be shared with parties in a family law case without the child being aware this is happening.		We are considering whether to amend primary legislation.	N/A at this stage
We anticipate that a system of regulation for child welfare reporters and curators *ad litem* would require personal data to be processed either Scottish Government officials or another organisation if this is contracted out.		Consideration will be given whether to regulate child welfare reporters.	N/A at this stage

9. Authorisation and publication

I confirm that the impact of undertaking the Review of the Children (Scotland) Act 1995 and creation of a Family Justice Modernisation Strategy has been sufficiently assessed against the needs of the privacy duty:

Name and job title of a IAO or equivalent To be completed in final DPIA	**Date each version authorised**

Annex J: Partial Equality Impact Assessment

PARTIAL EQUALITY IMPACT ASSESSMENT RECORD

Title of policy/ practice/ strategy/ legislation etc.	Review of Part 1 of the Children (Scotland) Act 1995 and creation of a Family Justice Modernisation Strategy.	
Minister	**Minister for Community Safety and Legal Affairs**	
Lead official	To be completed in final EQIA	
Officials involved in the EQIA	**name**	**team**
	To be completed in final EQIA	
Directorate: Division: Team	**Civil Law & Legal System**	
Is this new policy or revision to an existing policy?	**Review of Part 1 of the Children (Scotland) Act 1995**	

Screening

Policy Aims

This is a partial EQIA and is focussing on the main themes and desired outcomes of the review of part 1 of the Children (Scotland) Act 1995 (the 1995 Act) and Family Justice Modernisation Strategy. A further more detailed EQIA will be completed to go with any Family Law Bill.

The main aims of the consultation are to:

- Further comply with the United Nations Convention on the Rights of the Child;
- Ensure that both the child's best interests and the child's views are at the centre of any contact or residence case or children's hearing;
- Ensure that the voice of the child is heard in cases; and
- Ensure that cases and hearings are dealt with in an effective and efficient way.

To meet these aims we are seeking your views on the following main topics:

- How the court considers the views of the child and representation of the child;
- Who a child should have contact with and how contact should happen;

- Who should have Parental Responsibilities and Rights;
- How international parental child abduction can be prevented;
- How children and victims of domestic abuse can be protected;
- How court procedure can be improved in proceedings affecting children and young people;
- What alternatives there are to court;
- Amendments that are needed to birth registers; and
- Procedural changes to the Children's Hearings System.

The policy contributes to the following National Outcomes:

- Our young people are successful learners, confident individuals, effective contributors and responsible citizens;
- Our children have the best start in life and are ready to succeed;
- We have improved the life chances for children, young people and families at risk; and
- We live our lives safe from crime, disorder and danger.

Who will it affect?

The policy will affect a wide range of people including:

- Child welfare reporters and curators *ad litem*
- Children and young people
- Children's Reporters
- The Courts
- Crown Office and Procurator Fiscal Service
- Faculty of Advocates
- Family Lawyers
- Family mediators and arbitrators
- Family members
- Grandparents
- Health Boards and GP surgeries
- Individuals seeking to be declared a parent of a child
- Law Society of Scotland
- Local authorities
- National Records of Scotland
- Organisations supporting parents, families and children
- Parents
- Registers of Scotland
- Relationships Scotland and the four independent contact centres in Scotland
- Schools
- Scottish Children's Reporter Administration
- Scottish Courts and Tribunals Service
- Scottish Legal Aid Board
- Siblings

- Step parents

What might prevent the desired outcomes being achieved?

This consultation is seeking views on potential changes to Part 1 of the 1995 Act and creation of a Family Justice Modernisation Strategy.

The cost implications of some options may lead to them not being considered viable.

Stage 1: Framing

Results of framing exercise

We met with colleagues from the Directorate for Children and Families and Scottish Government Legal Division for the purpose of the framing exercise. We have also spoken separately to Justice Analytical Services.

Groups of people potentially affected positively by the proposals

The framing exercise suggested that the following groups of people might be affected positively by the main topics of the review of the Children (Scotland) Act 1995.

Age

- All the main themes will directly affect children and young people and any legislative proposals in this area would benefit children.

- Ensuring the voice of the child is heard by consulting on removing the presumption that only children aged 12 or above are mature enough to be able to form a view would arguably benefit children under 12. Evidence shows that contact centres are used primarily for facilitating contact with children under the age of 8. Therefore, any regulation of contact centres will directly affect more children under the age of eight.

- The number of sole registrations of a child's birth outside marriage is higher amongst mothers who were under the age of 20 when they gave birth to their child[170]. This could mean that any proposals in relation to Parental Responsibilities and Rights (PRRs) and parentage will have a greater impact on this age group.

- Considering who a child should have contact with may affect grandparents who are likely to be older and siblings who may be younger.

Disability

- We have received anecdotal evidence that children with disabilities are less well heard by the court than children without disabilities.

- Stress can have a negative impact on a person's mental health. There is evidence that parties find family cases in court stressful[171]. Options to ensure the voice of the child is heard, improve court procedure, seek alternatives to court, protect children and victims of domestic abuse and improve the Children's Hearings System may help reduce the stress of court cases.

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[170] https://www.nrscotland.gov.uk/files/statistics/vital-events-ref-tables/16/3-birth/ve-ref-tabs-16-tab3.03.pdf

[171] Laing, K &Wilson G. 2010 Understanding child contact cases in Scottish sheriff courts *Newcastle University*. http://www.gov.scot/Resource/Doc/334161/0109246.pdf

- Changes to allow the modernisation of the Children's Hearings System through enhanced use of available technology could allow remote participation thereby reducing the potential stress of attendance.

Sex

- We noted that the law on who gets PRRs treats men and women differently. The Scottish Law Commission recommended in 1992 that all parents should get PRRs[172]. Parliament decided, in 1995 and in 2006, not to follow that recommendation. However, in the Family Law (Scotland) Act 2006 we introduced legislation so that unmarried fathers could obtain PRRs by jointly registering the birth of the child with the mother and the mother completing a form stating that the person is the father of the child and the father acknowledges this or vice versa.

- We noted that domestic abuse, which disproportionately affects women, is a significant issue in family cases. Understanding of domestic abuse is developing, with coercive control now recognised as a significant issue.

- We noted that the pursuers in family cases are more often men. A point regularly suggested to us in correspondence is that court decisions in family cases favour women. Although the court must make decisions based on the welfare of the child, some stakeholders would like to see courts starting from a shared parenting perspective. We have received correspondence claiming that the legal aid system is unfair because men are more likely to be in full time work and therefore less likely to be eligible for legal aid. There may also be issues with who pays for child welfare reports.

Pregnancy and Maternity

- The option of introducing compulsory joint birth registration would affect new parents.

Gender reassignment

- We are not aware of any particular issues in relation to transgender children in contact and residence cases.

Sexual orientation

- The consultation outlines the law on parentage and PRRs for same sex couples. The consultation also provides an update on proposed amendments to section 20(1)(d) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 to refer to marriage as well as civil partnerships. This will benefit second female parents.

[172] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235744/0004.pdf (see paragraphs 2.36 to 2.51)

- We note that Lesbian, Gay or Bisexual children are more likely to experience bullying and mental health issues and that stress may be a particular issue for them. For example research by Stonewall suggests that 45% of LGB pupils are bullied in school[173].

- We have received no information to suggest that same sex couples are disadvantaged in the court process.

Race

- People who have English as a second language may be at a disadvantage in understanding the court procedure and proceedings.

- We are seeking views on whether fathers who jointly register the birth of a child with the mother of the child in a country where joint registration leads to PRRs should have their PRRs recognised in Scotland.

Religion or belief

- We noted that some faiths may have different approaches to equality of the sexes and to family matters in general.

- A child's beliefs may be different from the child's parents (or the parents may hold different beliefs) and these may be a source of conflict.

Marriage and Civil Partnership

- We noted that we only needed to consider this protected characteristic in relation to policies about work, such as HR policies.

Extent/Level of EQIA required

Following the framing exercise, we believe that the extent of the EQIA required was high. We have produced a draft EQIA at this stage and a further more detailed EQIA will be completed to go with any Family Law Bill.

A partial Child Rights and Wellbeing Impact Assessment (CRWIA) has been prepared separately and will be cross-referred to in this EQIA. The partial CRWIA is at annex H of the consultation document.

[173] The School Report *Stonewall 2017* Available at: http://www.stonewall.org.uk/sites/default/files/the_school_report_2017.pdf

Stage 2: Data and evidence gathering, involvement and consultation

Include here the results of your evidence gathering (including framing exercise), including qualitative and quantitative data and the source of that information, whether national statistics, surveys or consultations with relevant equality groups.

Characteristic	Evidence gathered and Strength/quality of evidence	Source	Data gaps identified and action taken
AGE	1. The partial Child Rights and Wellbeing Impact Assessment (CRWIA) sets out the evidence we have gathered in relation to children and young people under 18. This is available in Annex H of the consultation document. **Who a child should have contact with and how contact should happen** 2. Families need Fathers Scotland received 11 enquiries from people seeking contact with their siblings in 2017 3. More younger adults may be affected if we were to regulate contact centres. Data from Relationships Scotland suggests that 58% of individuals using a child contact centre were aged 20-29 and 26% were aged 30-39%. In	2. Families need Fathers Scotland. 3. Data from Relationships Scotland and independent child	1. The CRWIA has identified that there is no data from Scottish Courts and Tribunals Service (SCTS) on the age of the child involved in a case. 2. There is no data from the Scottish Legal Aid Board (SLAB) or SCTS on the number of people who are seeking contact with their siblings. We would welcome any further evidence on this during the consultation. 3. There is no data available for two of the independent child contact centres.

	the Paisley Child Contact Centre, 80% of the individuals were aged 20-29. In Promoting Positive Contact in Glasgow 38% of individuals who gave their age were between 20-29.	contact centres.	4. There is no information available on the number of grandparents who are seeking contact or PRRs by using section 11 of the 1995 Act. We would welcome any information on this during the consultation.
	What are Parental Responsibilities and Rights and who should have them. 5. SLAB data shows that 29% of defenders are aged between 25-29. This figure decreases to 20% for 30-34 year olds and 15% for 35-39 year olds. SLAB data also shows that 22% of pursuers were aged between 25-29. This figure decreases to 20% for 30-34 year olds.	5. SLAB.	5. The data from SLAB only covers those cases where the individuals are granted Legal Aid. There is no information on cases which are privately funded. We are discussing with SCTS the data we need them to gather.
	Amendments to birth registers 6. Data on live births by age of mother shows that the highest number of births are by mothers between the ages of 25-29.	6. Data from National Records of Scotland (NRS).[174]	

[174] https://www.nrscotland.gov.uk/files//statistics/vital-events-ref-tables/16/3-birth/ve-ref-tabs-16-tab3.01a.pdf

	7. The figures on the number of women who jointly/solely register births outside marriage show that 18.9% of sole registrations are done by women under the age of 20. This percentage decreases to 7.8% for women over 35. At the same time the number of women jointly registering births outside marriage rises from 81.1% of under 20's to 92.2% of over 35's.	7. Data from NRS.[175]	
DISABILITY	1. Children with disabilities are less well heard in court cases than those without disabilities. 2. More than half of pursuers reported that they experienced moderate or severe stress as they undertook contact action. **How the court considers the views of the child and representation of the child** 3. Research shows that uncertainty and distress of family breakdown was compounded for children by the lack of involvement in the process, rates of	2. Study on Understanding Child Contact Cases in Scottish Sheriff Courts.[176] 3. Holt, S. 2016 The voice of the child in family law: A discussion paper	1. We would be keen to receive further information on this during the consultation. 2. We have no information on the number of personal cross examinations that are carried out in child contact and residence cases where there are allegations of domestic abuse but we understand the figure to be very low as few cases go to proof. Personal cross examinations can cause more stress. 3. We would welcome any further information on the effect of the court process of children and young people.

[175] https://www.nrscotland.gov.uk/files//statistics/vital-events-ref-tables/16/3-birth/ve-ref-tabs-16-tab3.03.pdf
[176] http://www.gov.scot/Resource/Doc/334161/0109246.pdf

	satisfaction with current arrangements were conversely higher for those who have been consulted. **How children and victims of domestic abuse can be protected** 4. Research shows that domestic abuse is alleged in half of all court actions over contact raised by a parent. Research by CAFCASS and Women's Aid in 2017 shows that in England and Wales domestic abuse was alleged in 62% of cases with fathers more likely to be the subject of allegations than mothers. Cases featuring allegations of domestic abuse were more likely to result in an order for no direct contact than cases without. Research undertaken by the Ministry of Justice in 2009 showed that 53% of the contact and residence cases in England and Wales involved allegations of domestic abuse or concerns about abduction or harm to children. 5. 18% of cases referred to the Children's Panel on the grounds of domestic abuse.	*Children and Youth Services Review* 6 4. Mackay, K. 2013. The treatment of the views of children in private law child contact disputes where there is a history of domestic abuse.[177] CAFCASS and Women's Aid research[178].MoJ research.[179] 5. Scottish Children's Reporter Administration (SCRA) data.	

[177] https://www.cypcs.org.uk/ufiles/views-of-children-and-domestic-abuse.pdf
[178] https://www.cafcass.gov.uk/download/2124/
[179] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217368/family-justice-childrens-proceedings.pdf

SEX	**Who a child should have contact with and how contact should happen** 1. 76% of individuals using a child contact centre managed by Relationships Scotland are male. In the Paisley Child Contact Centre the split is 50/50. In Inverclyde Child (Family) Contact Centre three families used the centre in 2016 for contact with a mother and 1 for contact with a father and grandmother. In 2017, 9 families used the contact centre for contact with the mother and 1 used it for contact with the father and grandmother. 2. In 2017, 539 Fathers contacted Families need Fathers Scotland regarding contact as opposed to 38 women. Citizens Advice Bureaux in Scotland advised on 1861 cases related to parental contact in 2017. 3. SLAB data shows that, between 2015-2017, in contact and residence cases, 82% of defenders were female and 18% were male. During the same period 68% of pursuers were men and 32% were female. **What are Parental Responsibilities and Rights**	1. Relationships Scotland and independent contact centres. 2. Families Need Fathers Scotland and Citizens Advice Scotland. 3. SLAB data.	2. During the consultation we would like to receive information on this from other organisations. 3. The data from SLAB only covers those cases where the individuals are granted Legal Aid. There is no information on cases which are privately funded. We are discussing with SCTS the data we need them to gather.

	and who should have them 4. There is evidence which highlights the importance of father-child relationships. For example, Growing Up in Scotland study found that children with poor father-child relationships are more likely to have higher levels of behavioural and emotional problems and poor school adjustment than children with good father child relationships. 5. There is research that children benefit from the quality of parenting they receive and the quality of the relationship between parents. 6. Research also shows that more frequent and regular contact is associated with closer relationships with non-resident parents and fewer adjustment problems in children[180].	4. Evidence from Growing up in Scotland: Father-Child Relationships and Child Socio-Emotional Wellbeing.[181] Evidence from IRISS research in 2017. [182] Year of the Dad.[183] 5. Nuffield Foundation in 2013.[184] 6. See for example Bauserman, R. (2002). Child Adjustment in Joint-Custody	4. We would welcome any further evidence on the importance of father –child relationships. 5. We would welcome any further evidence on shared parenting.

[180] See for example Bauserman, R. (2002). Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review. *Journal of Family Psychology.* 16(1): 91-102.
[181] http://www.gov.scot/Resource/0051/00515142.pdf
[182] https://www.iriss.org.uk/sites/default/files/2017-06/insights-38.pdf

[184] Caring for children after parental separation: would legislation for shared parenting time help children? University of Oxford May 2011. http://www.nuffieldfoundation.org/sites/default/files/files/Would%20legislation%20for%20shared%20parenting%20time%20help%20children)OXLAP%20FPB%207.pdf

	7. There is research from Sweden about the benefits to children of shared parenting. A study of 60 studies published in English in academic journals or in government reports suggested that in 34 studies, joint physical custody children had better outcomes on all the measures of behavioural, emotional, physical and academic wellbeing than sole physical custody children. 8. There is, however, some evidence from Belgium that there has been little evidence that children's wellbeing in shared residence is higher than children living with one parent.	Versus Sole-Custody Arrangements: A Meta-Analytic Review. *Journal of Family Psychology.* 16(1): 91-102. 7. For example Elvis projektet. [185]. 8. Sodermans, AK and Matthijs K, Joint physical custody and adolescents' subjective well-being: a personality x environment interaction *Journal of Family Psychology 2014*	

[185] https://www.researchgate.net/project/Elvis-projektet

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	9. Data shows that between 2000 and 2016, there were 53,065 children and young people under the age of 16 born to an unmarried mother whose birth certificate originally only registered the mother as the parent. This compares to 407,408 children and young people who were born during the same period and have both parents registered on their birth certificate. Data shows that since 2006 there have been 1717 Parental Responsibilities and Rights Agreements registered which give father's PRRs.	9. NRS.[186]	
	How children and victims of domestic abuse can be protected		
	10. Figures for 2016-17 show that 79% of victims of domestic abuse reported to the Police were women and abusers were men, 18% of victims were men and abusers were women, 2% of victims and abusers were men and 1% of victims and abusers were women.	10. Scottish Government Domestic Abuse Recorded by the Police in Scotland 2016-17[187].	
	Procedural changes to the Children's Hearings System		
	11. 56% of children and young people referred to the Children's Panel are male and 44% are female.	11. Data from SCRA.	

[186] https://www.nrscotland.gov.uk/files//statistics/vital-events-ref-tables/16/3-birth/ve-ref-tabs-16-tab3.03.pdf
[187] http://www.gov.scot/Publications/2017/10/3700

PREGNANCY AND MATERNITY	In 2016 there were 54,488 births registered in Scotland.	NRS.[188]	
GENDER REASSIGNMENT			There is no information available on the number of trans men giving birth or number of trans women who father a child.
SEXUAL ORIENTATION			There is no information available on the number of contact cases involving same sex couples as SCTS and SLAB do not record this data. We will use the consultation to seek further information on this topic.
RACE	Evidence from Families Need Fathers Scotland suggests that about 16% of enquiries they receive are from ethnic minorities. There may be fathers coming from jurisdictions outside of the UK where joint birth registration leads to PRRs.	Families Need Fathers Scotland.	SCTS and SLAB do not hold information on use of interpreters or the race of parties applying to court. Further desk based research on jurisdictions that give fathers automatic PRRs and migration statistics for these countries.
RELIGION OR BELIEF	1. Four contact centres that are managed by Relationships Scotland use religious	1. Relationships Scotland	

[188] https://www.nrscotland.gov.uk/files//statistics/vital-events-ref-tables/16/3-birth/ve-ref-tabs-16-tab3.01b.pdf

	establishments as a venue for facilitating contact. 2. Our policies generally affect those families who have separated and therefore data on the number of divorces may be relevant. Statistics show that in 2015-16 the number of divorces of religious marriages was 4464. This was not significantly different from the number of civil marriages that ended in divorce (4411).	2. Scottish Government Divorces and Dissolutions supplementary tables 2015-16[189]	
MARRIAGE AND CIVIL PARTNERSHIP (the Scottish Government does not require assessment against this protected characteristic unless the policy or practice relates to work, for example HR policies and practices - refer to Definitions of Protected Characteristics document for details)	N/A	N/A	

[189] http://www.gov.scot/Topics/Statistics/Browse/Crime-Justice/Datasets/supptab1516

Stage 3: Assessing the impacts and identifying opportunities to promote equality

Having considered the data and evidence you have gathered, this section requires you to consider the potential impacts – negative and positive – that your policy might have on each of the protected characteristics. It is important to remember the duty is also a positive one – that we must explore whether the policy offers the opportunity to promote equality and/or foster good relations.

Do you think that the policy impacts on people because of their age?

Age	Positive	Negative	None	Reasons for your decision
Eliminating unlawful discrimination, harassment and victimisation	X			The option to reduce repeated litigation would reduce harassment and victimisation of children subject to repeated court cases. The issues in the consultation on protecting children and victims of domestic abuse may help to reduce harassment and victimisation of these individuals.
Advancing equality of opportunity	X			The option to remove the presumption that a child over 12 is of sufficient maturity to express a view could clarify that the views of children under the age of 12 with capacity will be sought in court cases under section 11 of the 1995 Act. The consultation on who a child should have contact with may clarify that under 16's can apply for contact under section 11 of the 1995 Act.
Promoting good relations among and between different age groups	X			The consultation seeks views on how best to ensure that a child can, where appropriate, have good relations with other family members. Therefore, this could promote good

				relations among and between different age groups.

Do you think that the policy impacts disabled people?

Disability	Positive	Negative	None	Reasons for your decision
Eliminating unlawful discrimination, harassment and victimisation			X	Policy is not designed for this.
Advancing equality of opportunity	X			Changes to allow the modernisation of the Children's Hearings System through enhanced use of available technology could allow remote participation thereby reducing the potential stress of attendance.
Promoting good relations among and between disabled and non-disabled people			X	Policy is not designed for this.

Do you think that the policy impacts on men and women in different ways?

Sex	Positive	Negative	None	Reasons for your decision
Eliminating unlawful discrimination			X	Policy is not designed for this.
Advancing equality of opportunity	X			Giving all fathers PRRs automatically could advance equality.
Promoting good relations between men and women	X	X		Encouraging using alternative methods to court could promote good relationships between men and women. Shared parenting could promote good relations between men and women. Alternative dispute resolution and shared parenting can have a negative impact in relationships where there is domestic abuse.

Do you think that the policy impacts on women because of pregnancy and maternity?

Pregnancy and Maternity	Positive	Negative	None	Reasons for your decision
Eliminating unlawful discrimination			X	Policy is not designed for this.
Advancing equality of opportunity			X	Policy is not designed for this.
Promoting good relations			X	Policy is not designed for this.

Do you think your policy impacts on transsexual people?

Gender reassignment	Positive	Negative	None	Reasons for your decision
Eliminating unlawful discrimination			X	Policy is not designed for this.
Advancing equality of opportunity			X	Policy is not designed for this.
Promoting good relations			X	Policy is not designed for this.

Do you think that the policy impacts on people because of their sexual orientation?

Sexual orientation	Positive	Negative	None	Reasons for your decision
Eliminating unlawful discrimination			X	Policy is not designed for this.
Advancing equality of opportunity	X			Amendments in relation to the second female parent could advance equality.
Promoting good relations			X	Policy is not designed for this.

Do you think the policy impacts on people on the grounds of their race?

Race	Positive	Negative	None	Reasons for your decision
Eliminating unlawful discrimination			X	Policy is not designed for this.
Advancing equality of opportunity	X			Recognising in Scotland the PRRs of a father who jointly registered a birth overseas in a country where this leads to PRRs.
Promoting good race relations			X	Policy is not designed for this.

Do you think the policy impacts on people because of their religion or belief?

Religion or belief	Positive	Negative	None	Reasons for your decision
Eliminating unlawful discrimination			X	Policy is not designed for this.
Advancing equality of opportunity	X			Giving all fathers PRRs and ensuring that they are involved in health and education decisions could help ensure that fathers can influence the religious or belief upbringing of their child.
Promoting good relations			X	Policy is not designed for this.

Do you think the policy impacts on people because of their marriage or civil partnership?

Marriage and Civil Partnership[190]	Positive	Negative	None	Reasons for your decision
Eliminating unlawful discrimination			N/A	N/A

[190] In respect of this protected characteristic, a body subject to the Public Sector Equality Duty (which includes Scottish Government) only needs to comply with the first need of the duty (to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010) and only in relation to work. This is because the parts of the Act covering services and public functions, premises, education etc. do not apply to that protected characteristic. Equality impact assessment within the Scottish Government does not require assessment against the protected characteristic of Marriage and Civil Partnership unless the policy or practice relates to work, for example HR policies and practices.

Stage 4: Decision making and monitoring

Identifying and establishing any required mitigating action

Have positive or negative impacts been identified for any of the equality groups?	Yes
Is the policy directly or indirectly discriminatory under the Equality Act 2010[191]?	No
If the policy is indirectly discriminatory, how is it justified under the relevant legislation?	
If not justified, what mitigating action will be undertaken?	

Describing how Equality Impact analysis has shaped the policy making process

The partial EQIA confirms that the proposed policy would have benefits for children and young people.

Monitoring and Review

At this stage this is a partial EQIA and therefore we will consider this further following analysis of the consultation responses.

Stage 5 - Authorisation of EQIA

Please confirm that:

- This Equality Impact Assessment has informed the development of this policy:
  Yes X No ☐

[191] See EQIA – Setting the Scene for further information on the legislation.

- ♦ Opportunities to promote equality in respect of age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation have been considered, i.e.:
    - ○ Eliminating unlawful discrimination, harassment, victimisation;
    - ○ Removing or minimising any barriers and/or disadvantages;
    - ○ Taking steps which assist with promoting equality and meeting people's different needs;
    - ○ Encouraging participation (e.g. in public life)
    - ○ Fostering good relations, tackling prejudice and promoting understanding.

    Yes ☒ No ☐

- ♦ If the Marriage and Civil Partnership protected characteristic applies to this policy, the Equality Impact Assessment has also assessed against the duty to eliminate unlawful discrimination, harassment and victimisation in respect of this protected characteristic:

  Yes ☐ No ☐ Not applicable ☒

Declaration

I am satisfied with the equality impact assessment that has been undertaken for the Review of Part 1 of the Children (Scotland) Act 1995 and creation of a Family Justice Modernisation Strategy and give my authorisation for the results of this assessment to be published on the Scottish Government's website.

TO BE COMPLETED WHEN FINAL VERSION OF EQIA IS PUBLISHED

Name:

Position: [Deputy Director level or above]

Authorisation date:

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