

Children (Scotland) Bill

[As Amended at Stage 2]

Supplementary Financial Memorandum

Introduction

1. As required under Rule 9.7.8B of the Parliament's Standing Orders, this supplementary Financial Memorandum is published to accompany the Children (Scotland) Bill, introduced in the Scottish Parliament on 2 September 2019.

2. This supplementary Financial Memorandum has been prepared by the Scottish Government. It does not form part of the Bill and has not been endorsed by the Parliament. It should be read in conjunction with the original Financial Memorandum published to accompany the Bill as introduced.

3. The purpose of this supplementary Financial Memorandum is to set out the expected costs associated with the new and amended provisions included in the Bill following the amendments made at Stage 2. This document addresses those amendments with anticipated or potential cost implications. Amendments agreed at Stage 2 which are not covered in this supplementary Financial Memorandum are considered not to significantly or materially affect the assumptions in the original Financial Memorandum.

4. This supplementary Financial Memorandum focuses on three amendments agreed at Stage 2:

- Section 11A Alternative Methods of Dispute Resolution;
- Section 11B: Mandatory Information Awareness Meeting on Mediation; and
- Section 15A: Duty to ensure availability of child advocacy services.

5. The majority of the costs of the first amendment, on alternative methods of dispute resolution, fall to the Scottish Legal Aid Board (SLAB). The

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majority of the costs of the other two amendments would fall to the Scottish Government.

Legal Aid for Alternative Methods of Dispute Resolution

6. Section 11A of the Bill requires the Scottish Government by regulations to make provision for legal aid to be available for different forms of Alternative Dispute Resolution (ADR). The alternative forms of ADR that are to be made available are:

- Mediation
- Arbitration
- Collaborative law
- Family Group Conferencing

7. 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.

8. 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”¹. There are similar provisions in Ordinary Cause Rule 33A.22 for civil partnership actions² and in 49:23 of the Court of Session Rules³. The Scottish Government has sent a policy paper to the Family Law Committee of the Scottish Civil Justice Council seeking to extend these rules to all family actions (e.g. those about financial provision on divorce).

9. 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.

¹ [https://www.scotcourts.gov.uk/docs/default-source/scr-ordinary-cause-rules---part-2/chapter-33-\(actions-lodged-on-or-after-24-june-2019\).doc?sfvrsn=6](https://www.scotcourts.gov.uk/docs/default-source/scr-ordinary-cause-rules---part-2/chapter-33-(actions-lodged-on-or-after-24-june-2019).doc?sfvrsn=6)

² [https://www.scotcourts.gov.uk/docs/default-source/scr-ordinary-cause-rules---part-2/chapter-33a-\(actions-lodged-on-or-after-24-june-2019\).doc?sfvrsn=4](https://www.scotcourts.gov.uk/docs/default-source/scr-ordinary-cause-rules---part-2/chapter-33a-(actions-lodged-on-or-after-24-june-2019).doc?sfvrsn=4)

³ <https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/rules-of-court/court-of-session/chap49.pdf?sfvrsn=24>

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The arbitrator in family cases is usually a family lawyer who has received special training.

10. 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. Family Group Conferencing (FGC) involves an extended family meeting to resolve issues of child welfare concerns. FGC generally incorporates four stages. Firstly: referral. Family members agree that FGC is required and an independent coordinator is appointed. Secondly: preparation. The coordinator identifies the family network and meets with people to discuss the reason for the meeting and invite them to participate. Thirdly: meeting. Everyone attends to discuss the situation. The family meets in private to discuss a plan of action and this is agreed by all attendees. Finally: review. The operation of the plan is reviewed and if necessary further meetings are arranged.

Costs

12. The cost implications are likely to fall to SLAB so have been considered later in this Financial Memorandum (see paragraphs 44 to 47).

Savings

13. There are likely to be cost savings to the Scottish Courts and Tribunals Service (SCTS) as judicial time would be reduced with a reduction in court cases. However, these cost savings are likely to be balanced out by a reduction in fee income received by the SCTS.

Mandatory Information Awareness Meeting for Mediation

14. Section 11B of the Bill requires the Scottish Ministers by regulations to make provision for a pilot scheme for individuals to attend a Mandatory Information Awareness Meeting on mediation (MIAM) except where there is domestic abuse involved. The amendment enables the court in pilot areas to refer parties to a MIAM before an order under section 11 of the Children (Scotland) Act 1995 (the 1995 Act) is made. The regulations may provide for judicial discretion to allow the parties in dispute not to attend a MIAM where reasonable mitigating factors have been given. The regulations must

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be laid in draft before the Scottish Parliament no later than 6 months after Royal Assent.

15. A MIAM provides information on alternatives to court and by itself is not alternative dispute resolution. The person conducting the MIAM would discuss with the party the advantages of not going through the court process and alternatives that may be available.

Costs

16. The provisions in the Bill do not specify the size of the pilot or the duration of the pilot. The Scottish Government assumes a pilot would run for a year as this would allow a significant amount of data to be gathered for the purposes of evaluation.

17. In 2018/19 there were 3,554 family cases raised which involved children (excluding adoption and permanence cases)⁴. The provision in the Bill excludes cases where there is domestic abuse from the pilot. Research shows that domestic abuse is alleged in around half of all court actions over contact raised in Scotland⁵. Therefore, the total number of eligible cases would be 1,777 (3,554 divided by 2). A suitable pilot to give robust evidence for an evaluation would be 25% of those cases. This would be 444, which has been rounded up to 500 for the purposes of this supplementary Financial Memorandum.

18. The costs are based on a range of 500 MIAMs and 1,000 MIAMs. A party may not wish to attend a MIAM with the other party and therefore the Scottish Government has estimated costs for each party attending separate MIAMs as well as joint MIAMs.

19. The Scottish Government would envisage that the MIAM sessions would be undertaken by the two organisations who are currently approved by the Lord President under the Civil Evidence (Family Mediation) (Scotland) Act 1995⁶. These are the Law Society of Scotland (for lawyer mediators) and Relationships Scotland⁷ (RS). Lawyer mediators have an

⁴ Figures from SCTS

⁵ Mackay K. 2013 The treatment of the views of children in private law child contact disputes where there is a history of domestic abuse. Available at:

<https://www.cypcs.org.uk/ufiles/views-of-children-and-domestic-abuse.pdf>

⁶ <https://www.legislation.gov.uk/ukpga/1995/6/section/1>

⁷ <https://www.relationships-scotland.org.uk/>

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organisation called Comprehensive Accredited Lawyer Mediators Scotland⁸ (CALM). The Scottish Government estimates the average cost of a mediator to be £50 per hour. The Scottish Government estimates that a MIAM would last one hour but there would need to be one hour preparation time and also one hour after the meeting for the mediator to write a note of the meeting. Therefore the cost for mediators would be between £75,000 (£50 x 3 x 500) and £150,000 (£50 x 3 x 1,000).

20. The Scottish Government assumes that the MIAM would take place in the existing premises of RS member services and CALM mediators as this work would form part of their usual day to day role. Therefore there would be no accommodation costs.

21. There would likely be a need for coordination of the pilot from within the Scottish Government. The Scottish Government has estimated this as half the average salary cost of an A4 administrative officer which is £15,131 (£30,271 divided by 2).

22. In advance of undertaking MIAMs mediators may need training on what they should be doing during the MIAM. The Scottish Government assumes that a mediator would handle approximately 50 MIAMs during the pilot. This would mean between 10 and 20 mediators would be required (based on between 500 and 1,000 MIAMS taking place during the pilot). Training may last 2 hours and be charged at £50 an hour. Therefore, the costs would be between £1,000 and £2,000.

23. There may be travel costs associated with parties attending a MIAM pilot. This would vary depending on the areas of Scotland that the MIAM covers. There may not be costs if a party can walk or cycle to a MIAM session. However, there may be costs associated with travelling by public transport or driving to a MIAM.

24. The Scottish Government's mileage rate for travelling by car is £0.45 per mile. In England and Wales there is an exemption from attending a MIAM if a party has to travel more than 15 miles⁹. Therefore, the Scottish Government assumes that there could be costs of between £0 (everyone

⁸ <http://www.calmScotland.co.uk/>

⁹ 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

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walking or cycling to the MIAM) and £6,750 (1,000 parties travelling 15 miles at £0.45 per mile). The Scottish Government assumes that mediators would not charge travel expenses as the mediation session would likely take place at their usual place of work¹⁰.

25. Parties attending a MIAM may receive a leaflet on alternatives to court. There would be cost implications of producing these leaflets. Based on an estimate received from the Scottish Government approved printer for a four page leaflet this could cost £120. The Scottish Government assumes that there would be no costs associated with designing the leaflet as it would be done in-house by the Scottish Government.

26. The provisions in the Bill provide that it is for the court to order parties to attend a MIAM. This would require court time. Work is being undertaken by the Family Law Committee of the Scottish Civil Justice Council on case management in family actions. The Scottish Government expects initial case management hearings established as part of this case management work could, in pilot areas, refer parties to a MIAM and therefore there would be no direct cost implications for the courts in referring parties in a pilot area to a MIAM.

27. In addition to the costs for operating the pilot there would need to be a full evaluation, which would be made public. The Scottish Government has estimated the cost of this evaluation to be between £35,000 and £50,000. The evaluation would involve interviews with people who have participated in the pilot and also interviews with mediators.

28. The provision in the Bill does not specify when the pilot should take place but provides that a draft of regulations must be laid before the Parliament no later than 6 months after Royal Assent. Further work with the SCTS, RS and CALM would be needed in advance of commencing the pilot. Rules of Court may also be needed. The Scottish Government considers that the pilot could run from late 2021 until late 2022. The evaluation would take approximately six months to complete after the end of the pilot.

¹⁰ <https://www.gov.uk/government/publications/490-employee-travel-a-tax-and-nics-guide>

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29. The table below shows estimated costs for the pilot of MIAMs

Activity	Cost
Mediators	£75,000 - £150,000
Administrative support	£15,131
Training of mediators	£1,000 - £2,000
Travel expenses for people attending MIAMs	£0 - £6,750
Leaflet produced on MIAMs	£120
Evaluation of MIAMs	£35,000 - £50,000
Total cost	£126,382 - £224,001

Savings

30. There may be cost savings associated with the pilot if individuals decide not to proceed with a court case. These costs savings would be in terms of a reduction in the number of court cases and also in terms of costs of child welfare reports.

31. On child welfare reports, in 2017 SLAB did work which showed around 1,100 reports were ordered in family disputes. This accounted for a third of family actions. If the pilot were to cover 500 cases then the Scottish Government would expect usually that in a third of these cases (167) a child welfare report would be ordered. There could be savings if the MIAM leads to the case going to mediation and the case is then resolved without the need for any further court action (and as a consequence no child welfare report would be required).

32. The average cost of a child welfare report is estimated by SLAB to be £2779. As the provision only requires the parties to attend a MIAM once they have started a court process then it is likely that most parties would decide to proceed with court action as parties' attitudes are likely to be antagonistic and not amenable to mediation. Even if a couple do proceed

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to mediation, there is no guarantee this will succeed. If between 10% and 30% of MIAMS lead to cases being resolved outwith court this could lead to savings of between £47,243 (based on 17 child welfare reports not being required) and £138,950 (based on 50 child welfare reports not being required).

33. The average cost of an account made for payment for a section 11 claim by SLAB was, in 2018/19, £3,207.14. However, there would still be costs in relation to mediation plus costs associated with solicitors involved in finalising agreements. These costs have been estimated as £600 for mediation and £1,300 for negotiating and agreeing a Minute of Agreement. Therefore cost savings may be £1,307 [£3,207 minus £600 minus £1,300] for each case that is not proceeding in court. Based on 500 cases being part of the pilot and between 10% and 30% of parties resolving cases outwith court this could lead to a saving of between £65,350 and £196,050.

Duty to Ensure Availability of Child Advocacy Services

34. Section 15A of the Bill requires the Scottish Ministers to make such provision as they consider necessary and sufficient to ensure that all children concerned in proceedings for an order under section 11(1) of the 1995 Act have access to appropriate child advocacy services. Advocacy services would provide advice, support and representation to a child when they are the subject of proceedings under section 11 (1) of the 1995 Act.

35. Consideration would need to be given as to what advocacy services should be provided. This Financial Memorandum has considered the option of awarding a grant for child advocacy services.

36. In 2018/19 there were 3,554 family cases raised involving children excluding permanence and adoption.¹¹ The assumption has been made for this Financial Memorandum that most children would need an advocacy worker as the exceptions to obtaining the views of the child set out in section 1 of the Bill would only be used very infrequently.

37. However, some children may not require an advocacy worker as they may decide they do not want one, or do not wish to participate in a case or may not be able to participate in a case if their location is unknown or they are so young they are unable to express a view. However, the number of children who do not have an advocacy worker appointed would be

¹¹ Figures from SCTS.

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balanced out by the number of children who require a higher degree of support from the advocacy worker. In addition, some cases may involve more than one child.

38. The Scottish Government has estimated that each advocacy worker would be able to work with 20 children a year. This would involve engaging with the child multiple times and providing ongoing support to the children. Therefore, 180 individuals may need to be grant funded to cover 3,600 cases. All parts of Scotland would need to be covered.

Costs of Child Advocacy Workers

39. Based on similar support worker roles the Scottish Government estimates that an advocacy worker would be paid between £23,000 and £25,000 per year and therefore there would be employer NI contributions of between £2599 and £3349¹². This assumes that the advocacy worker works full time on providing support to children at the centre of cases under section 11 of the 1995 Act. Therefore assuming 180 advocacy workers there would be an ongoing cost of between £4.61m and £5.13m per year.

40. There would also need to be some oversight of the grant within Scottish Government. During the set up period the Scottish Government has estimated that this would require a full time member of staff at B2 grade and also half of a team leader based at C1 grade. Based on average salary costs which include National Insurance contributions this would be £0.1m. The Scottish Government has not included accommodation and IT costs for these members of staff as they would be located with Scottish Government buildings and would be existing members of staff so would have access to Scottish Government IT.

41. Once the grant is awarded there would need to be continued administration and oversight of the grant. This could be done by a member of staff at B2 grade. Based on average staff costs of a B2 including National Insurance contributions this would be £0.04m per year.

¹² <https://www.gov.uk/government/collections/how-to-manually-check-your-payroll-calculations>

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42. Therefore, total estimated ongoing cost of operating a grant scheme is between £4.65m and £5.17m per year, as shown in the table below.

	Costs (£m)
Ongoing administration costs	0.04
Costs of grant	4.61 – 5.13
Total costs	4.65 – 5.17

Costs on Local Authorities

43. The Scottish Government does not expect there to be any additional costs to local authorities.

Costs on Other Bodies, Individuals and Businesses

Alternative Dispute Resolution

44. It is not expected that these provisions would have cost implications in relation to mediation as SLAB is already funding mediation. In 2018/19 SLAB received 436 requests for funding for mediation under civil legal aid while in 2019/20 it was 415.

45. It is not expected that collaborative law would have significant cost implications given that in these circumstances SLAB would be paying for solicitors and this is already done now.

46. Family Group Conferencing is similar to family group therapy. SLAB costs for family group therapy are typically £1000 but will exceed that if extensive work is needed. It is uncertain how many applications for Family Group Conferencing there would be. However, if there are between 208 and 415 requests for this form of ADR per year (between half and the same number of applications for funding for mediation) then this could cost between £208,000 and £415,000 per year.

47. In terms of arbitration, there would be costs associated with the arbitrator and the solicitors for each party. The costs of the arbitrator could be an additional cost to SLAB. However, in practice the Scottish Government would expect the use of arbitration through legal aid funding to resolve child contact and residence cases to be low.

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