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Pàrlamaid na h-Alba

Justice Committee
Comataidh a' Cheartais

Stage 1 Report on the Children (Scotland) Bill

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Contents

Justice Committee

To consider and report on matters falling within the responsibility of the Cabinet Secretary for Justice, and functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.

http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/justice-committee.aspx

justicecommittee@parliament.scot

0131 348 5047

Committee Membership

Convener
Margaret Mitchell
Scottish Conservative and Unionist Party

Deputy Convener
Rona Mackay
Scottish National Party

Alasdair Allan
Scottish National Party

John Finnie
Scottish Green Party

James Kelly
Scottish Labour

Liam Kerr
Scottish Conservative and Unionist Party

Fulton MacGregor
Scottish National Party

Liam McArthur
Scottish Liberal Democrats

Shona Robison
Scottish National Party

Executive summary

Sometimes parents end up in dispute with each other over their children, for example when the parents are separating or divorcing. Part 1 of the Children (Scotland) Act 1995 ("the 1995 Act") contains the law which applies to resolve these disputes. The Children (Scotland) Bill ("the Bill") would substantially amend the 1995 Act, as well as making some changes to other legislation affecting children.

According to the Scottish Government, the policy aims of the Bill are to:

- ensure the views of the child are heard in contact and residence cases;
- further protect victims of domestic abuse and their children;
- ensure the best interests of the child are at the centre of contact and residence cases and children's hearings; and
- further compliance with the United Nations Convention on the Rights of the Child (UNCRC) in family court cases.

Overall, the Committee considers that the Bill is a positive step forward in achieving these policy aims. We therefore support the general principles of the Bill.

In particular, we welcome the removal of the existing presumption in the 1995 Act that a child aged 12 or over is of sufficient age and maturity to form a view. A 12-year-old child is no more able to express a view than a child one day short of his or her 12th birthday. We heard consistent evidence that the presumption has meant that the views of younger children are not routinely heard in practice.

However, in this report we have asked the Scottish Government to respond to the concerns raised by various stakeholders that the current drafting of the Bill does not go far enough in ensuring that the views of all children, particularly younger children, are heard.

Moreover, we heard powerful evidence that the infrastructure for taking children's views needs to be strengthened. Without this, the Bill may make very little difference in practice, particularly in relation to hearing the views of younger children where specific skills and more creative methods are required.

If the Scottish Government's aim of ensuring that all children who wish to do so are able to express their views is to be met, then the necessary infrastructure and resources must be in place to support this. For example, we have asked the Scottish Government to commit to ensuring that children's advocacy is available to all children involved in cases under section 11 of the 1995 Act.[i]

We also strongly support provisions in the Bill which would regulate child contact centres. While we heard that contact centres can play an important role in facilitating contact which might not otherwise be possible, we also heard concerns about the current safety of contact centres for children and families. Consistent standards for, for example, training

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i Section 11 of the 1995 Act gives the court various powers to resolve parenting disputes, including powers to make orders about who the child lives with and has contact with.

and premises should help to ensure that contact centres are safe for all those who use them.

However, it is clear from the evidence we heard that there are significant concerns about the impact of regulation on the ability of contact centres to continue to operate. The closure of contact centres could mean families who need to use them to maintain contact are no longer able to do so, which would not be in the best interests of the children involved.

The Financial Memorandum suggests that there could be significant costs for contact centres in meeting the new regulatory requirements, yet no additional funding is proposed. We do not consider that legislation should be passed if it is not clear that there are sufficient means to fund the changes proposed.

We have therefore asked the Scottish Government to provide details on how it will ensure that sufficient funding will be available for contact centres to meet both their existing level of service provision and the new regulatory requirements.

In this report, we make a number of other recommendations aimed at improving both the law and practice relating to disputes over children. These include:

- amending the Bill to provide for a fuller list of factors for the court to consider when deciding disputes about children, in line with the UNCRC;
- ensuring all those involved in deciding disputes about children, including the judiciary and child welfare reporters, receive appropriate training; and
- undertaking a review of special measures[ii] to ensure that, where possible and appropriate, the approach to children and vulnerable individuals is the same across all criminal and civil proceedings, including children's hearings.

[ii] Special measures are things a court does to help vulnerable individuals to give evidence effectively, or otherwise appear in court, with as little fear and distress as possible.

Membership changes

James Kelly replaced Daniel Johnson on 10 September 2019. Alasdair Allan replaced Jenny Gilruth on 25 February 2020.

Introduction

1. The Children (Scotland) Bill ("the Bill") was introduced in the Scottish Parliament on 2 September 2019. It is a Scottish Government Bill.

2. The Bill would substantially reform Part 1 of the Children (Scotland) Act 1995 ("the 1995 Act"). The 1995 Act sets out the law which applies to resolve disputes between parents about their children. The Bill would also make some changes to other legislation affecting children.

3. According to the Scottish Government, the policy aims of the Bill are to:

   - ensure the views of the child are heard in contact and residence cases;
   - further protect victims of domestic abuse and their children;
   - ensure the best interests of the child are at the centre of contact and residence cases and children's hearings; and
   - further compliance with the United Nations Convention on the Rights of the Child (UNCRC) in family court cases. [1]

4. The Bill and accompanying documents can be found here.

5. The Scottish Government has produced the following impact assessments for the Bill:

   - equality impact assessment and equality impact assessment summary;
   - Fairer Scotland duty impact assessment;
   - data protection impact assessment;
   - child rights and wellbeing impact assessment; and
   - islands communities screening assessment.

6. The Scottish Government also published a Family Justice Modernisation Strategy at the same time as the Bill, explaining other ongoing and future reforms in this area.

7. A SPICe briefing on the Bill can be found here.

Background to the Bill

8. The Bill would mainly make changes to Part 1 of the 1995 Act. Part 1 of the 1995 Act sets out various parental responsibilities and rights ("PRRs") for children living in Scotland. In practice, PRRs are powers which enable parents or other adults to take key parenting decisions on behalf of children.

9. Sometimes parents end up in a dispute with each other about their children, for example, when the parents are separating or divorcing. Section 11 of the 1995 Act gives the court various powers to resolve these parenting disputes. The court can make different types of orders including:

- a residence order, setting out where the child is to live, which can be with one or both parents;
- a contact order, setting out the arrangements for a child to have contact with a person he or she does not live with, for example, a parent or grandparent;
- an order giving or taking away some or all PRRs; and
- a specific issue order, which can settle other types of dispute, such as where a child goes to school.

10. The key principle in the 1995 Act is that the welfare of the child (sometimes referred to as the best interests of the child) is the paramount consideration. The 1995 Act also requires the court to give a child the opportunity to express his or her views, and the court must consider (although not necessarily follow) any views expressed.

11. The last major reform of the 1995 Act was in 2006, by the Family Law (Scotland) Act 2006 ("the 2006 Act").

12. Since then, there has been growing pressure for further reforms to the law and practice in this area.[iii]

13. In 2018, the Scottish Government consulted on a wide range of possible reforms to Part 1 of the 1995 Act. Some of the proposals consulted on (e.g. regulating child welfare reporters and child contact centres) have made it into the Bill. Others (e.g. strengthening the rights of unmarried fathers) have not.

14. Responses to the consultation, an analysis of responses and summary of that analysis were published in May 2019.

15. In its Programme for Government 2019-20, the Scottish Government said that it would incorporate the UN Convention on the Rights of the Child (UNCRC) into domestic law before the end of the current parliamentary session. A key aim of the Children (Scotland) Bill is to strengthen the 1995 Act's compliance with the UNCRC.

Overview of the Bill

16. The main provisions of the Bill are summarised below.

- **Children's participation:** sections 1 to 3 and 15 propose changes to the 1995 Act (and other legislation) to help children participate in decisions about them. One aim is to encourage the court to hear the views of younger children (under 12s) before reaching its decision. Another is to explain court decisions to children.
- **Statutory factors:** sections 1 and 12 would restate, and add to, the statutory factors the court must consider when deciding an individual case.

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iii For further background, see the SPICe briefing on the Bill, page 7.

- **Vulnerable people:** sections 4 to 7 aim to improve the experience of vulnerable people in the courtroom in family cases, including those affected by domestic abuse.
- **Greater regulation:** sections 8, 9 and 13 propose statutory regulation of several aspects of the machinery associated with the 1995 Act. This includes child welfare reporters and child contact centres.
- **Failure to obey a court order:** where someone fails to obey a court order, section 16 would place a duty on the court to investigate the reasons for this.
- **Delays:** section 21 says that, in various family cases, including those under the 1995 Act, the court must consider the risk to the child's welfare that delay in the proceedings would pose.
- **Siblings:** section 10 says that, for looked after children, a local authority must promote personal relations and direct contact with siblings, where that is practicable and appropriate.

Justice Committee consideration

17. The Bill was referred to the Justice Committee for Stage 1 scrutiny and the Committee issued a call for evidence on 20 September 2019, with a closing date of 15 November 2019. The Committee received 75 responses to its call for evidence and 12 supplementary responses during its Stage 1 scrutiny of the Bill. All written submissions can be found here.

18. To support the Committee's work on the Bill, SPICe published a briefing on 20 November 2019 which considers how various other legal systems deal with parenting disputes.

19. The Committee also commissioned external research from Dr Lesley-Anne Barnes Macfarlane of Edinburgh Napier University. This looked at whether the existing law and the Bill are compatible with the rights of parents and children, as set out in the European Convention on Human Rights (ECHR) and the UN Convention on the Rights of the Child (UNCRC). The research report and summary were published on 15 November 2019. On 26 November 2019, the Committee received an informal briefing in private from Dr Barnes Macfarlane on her report.

20. The Committee took formal evidence on the Bill at eight meetings:

- on 26 November 2019, from the Scottish Government Bill team (the officials responsible for assisting the Minister for Community Safety in developing the policy and drafting of the Bill);
- on 17 December 2019, from Dr Fiona Morrison, University of Stirling, Professor Kay Tisdall, University of Edinburgh, and representatives of the Children and Young People's Commissioner Scotland and Scottish Women's Aid;[iv] and then from Professor Elaine Sutherland, University of Stirling, and Dr Richard Whitecross, Edinburgh Napier University;

- on 7 January 2020, from representatives of the Children and Young People's Commissioner Scotland, Children 1st, NSPCC Scotland, ASSIST and Scottish Women's Aid;
- on 14 January 2020, from Dr Sue Whitcombe, Chartered Psychologist, and representatives of Grandparents Apart UK, Shared Parenting Scotland and Relationships Scotland;
- on 21 January 2020, from representatives of CELCIS, Social Work Scotland, Who Cares? Scotland, Children's Hearings Scotland and the Scottish Children's Reporter Administration;
- on 28 January 2020, from Susan Edington, Edingtons WS, Nadine Martin, Harper Macleod LLP, and representatives of Clan Childlaw, the Faculty of Advocates and the Family Law Association;
- on 20 February 2020, from The Hon. Lady Wise and Sheriff Tait;
- on 25 February 2020, from the Minister for Community Safety, Ash Denham, and Scottish Government officials.

21. On Tuesday 4 February 2020, members of the Committee met informally and in private with five young people from YELLO!, the young expert group for the Improving Justice in Child Contact (IJCC) project. The young people in YELLO! have all experienced domestic abuse and have been supported by Scottish Women's Aid's children's services. A note of that meeting can be found here.

22. The Committee is grateful to all those who provided evidence. We are particularly grateful to the young people from YELLO! for sharing their experiences, which helped us to understand what changes are needed to improve how the system works for children and young people.

Consideration by other committees

23. The Finance and Constitution Committee issued a call for evidence on the Financial Memorandum for the Bill and received ten responses. The Finance and Constitution Committee wrote to the Justice Committee on 21 November 2019 summarising the issues raised in the submissions.

24. The Delegated Powers and Law Reform Committee considered the Delegated Powers Memorandum for the Bill. It reported on 19 November 2019 that it was content with the delegated powers provisions in the Bill.

25. Both the Financial Memorandum and the delegated powers provisions in the Bill are considered in more detail later in this report.

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iv This was a round-table evidence session to explore available research on children's participation in contact disputes.

The 1995 Act in practice

Research and data on parenting disputes

26. One issue that emerged during the Committee's scrutiny of the Bill was whether there is enough research or data on parenting disputes, particularly where cases do not end up in court or do not involve domestic abuse.

27. Available research suggests that a very small minority of parenting disputes go as far as court. The results from a child contact survey in 2007 found that the overwhelming majority of contact arrangements were agreed between parents, with less than 5% involving the courts. [2] This means that Part 1 of the 1995 Act is much more likely to be used by, for example, solicitors and mediators advising clients, than it is by the courts. When parents settle cases out of court they tend to negotiate 'in the shadow of the law' (i.e. mindful of what the likely outcome would have been had the case gone to court).

28. However, research studies have tended to focus on those cases that end up in court, particularly where domestic abuse is a factor. Even for those cases that do go to court, available research and data is limited. In oral evidence, the Committee heard from Dr Whitecross, an academic at Edinburgh Napier University, that this is partly because it can be difficult for researchers to gain access to the records of historical court cases. This means that information is not available on how the courts are operating in practice. He noted that in England and Wales, researchers are able to gain access to such records. [3]

29. In response to this evidence, the Scottish Courts and Tribunals Service (SCTS) said that, under current guidance, it would be “unlikely” that researchers would be allowed access to court records. However, any research application would be considered on a case-by-case basis. The SCTS also said that its case management system does not allow cases to be designated as section 11 cases, which means that it is currently unable to easily identify and provide information on these cases.

30. In its written submission, Shared Parenting Scotland argued:

> [The SCTS] should take steps to obtain far more accurate statistics on the operation of family courts, in order that the current situation can be more easily understood and to monitor the impact of the changes that will be made through the Children (Scotland) Bill and the Family Justice Modernisation Strategy. It is totally unacceptable that major decisions involving significant amounts of public expenditure as well as a major impact on the well-being of children should be made without a sound statistical understanding.
>
> Source: Shared Parenting Scotland, written submission.

31. For those cases that do go to court, research published in 2012 suggests that domestic abuse is alleged in just under half (47%) of court actions over contact. [4] The Committee heard arguments from stakeholders including Scottish Women's Aid and ASSIST that, given the percentage of court cases affected by allegations of domestic abuse, it is important to design the law and court system around the most vulnerable adults and children.

32. On the other hand, Shared Parenting Scotland and Grandparents Apart UK argued that legislation and policy should reflect the needs of all those involved in parenting disputes, including cases where there are no domestic abuse or serious child welfare concerns.

33. In June 2018, the Scottish Government announced funding for two research projects to inform the development of policy in this area.[v] Unfortunately, findings from these projects were not published before or during the Committee's Stage 1 scrutiny of the Bill.

34. The Scottish Government has also acknowledged the limitations of the available statistics in relation to family law cases. Annex C of the Family Justice Modernisation Strategy suggests that the Scottish Government is working with the SCTS to report more detailed information from the new integrated case management system in family law cases. It also suggests that the Government is working with other external agencies to identify other sources of data.

Resolving disputes out of court

Background

35. As discussed above, research suggests that a very small proportion of parenting disputes go to court. Many cases are resolved between parents themselves, including by negotiating through solicitors. Solicitors are increasingly using alternative dispute resolution (ADR) techniques,[vi] including mediation and collaborative law, to support their clients.

36. Mediation is currently the main form of ADR used in family cases, although other methods, including collaborative law and arbitration, are also used. Mediation is mainly provided by third sector organisations who are members of Relationships Scotland, or by solicitors who are also qualified as mediators.

37. People can self-refer to ADR. The current court rules also allow the sheriff to refer a case under section 11 to mediation at any stage of the court action. For people on low incomes mediation can be (wholly or partly) funded by legal aid. Other types of ADR for family cases are not available under the legal aid system.

38. During its consultation in 2018, the Scottish Government consulted on introducing, with some exceptions, a requirement on parents to attend an information meeting

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v The two projects are: (1) Children's Participation in Family Actions: Probing compliance with children's human rights. This project is looking at the current position of children's participation in family actions and drawing on empirical evidence from other jurisdictions where improvements have been adopted. (Lead - Dr Fiona Morrison, University of Stirling); (2) Domestic Abuse and Child Contact: The interface between criminal and civil justice. This project is examining the interrelationship between the investigation and prosecution of domestic abuse in criminal justice and parallel child contact proceedings. (Lead - Professor Jane Muir, University of Glasgow).

vi The term "alternative dispute resolution" is traditionally used to describe a collection of methods designed to enable people to resolve disputes outside the civil court system.

about mediation, prior to raising court proceedings. Similar requirements exist in England and Wales and in Ontario, Canada.[vii]

39. Compared to the Scottish Government's other suggestions for promoting ADR, the information meeting was a popular option, with 41% of respondents to the consultation in favour. This was closely followed by better signposting and guidance, preferred by 35% of respondents. (16% favoured other options; 31% gave no response.) However, no proposal on information meetings appears in the Bill. Instead, the Government plans to issue guidance on ADR for individuals considering seeking a court order under section 11 of the 1995 Act. [5]

40. In 2018, the Justice Committee undertook a short inquiry into ADR. Our report, published in October 2018, made a number of recommendations including:

- that the Scottish Government and the Scottish Legal Aid Board consider making legal aid available for other forms of ADR; and
- that mandatory information meetings on ADR should be piloted, with an exception for domestic abuse cases.

41. The Committee concluded that such changes were necessary to facilitate a step-change in the uptake of ADR across Scotland.

42. Since the Government's consultation and the Committee's report, Scottish Mediation has led an independent review of mediation in Scotland. The report from this review recommends introducing a requirement to attend an initial mediation meeting, subject to certain exemptions (including in relation to domestic abuse). The Scottish Government has committed to consulting on the expert group's recommendations in 2020.

43. In addition, a proposal for a Member's Bill was published by Margaret Mitchell MSP. That Bill would provide that, when a case first comes before a court, a duty mediator would be required to meet with the litigants in an information session, to discuss whether they want to attempt mediation. The Member has secured a right to introduce a Bill (which must be done by 1 June 2020 or, exceptionally, by 30 September 2020).

Evidence to the Committee

44. The Committee heard that ADR could allow more bespoke and family-focused solutions to parenting disputes to be found. We also heard that ADR could minimise the damage and trauma that can be experienced by families, particularly children, if cases end up in court. In its written submission, Children 1st argued:

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vii For more information on the approach taken in other countries, see the SPICe comparative briefing, page 18.

> Courts are rarely the best place for resolving family disputes. Children 1st is firmly of the view that families should be given early help and support to resolve problems and disputes, where it is safe and appropriate to do so, before these issues reach the courts. In particular we highlight the value of Family Group Decision Making (FGDM) as an important option to help resolve conflict and reduce stress.
>
> Source: Children 1st, written submission.

45. Jennifer Gallagher, representing the Family Law Association, also emphasised the importance of early intervention to prevent people becoming "entrenched" in their positions. [6]

46. Some evidence argued, therefore, that the Bill should do more to encourage the use of ADR in parenting disputes. Nadine Martin, a solicitor from Harper Macleod LLP, told the Committee:

> I had hoped to see more emphasis in the Children (Scotland) Bill on encouraging the parties to consider speaking with a mediator at an early stage in the process. … mediation helps to prevent the trauma that a litigated court process about children can bring. I think that the provision to simply signpost people to services will not lead to a real uptake in people engaging with ADR as a way to resolve issues.
>
> Source: Justice Committee, Official Report 28 January 2020, col. 4.

47. Relationships Scotland was in favour of a requirement in the Bill for people to attend a dispute resolution information session before going to court. In its written submission, it argued that rules of court referral are already in place, as is guidance, and therefore "an intervention of greater impact than further guidance" is needed to bring about a step-change in the uptake of ADR.

48. Witnesses identified that one of the barriers to greater use of ADR is the lack of legal aid for ADR methods other than mediation. Legal professionals who gave evidence to the Committee were not aware of any proposed changes in this area. [7]

The role of the court

49. A recurring issue during the Committee's scrutiny of the Bill was the role of the court in resolving parenting disputes. Two main themes emerged from this evidence:

- the need for more training for the judiciary making decisions about child contact; and
- the potential for greater judicial specialism to resolve some of the issues with the current system.

50. Under the current legislative framework relating to the civil courts in Scotland, both these matters are the responsibility of the Lord President rather than the Scottish Government.

Judicial training

51. Several stakeholders suggested that, in order for the Bill's policy aims to be achieved, there is a need for judicial training on a variety of topics, including domestic abuse and coercive control, trauma, child development and effective communication with children.

52. In particular, Children 1st and Scottish Women's Aid highlighted that there is no specific financial provision in the Financial Memorandum for judicial training in speaking to children. In a joint submission to the Finance and Constitution Committee, they suggested that such training is necessary because "there is often inconsistent practice and methods of engagement in this area".

53. Similarly, the Children and Young People's Commissioner Scotland suggested that some sheriffs could benefit from training on hearing the views of children, particularly to improve understanding of "the child's evolving capacities". [8]

54. The planning and delivery of judicial training is the responsibility of the Judicial Institute for Scotland. The Committee wrote to the Judicial Institute for information on training currently provided to the judiciary on issues relevant to the Bill.

55. In its response, the Judicial Institute emphasised that a vital part of maintaining the principle of the independence of the judiciary is that training must be judge-led. The letter went on to state:

> training provision is, like all other aspects of the justice system, subject to finite resource which requires careful management to ensure it is targeted most effectively at where it will have the greatest impact.
>
> Source: Letter from the Judicial Institute, 4 March 2020.

56. In relation to training in areas relevant to the Bill, the letter stated that courses have been provided in family law, children in court, child welfare hearings and vulnerable witnesses. The letter also provides details of recent training undertaken by all judges and sheriffs in relation to the new Domestic Abuse (Scotland) Act 2018. In the Institute's view, the content and level of current provision meets the needs of judicial office holders.

Judicial specialism

57. There is no specialist family court system in Scotland. Cases are usually considered by the local sheriff court, which deals with a wide range of civil and criminal matters. Also, sheriffs who specialise in family cases only exist in large urban centres, mainly in Edinburgh and Glasgow.

58. The comparative briefing prepared by SPICe found that, in the three main legal systems looked at (Australia, England and Wales, and Canada), there is a greater degree of judicial specialisation in family cases than exists in Scotland. New Zealand is another example of a country with a well-developed family court (see page 15).

59. At the Scottish Government's 2016 summit on the Family Justice Modernisation Strategy, greater judicial specialisation in family cases was suggested as a possible solution to some of the issues facing the court system, including delays and the voice of the child not being properly heard in court.

60. In 2016, the Parliament's then Justice Committee carried out some post-legislative scrutiny of the 2006 Act. In its report, the Committee said that cases would benefit from being heard by specialist family law sheriffs.

61. Similar points were made to this Committee during its scrutiny of the Bill. For example, Professor Sutherland, an academic from the University of Stirling, told the Committee that "as the law gets more complex, it is desirable to have judges working in specialist fields where they have the opportunity to develop their expertise". In her view, a specialist family court would be workable even in more rural areas, where she suggested a "floating family court, with specialist judiciary" could travel around to deal with the bulk of the family work. [9]

62. Dr Whitecross could also see benefits of more specialist judges in, for example, changing culture and practice around domestic abuse, although he recognised that there would be practical challenges in rural areas. [10]

63. Evidence from the judiciary highlighted that there is already a degree of specialism, but that there may be difficulties with such an approach in rural areas. [11] A similar argument was made by the Scottish Government. [12] In closing evidence the Minister emphasised that "decisions on how sheriffs are deployed and how courts are set up are a matter for the Lord President and the Sheriffs Principal". [13]

Drafting of the Bill

64. In several places, the Bill is a complex piece of legislative drafting. In particular, section 11 of the 1995 Act would be heavily amended. The Scottish Government has produced a version of what section 11 would look like if the Bill is passed.

65. Some evidence to the Committee expressed concerns about how accessible the law would be to its users, which include members of the public. In her report for the Committee, Dr Barnes Macfarlane noted:

> While the Bill seeks to achieve a number of positive outcomes, the content of the Bill is not easy to absorb. It contains many insertions, deletions and amendments (including amendments to the amendments already proposed). … Early verbal feedback on the structure of the Bill from academics, family lawyers and third sector organisations indicates that accessibility is a significant and commonly held concern. Some asked how Part 1 of the 1995 Act, if amended as proposed by the Bill, could be explained simply to members of the public (including children) seeking advice about a family law dispute.
>
> Source: Dr Barnes Macfarlane, Balancing the Rights of Parents and Children Report, pages 46-47.

Conclusions and recommendations on the 1995 Act in practice

Research and data on parenting disputes

66. There is limited research and data currently available on parenting disputes in Scotland, particularly in relation to cases which do not end up in court. Even for the cases that do reach court (less than 5%), there is an absence of independent statistical data. Perhaps understandably, the research studies that do exist have focused on the needs of families in more complex cases, such as where there are domestic abuse or other serious child welfare concerns. However, it is important that policy-making is informed by a broader understanding of the characteristics and experiences of those resolving parenting disputes, and is not just focused on the more complex cases that reach court.

67. Recommendation: We welcome the Scottish Government's commitment in the Family Justice Modernisation Strategy to improve the quality of family law statistics and wider evidence base in Scotland. The Scottish Government should, in its response to this report, provide the Committee with an update on this work.

68. Recommendation: The Scottish Government should continue to work with the Scottish Courts and Tribunals Service (SCTS) and other relevant agencies to improve the collection and availability of data in relation to parenting disputes (section 11 cases). This should include reviewing current guidance from the SCTS on access to historical court records, with a view to reversing the current restrictions.

69. Recommendation: The Scottish Government should commission further research to explore the experiences of families who resolve parenting disputes outwith the court system. The Scottish Government should also commission research in cases where domestic abuse or other serious child welfare concerns are not a factor. This will help policy-makers develop an understanding of what is happening across a broader range of cases.

Resolving disputes out of court

70. During both our previous inquiry into alternative dispute resolution (ADR) and our scrutiny of this Bill, we have consistently heard about the significant advantages of ADR over going to court. In the context of this Bill, we heard that greater use of ADR could have a positive impact for families and, in particular, children, by avoiding the often-damaging adversarial court process.

71. As we said in our report on ADR in 2018, previous efforts to encourage greater use of ADR have had limited effect. In our view, more fundamental changes which could facilitate a step-change in the uptake of ADR in Scotland should be explored. We therefore welcome the Scottish Government's commitment to consult on the recommendations of the independent review of mediation in Scotland.

72. Recommendation: As we previously recommended, the Scottish Government and the Scottish Legal Aid Board should explore making legal aid available for other forms of ADR. We are disappointed that no progress appears to have been made in this area in the near 18 months since our report on ADR was published in October 2018. The Committee recommends that the Scottish Government provide an explanation for the delay and details on its plans to progress this matter.

73. Recommendation: Again, as we previously recommended, mandatory dispute information meetings should be piloted, with an exception for domestic abuse cases. We fully recognise that any move towards greater use of ADR must ensure that victims of domestic abuse and their children are not put at risk. However, outwith those cases, we believe that there are potentially significant gains to be made through early recourse to ADR, thereby helping families to avoid the often-damaging adversarial court process.

The role of the court

74. The Committee fully recognises the fundamental importance of the independence of the judiciary and that, under the current legislative framework, judicial training and the organisation of court business (including any judicial specialisation) are matters for the Lord President. However, it is equally important to the Parliament that it can have confidence that any legislation it passes will be fully and effectively implemented by all actors involved in taking forward a Bill's provisions. That includes being trained in any changes in practice that a Bill brings about.

75. The Committee has heard persuasive evidence that there is a need for greater judicial training in areas relevant to the Bill, including effective communication with children. We also consider that there would be merit in exploring whether greater judicial specialisation in family cases could provide a solution to some of the issues faced by the current system, including delays and the voice of the child not being properly heard in court.

76. Recommendation: The Committee asks the Lord President to reflect on this evidence and to provide further details on how the training needs of the judiciary will be assessed and met in relation to the areas covered by the Bill.

77. Recommendation: The Committee also asks the Lord President to provide his view on whether there could and should be greater judicial specialisation in family cases.

Drafting of the Bill

78. Recommendation: The Scottish Government should consider bringing forward amendments at Stage 2 to simplify the drafting of the Bill. It is an important

principle that, insofar as it is possible, legislation passed by the Parliament should be clear and understandable.

79. Recommendation: The Scottish Government should also therefore provide details on how it will ensure that Part 1 of the 1995 Act, if amended as proposed by the Bill, is clear and understandable to members of the public seeking advice about a family law dispute.

Children's participation in decisions affecting them

Background

80. The 1995 Act currently requires the court, taking into account the child's age and maturity, to give the child the opportunity to express his or her views and to have regard to any views expressed. This does not mean the court has to follow the views expressed – the welfare of the child may require a different approach.

81. The 1995 Act also provides for a presumption that a child aged 12 or over is of sufficient age and maturity to form a view.

82. These provisions apply both when courts are deciding parenting disputes under section 11 of the 1995 Act and when parents are reaching major decisions at home (see section 6 of the 1995 Act).

83. Similar requirements can be found in other legislation including the Adoption and Children (Scotland) Act 2007 (in relation to adoption and permanence orders) and the Children's Hearings (Scotland) Act 2011 (in relation to children's hearings and associated court proceedings).

84. The 1995 Act does not set out how a child is to express his or her views. In practice, approaches for section 11 cases include:

- the child expressing a view in writing through completion of the Form F9;
- a child welfare reporter writing a report for the court;
- the child speaking to the sheriff directly;
- the child speaking to a trusted adult in their life, who then gives the court information; and
- the child instructing their own solicitor who can, for example, help the child to complete the Form F9 or represent his or her views in court.

85. Research suggests that a minority of children express their views directly to sheriffs or instruct a solicitor themselves. Most speak to a child welfare reporter or complete the Form F9.[viii]

Removal of the 12+ presumption in relation to children's views

86. Sections 1 to 3 of the Bill would remove the existing presumption that a child aged 12 or over is of sufficient age and maturity to form a view ("the 12+ presumption").

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viii See SPICe briefing, page 16.

This presumption would be removed from the relevant provisions of the 1995 Act, as well as from the Adoption and Children (Scotland) Act 2007 and the Children's Hearings (Scotland) Act 2011. The Scottish Government's aim is to encourage the courts to hear from younger children. [14]

87. Table 1 below shows how the proposed amendments in the Bill would change the current wording of section 11 of the 1995 Act

Table 1: Children's views: 1995 Act vs. Bill

Current wording in section 11	New wording proposed in Bill
In considering whether or not to make an order and what order to make, the court, taking account of the child's age and maturity, shall so far as practicable: • give him an opportunity to indicate whether he wishes to express his views; • if he does so wish, give him an opportunity to express them; and • have regard to such views as he may express.	In deciding whether or not to make an order and what order (if any) to make, the court must: • give the child an opportunity to express the child's views in a manner suitable to the child, and • have regard to any views expressed by the child, taking into account the child's age and maturity.
Without prejudice to the generality of the above, a child twelve years of age or more shall be presumed to be of sufficient age and maturity to form a view.	But the court is not required to comply with the above if satisfied that: • the child is not capable of forming a view, or • the location of the child is not known.

88. The Committee heard broad support for the removal of the 12+ presumption relating to children's views. Several witnesses, including children's organisations and legal academics, thought that the current presumption had been misunderstood so that, in practice, the views of younger children are not routinely heard. Evidence from children's organisations highlighted the negative impact that this could have on children's development and wellbeing.

89. This evidence also emphasised that even very young children can give their views and that an arbitrary age limit should not be used to determine their ability to do so. As Megan Farr, representing the Children and Young People's Commissioner Scotland, told the Committee:

> Children's views do not miraculously change the minute that they turn 12, but their capacity to express their views evolves over time from birth.
>
> Source: Justice Committee, Official Report 17 December 2019, col. 10.

90. The Committee heard that removal of the 12+ presumption would ensure compliance with Article 12 UNCRC. Article 12 provides:

> 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.

91. Guidance on Article 12 from the UN Committee on the Rights of the Child specifically discourages the use of age limits either in law or in practice which would restrict the child's right to be heard. [15]

92. In her report to the Committee, Dr Barnes Macfarlane concluded that the removal of the 12+ presumption "would more closely align the 1995 Act with the spirit of the UNCRC". [16]

93. On the other hand, the Law Society of Scotland argued against the removal of the 12+ presumption. It emphasised that the presumption should not be taken to mean that those below the age of 12 cannot give a view, suggesting that greater awareness, training and engagement could improve consistency of approach. Dr Kirsteen Mackay (an academic) also suggested that the presumption should be retained, as removing it may risk professionals assuming they are no longer under a duty to afford a child aged 12 and over an opportunity to express his or her views.

The "capacity exception"

94. While there was broad support for the removal of the 12+ presumption, some evidence to the Committee raised concerns about the exception in the Bill which provides that a child's views do not have to be sought if "the child is not capable of forming a view" ("the capacity exception").

95. Children 1st, the Children's Commissioner, NSPCC Scotland and CELCIS were among those who argued this exception should be removed. This evidence suggested that the exception could wrongly create the impression that younger children are not capable of giving their views, whereas the Committee consistently heard that even very young children can give a view if an appropriate method is used. Children 1st and Scottish Women's Aid were particularly concerned that the Scottish Government has suggested that very young children may not be able to express a view.[ix]

96. Legal academics also raised concerns about the capacity exception. As Professor Sutherland commented in her written submission:

> The danger with this provision is that it could be (mis)used as a way to disempower children, rather than as an opportunity to be creative in facilitating the expressions of views.
>
> Source: Professor Sutherland, written submission.

97. The Faculty of Advocates also argued that the exception should be removed from the Bill. In its view, creating an express test of "capacity" could lead to additional litigation. It also suggested that the wording in the Bill is more restrictive than the current wording of the 1995 Act, where the focus is on the practicability of giving a child the opportunity to express his or her views. The Faculty, Clan Childlaw and Dr Barnes Macfarlane questioned how judges or sheriffs would form a view of a child's capability to express his or her views.

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ix The Policy Memorandum says at paragraph 29 that there "may be cases where a very young child is not able to give their views". Similarly, the Financial Memorandum says at paragraph 51 that "the views of the youngest children would not be taken as they would not be capable of forming a view".

A positive presumption

98. Partly to address the concerns discussed above, some argued that the Bill should be strengthened to make it clear that all children should be given the opportunity to express their views.

99. The Children's Commissioner argued that the Bill should be amended to include "an explicit presumption that all children, regardless of age, are presumed to be capable of forming a view". The Children's Commissioner also suggested that the wording in the Bill which states "give the child an opportunity to express the child's views" should be replaced with "ensure all children have the right to express their views and have those views taken into account". [17]

100. The Children's Commissioner argued that such changes were necessary to ensure compliance with Article 12 UNCRC. Guidance on Article 12 from the UN Committee on the Rights of the Child states that:

> States Parties cannot begin with the assumption that a child is incapable of expressing her or his own views. On the contrary, States parties should presume that a child has the capacity to form her or his own views and recognize that she or he has the right to express them; it is not up to the child to first prove her or his capacity.
>
> Source: UN Committee on the Rights of the Child, General Comment No. 12 (2009), paragraph 20.

101. Children 1st and Scottish Women's Aid supported the amendments proposed by the Children's Commissioner. Children 1st argued that, without a new presumption, the Bill might inadvertently lead to fewer children being asked for their views. In its view, a positive presumption "would help to enforce the message that all children's views, including those of very young children, should be taken into account". [18] Scottish Women's Aid suggested that the Bill does not "place enough of a duty on the courts to ensure all children are able to give their views in a meaningful way". [19]

102. Other evidence, for example from NSPCC Scotland, Clan Childlaw and Professor Sutherland, similarly suggested that a positive presumption would reinforce the idea that younger children are capable of giving a view and ensure compliance with Article 12 UNCRC.

103. On the other hand, evidence from the judiciary noted some concerns about a positive presumption. In oral evidence, Lady Wise told the Committee:

> Concerns have been raised about the difficulty of having such a presumption, because it would encompass all children – from babies onwards – unless they were made exempt. … if all children were to be encompassed by a positive presumption, there is a view – others might have already expressed it to the Committee – that there would then need to be some form of capacity examination in every case, rather than simply leaving that to the discretion of the court, as happens in the current situation.
>
> Source: Justice Committee, Official Report 20 February 2020, col. 2.

104. In her evidence to the Committee, the Minister for Community Safety suggested that the provisions in the Bill follow the UNCRC wording. She told the Committee:

> Of course, the majority of children are able to express their views, but there will be circumstances involving extremely young children and children with severe learning difficulties who are not able to form views, and the legislation needs to include options for those exceptional circumstances. I would expect such exceptions to be used only infrequently, but the Bill provides for them.
>
> Source: Justice Committee, Official Report 25 February 2020, cols. 1-2.

105. She commented that the Scottish Government is "seeking to take a practical approach and ensure that the provisions are workable". [20]

The child's wishes

106. Currently the 1995 Act states that a child should be given "an opportunity to indicate whether he wishes to express his views". This wording does not appear in the Bill. Professor Sutherland told the Committee that this is a "retrograde step" and that it must be made clear in the Bill that it is the child's choice as to whether to give a view. [21]

107. Dr Barnes Macfarlane made a similar point in her report for the Committee, saying that "deleting these words does not seem to strike the right tone". She noted that the UN Committee on the Rights of the Child has stressed that "expressing views is a choice for the child, not an obligation". She argued that particular care must be taken to ensure that no child ever feels required, or pressurised, to express a view. [22]

108. Other evidence, for example from Children 1st, similarly highlighted the importance of making it clear to children that they do not have to share their views if they do not want to. The Policy Memorandum (at paragraph 29) acknowledges that if a child does not wish to give his or her views, that should be respected.

How children's views are heard

109. The Bill would require decision-makers to give the child the opportunity to express his or her views "in a manner suitable to the child". The Scottish Government's intention is that the decision-maker should consider a range of options on how the child's views are heard. [23]

110. However, several stakeholders emphasised that the Bill does not propose anything new in terms of how children's views are heard. They argued that, without the necessary infrastructure and resources, the Bill would make very little difference in practice, particularly for younger children.

111. In her report for the Committee, Dr Barnes Macfarlane noted a "lack of detailed provision in the Bill (and in the supporting documentation) regarding the steps required to better support children". [24] She argued:

> Without such provision, the removal of the age presumption is likely to make little difference to the environment in which children express a view.
>
> Source: Dr Barnes Macfarlane, Balancing the Rights of Parents and Children Report, page 51.

112. Similarly, in their written submission, the academics Dr Morrison, Dr Friskney and Professor Tisdall, expressed concern that the Financial Memorandum makes no provision for an infrastructure to support children to express their views. They argued:

> An infrastructure is urgently required to support children's participation, that involves: training for all those involved; ensuring a range of methods are routinely available to children; that children have some information about choice about the methods; and working with the courts so that these methods are acceptable and possible.
>
> Source: Dr Morrison, Dr Friskney and Professor Tisdall, written submission.

113. Dr Morrison, Dr Friskney and Professor Tisdall also argued for "effective monitoring of the Bill's implementation". They said:

> This requires specific data to be gathered and published for monitoring, and a statutory requirement for reporting to be included in the Bill, as informed by that data.
>
> Source: Dr Morrison, Dr Friskney and Professor Tisdall, written submission.

114. This was supported by Scottish Women's Aid, who suggested that "monitoring and review of the Bill's implementation is required to ensure that children's rights are realised in practice". [19]

115. Children's organisations emphasised the need for adequate resources to ensure that a variety of methods are available for obtaining children's views. In their joint response to the Finance and Constitution Committee's call for evidence on the Financial Memorandum, Children 1st and Scottish Women's Aid raised concerns that the Financial Memorandum does not provide for resources for methods other than the child speaking directly to the court or a child welfare reporter.

116. Some evidence from the judiciary suggested that the Bill would have a limited effect in practice. In their written submission, the Sheriffs Principal stated:

> It is not apparent to the Sheriffs Principal that the changes proposed will assist the court in gathering the views of the child or assist the child in expressing their views; nor that any additional methods are proposed which are not possible at the present time.
>
> Source: Sheriffs Principal, written submission.

117. The Scottish Courts and Tribunals Service (SCTS) made a similar point in its written submission, noting that the options for hearing children's views suggested in the Policy Memorandum (at paragraph 32) do not include any new methods such as the use of technology. The SCTS emphasised that, depending on the methods used, the costs of the Bill could be higher than those suggested in the Financial Memorandum.

118. Particular concerns were raised by children's organisations about the lack of infrastructure for hearing the views of very young children. Some evidence, including from the judiciary and legal professionals, suggested that the courts already obtain the views of younger children. However, this evidence tended to refer to school-age children,[x] whereas others argued that the views of much younger children, including babies and toddlers, could and should be sought.

119. For example, Children 1st argued:

> The views of very young children can be obtained and shared, if appropriate, if a sufficiently creative approach is taken to eliciting them. This needs to be done by a skilled worker who has a clear understanding of child development and is able to clearly interpret body language and non-verbal communication.
>
> Source: Children 1st, written submission.

120. Other organisations, including NSPCC Scotland, CELCIS and Social Work Scotland, emphasised that methods already exist for obtaining the views of very young children, but resources would be needed to incorporate those practices into the court system. In particular, this evidence highlighted the need for skilled professionals with an appropriate understanding of child development.

121. In her evidence to the Committee, the Minister said that the Scottish Government "want sheriffs and the courts to find ways to engage with children – even young children". [20] The Committee heard that the Financial Memorandum focused on a child speaking directly to the court or a child welfare reporter because these are the most likely ways in which a child's views could be taken. Other methods could still be used, and the associated costs could be higher or lower.

Advocacy or child support workers

122. A key theme in the evidence to the Committee was the need for children to be supported to express their views by an independent person who they know and trust. This point was powerfully made to us by the young people from YELLO!, who emphasised that having a support worker could really help children and young people to share their views.

123. Several stakeholders therefore argued for the introduction of advocacy or child support workers in section 11 cases.

124. As part of its 2018 consultation, the Scottish Government consulted on introducing child support workers in section 11 cases to help explain the court process to the child, support the child in giving his or her views to the court, and provide feedback to the child on the court's decision. However, no proposal on child support workers features in the Bill.

125. The Family Justice Modernisation Strategy (at paragraphs 2.23 - 2.24) states that the Scottish Government is still considering whether to introduce child support workers in section 11 cases. The Government is keen to avoid children having

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x See, for example: Justice Committee, Official Report 28 January 2020, col.8; Justice Committee, Official Report 20 February 2020, col. 2.

multiple child support workers and therefore wants to ensure that any new system would work with existing systems and other proposed work in this area.

126. Children 1st and the Children's Commissioner both welcomed the commitment in the Family Justice Modernisation Strategy to explore the possibility of introducing child support workers in section 11 cases. However, other stakeholders argued that provision should be made in the Bill to ensure that children receive independent information, advice and support to participate in the court process.

127. In their written submission, Dr Morrison, Dr Friskney and Professor Tisdall expressed strong concerns about the absence of any infrastructure for child advocacy in the Bill, noting that the Family Justice Modernisation Strategy provided no clarity about whether such a scheme would be implemented. They argued:

> The strongest and most consistent request from children and young people in Scotland, who have been involved in contested contact proceedings, is to have a child support worker. Without addressing this now, children's participation throughout the legal process risks being dealt with inconsistently, on an ad hoc basis and thus marginalised. We recommend provision be put into primary legislation, with the ability to then link developments to other advocacy roles.
>
> Source: Dr Morrison, Dr Friskney and Professor Tisdall, written submission.

128. Relationships Scotland similarly suggested:

> The provision of child support workers seems to be fundamental to supporting the main policy objectives of the Bill … There would be significant benefit from including provision in relation to child support workers in the Children (Scotland) Bill legislation to ensure action is taken sooner rather than later.
>
> Source: Relationships Scotland, written submission.

129. A number of other organisations expressed similar views, including Clan Childlaw, ASSIST, the Scottish Child Law Centre, Partners in Advocacy, and the Scottish Independent Advocacy Alliance.

130. In their evidence to the Committee, Children's Hearings Scotland and the Scottish Children's Reporter Administration highlighted ongoing work to introduce advocacy workers in the children's hearings system.[xi]

131. In response to the arguments in favour of introducing children's advocacy or support workers, the Minister told the Committee:

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xi Section 122 of the Children's Hearings (Scotland) Act 2011 requires the chairing member of the children's hearing to inform the child of the availability of children's advocacy services. That provision is due to be brought into force from Spring 2020, with a primary advocacy organisation contracted by the Scottish Government to provide advocacy services for children and young people within the children's hearings system across every local authority area in Scotland.

> Such workers may play a useful role in supporting children to give their views. However, we would need to ensure that minimum standards of training and experience were set out in legislation in order to ensure that there was a consistent approach and the best interests of the child were maintained. Further work would be needed to ensure that there was a joined-up approach so that any provisions would work with existing support and advocacy systems and other proposed Scottish Government work. As the Committee will be aware, we have committed in the Family Justice Modernisation Strategy to consider that.
>
> Source: Justice Committee, Official Report 25 February 2020, col. 2.

A list of options or guidance

132. As discussed earlier, the Bill would require decision-makers to give a child the opportunity to express his or her views "in a manner suitable to the child". The Bill does not, however, list any options which should be available to children to give their views. The Scottish Government does not support a list of recognised methods appearing in primary legislation, because of the need for flexibility. [25]

133. In her report for the Committee, Dr Barnes Macfarlane argued that, to promote compliance with Article 12 UNCRC, the methods the court can use should appear on the face of the Bill. She suggested:

> Providing a clear list of options available for children in primary legislation could create clearer benchmarks for ensuring meaningful participation.
>
> Source: Dr Barnes Macfarlane, Balancing the Rights of Parents and Children Report, page 50.

134. NSPCC Scotland supported minimum standards being set out in primary legislation, suggesting that, without this, "a 'postcode lottery' situation could emerge". In its view:

> A stated list of methods which a child must have available as options to give their views, supplemented with an 'and any other appropriate method' clause would retain flexibility but also ensure there is a 'minimum floor' of options available for all children to give their views.
>
> Source: NSPCC Scotland, written submission.

135. Professor Sutherland also suggested that the Bill could provide a non-exhaustive list of options or, alternatively, guidance could be issued for the courts as is done in England and Wales.[xii]

136. However, most stakeholders were against including any list of methods in the Bill. They thought that such an approach would be too prescriptive. This view reflected a recurring theme in the evidence to the Committee, which emphasised the need for flexibility and creativity in the methods used to hear children's views. As the young

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xii A list of recognised methods for taking a child's views is set out in a practice direction for the Family Court (see paragraph 4.5).

people from YELLO! told us, every child is different and there needs to be a variety of options available.

137. Nonetheless, the Children's Commissioner, CELCIS and Scottish Women's Aid suggested that guidance on possible methods should be provided alongside the Bill. Any list included in such guidance could be updated as new methods are developed.

The child's preferences

138. The young people from YELLO! told the Committee that children and young people should be given a choice as to how their views are heard.

139. The Explanatory Notes for the Bill (at paragraph 12) suggest that the reference to "in a manner suitable to the child" would require a decision-maker to consider the preferences of the child on how they wish to give their views. However, some evidence to the Committee argued that this should be made clearer on the face of the Bill.

140. In her report for the Committee, Dr Barnes Macfarlane argued that provision should be included in the Bill to allow children to indicate their preferred method for taking their views. Professor Sutherland, Dr Whitecross and the Children's Commissioner were among those who supported this idea, although they acknowledged that it might not always be possible to follow a child's preferences.

141. A similar point is made by the Scottish Government in the Policy Memorandum for the Bill (at paragraph 38), which states that it would not be feasible to require a decision-maker to use the child's preferred method as this may lengthen a case or may not be practicable.

142. Children 1st, however, emphasised that it would not be in children's best interests to share their views in a way that they feel is unsafe or unsuitable.

143. In the children's hearings system, the rules of procedure say that where, during the proceedings, the child wishes to express a view, the chairing member must make reasonable arrangements to enable the child to express those views in the manner preferred by the child.[xiii]

12+ presumption for instructing a solicitor

144. The Bill keeps an existing presumption that a child of 12 years and over is sufficiently mature to instruct his or her own solicitor. The Scottish Government's view is that, while younger children are able to express their views, "a child requires a level of maturity to be able to make a decision whether to instruct a lawyer". [26] The Government also notes that this presumption exists in other legislation. [27]

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xiii See rule 6, available at http://www.legislation.gov.uk/ssi/2013/194/contents/made.

145. Various stakeholders criticised this approach, including the Faculty of Advocates, Scottish Women's Aid, Children 1st, CELCIS and the Children's Commissioner. They said that it is inconsistent with the removal of the 12+ presumption in relation to the child's views.

146. In oral evidence, Megan Farr, representing the Children's Commissioner, argued that the presumption already exists in the Age of Legal Capacity (Scotland) Act 1991,[xiv] and therefore its inclusion in the Bill serves no useful purpose. [28] Keeping it in the Bill could, she suggested, "cause confusion between the notion of legal capacity … and the ability to express views". [29]

147. Scottish Women's Aid argued that removing the presumption in the Bill would "at least go some way in lifting the age-related barrier to children's right to access legal representation". [19]

Explanation of decisions

The duty in section 15

148. At present, there is no requirement in legislation for the court's decision to be explained to a child. In a couple of recent, well-publicised cases, judges have written letters to children explaining court decisions. However, there is no established judicial practice in this area.

149. Section 15 of the Bill would place a duty on the court to explain decisions made under section 11 of the 1995 Act to children. The Scottish Government argues that it is in the best interests of the child to receive an impartial explanation of these decisions. The Policy Memorandum states:

> Parents and relatives can play an important role in explaining a court's decision but the information can be manipulated. In addition, the role of explaining the decision can be a difficult one for a parent who may not agree with the court's decision.
>
> Source: Policy Memorandum, paragraph 178.

150. However, section 15 would not require all decisions to be explained to children. Procedural decisions, such as a decision to postpone a hearing, are not likely to need to be explained. Nonetheless, a decision which is not a final decision may need to be explained if it is likely to have an impact on the child. For example, the Scottish Government says it would expect the court to explain any interim decision that a child should start having contact with a parent who they have not seen for a period of time. [30]

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xiv See s.2(4A) Age of Legal Capacity (Scotland) Act 1991, which states: "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."

151. Section 15 also says that a court would not have to explain a decision where a child is not capable of understanding it, it is not in the best interests of the child to give an explanation, or the location of the child is not known.

152. The court would have two options to fulfil the new duty in section 15. It could:

- give the explanation to the child itself; or
- arrange for it to be given by a child welfare reporter.[xv]

153. The Financial Memorandum (at paragraph 44) suggests that the vast majority of decisions (90%) would be explained to children by child welfare reporters. It estimates that the cost of child welfare reporters providing explanations would be between £1.53m and £3.93m per year. [31] For the SCTS, the courts explaining decisions directly to children would cost between £0.17m and £0.61m per year. There would also be costs to the SCTS of £0.62m per year, to cover the court providing information to child welfare reporters to explain decisions to children. [32]

Evidence to the Committee

154. The Committee heard mixed views on the new duty in section 15.

155. Children's organisations were strongly in favour of the new duty. The Children's Commissioner, for example, argued that explaining decisions to children is an important part of the participation process. [33]

156. The Family Law Association also supported the new duty, suggesting that it is "important for the child that the decision is not communicated by either party to the action. The decision should be communicated in neutral language which may be difficult for a party to the action, particularly if he/she disagrees with the decision". [34]

157. In her report for the Committee, Dr Barnes Macfarlane said that section 15 was a "positive step" in terms of compliance with Article 12 UNCRC. [35] According to the UN Committee on the Rights of the Child, feedback "is a guarantee that the views of the child are not only heard as a formality, but are taken seriously". [36]

158. Some of this evidence argued that the duty in section 15 should in fact be strengthened to ensure more decisions are explained to more children. Dr Barnes Macfarlane, for example, was concerned that the Bill would only require the court to explain a decision not to vary or discharge an order where it considers it appropriate. She also argued that the best interests exception in section 15 may be problematic from a children's rights perspective. Her report stated:

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xv Other options could be added to this list in the future by the Scottish Government through regulations.

> In exceptional circumstances, it might be in the child's best interests that he or she does not receive an explanation of the court's decision. However, the occasions on which it would be inappropriate to give *any* feedback to the child about the court's decision are likely to be rare.
>
> There is a danger that the best interests test … might operate to prevent explanations to children becoming the regular practice in family cases.
>
> Source: Dr Barnes Macfarlane, Balancing the Rights of Parents and Children Report, page 54.

159. The Children's Commissioner suggested that the exception relating to best interests should be rarely used

160. On the other hand, the Faculty of Advocates and the judiciary questioned whether the duty, even as currently drafted, would be workable in practice.

161. The Faculty of Advocates, while supporting the principle of explaining decisions to children, did not support the mandatory nature of the duty in section 15. The Senators of the College of Justice similarly commented that "the mandatory nature of the proposed obligation seems to place a novel and unnecessary burden on the court". The Senators argued:

> This proposed obligation would be of particular concern in sheriff court cases, given the volume of section 11 orders which are made on a daily basis. The practical challenges, were the court to be responsible for explaining the decision to the child in each of these cases, would be difficult to overcome. It would simply be unworkable for the judiciary to perform this function. It is clear that this is not a function which it would be appropriate for court staff to perform. Aside from the operational difficulties that this would cause, court staff are neither trained nor qualified for this function. It is not within their job description.
>
> Source: Senators of the College of Justice, written submission.

162. In the Senators' view, the primary responsibility to explain the decision to the child should remain with the parents.

163. Similarly, in oral evidence, Lady Wise told the Committee:

> At present, if there is a concern that a decision of the court would be inappropriately conveyed to the child or that it would not be explained properly in the adversarial process, parties can bring that to the court's attention. Where there is a child welfare reporter, the reporter might highlight that and be instructed to convey the decision to the child. Only in the rarest of cases would a parent with on-going responsibility for a child not be in a position to convey the decision to the child. Parental responsibilities stretch to having to guide the child through difficult situations, such as the outcome of a court process.
>
> Source: Justice Committee, Official Report 20 February 2020, cols. 5-6.

164. The Summary Sheriffs' Association, the Sheriffs' Association, and the Sheriffs Principal all expressed concern about section 15 of the Bill. For example, the Sheriffs' Association commented:

> Section 15 of the Bill appears to suggest that the court must ensure that each interim decision varying contact requires to be explained to the child (unless the decision is to decline to change the order). We are strongly of the view that such a duty would be unrealistic, unduly onerous and may lead to communication fatigue and stress to the child concerned.
>
> Source: Sheriffs' Association, written submission.

165. The Sheriffs Principal argued that the duty would "not be deliverable within existing resources". [37] The Summary Sheriffs' Association raised various practical concerns about the new duty, including whether it would be feasible in practice for the court or a child support worker to explain a decision before any new arrangements take effect or the decision is explained by the child's parent(s). Its written submission concluded:

> It is difficult to envisage how decisions can be explained to the child throughout a process without considerable practical barriers as well as potential negative impacts on the welfare of the child.
>
> Source: Summary Sheriffs' Association, written submission.

166. The Faculty of Advocates and the Senators also emphasised that child welfare reporters are not typically present in court when a decision is made. The Faculty therefore suggested that, if section 15 is retained, it should allow the courts more discretion as to the way in which decisions are explained. [38]

167. Even those who supported the new duty suggested further consideration needed to be given as to how it would be delivered in practice. For example, Megan Farr, representing the Children's Commissioner, told the Committee in oral evidence that more research on how to deliver the duty was needed, and work would have to be done "to build the courts' capacity to deliver on the obligation to explain decisions". [33]

168. Clan Childlaw questioned the assumption in the Financial Memorandum that 90% of decisions would be explained by child welfare reporters. Like the Faculty and the Senators, Clan Childlaw emphasised that child welfare reporters would not usually be present in court when decisions are made. Clan Childlaw also suggested the "possibility of hostility" on the part of the child to the child welfare reporter. [39] In its view, decisions should therefore be explained by the court rather than a child welfare reporter.

169. Children 1st and NSPCC Scotland suggested that the Bill should provide for more flexibility around how decisions are explained to children. Dr Barnes Macfarlane made a similar point in her report, suggesting that a range of options should be available for explaining decisions to children. Other evidence suggested that, if introduced, children's advocacy or support workers could play an important role in explaining decisions to children.

170. Scottish Women's Aid emphasised that children should be given a say as to how and what information is fed back to them. In its view, the Bill should do more to ensure that children and young people are the ones who set the limits on the

amount of information they receive from the courts, rather than this being decided by adults.

171. Scottish Women's Aid also argued that the Bill should provide for a system of redress, to allow children and young people "to raise concerns and feedback on, and challenge, decisions made by the courts". [19] Scottish Women's Aid said that children and young people should be able to do this for as long as is required after an order under section 11 is made.

172. In their written submission to the Committee, YELLO! argued:

> It needs to be made really clear to children how they can raise any problems with the contact order after it has been made. Children should have the right to ask questions and appeal. Cases should be kept open so children and young people can continue sharing their views and experiences of the aftermath of the decisions made.
>
> Source: YELLO!, written submission.

173. Children 1st, Clan Childlaw, Dr Morrison, Dr Friskney and Professor Tisdall also supported amending the Bill to provide for a system of redress for children and young people.

174. In her evidence to the Committee, the Minister emphasised that children should receive an impartial explanation of decisions. In response to the concerns raised about the practical implications of section 15, the Minister told the Committee:

> We are trying to take a balanced approach: we are asking the court to consider how decisions can be explained impartially to the child, but we are building flexibility into the approach so that, if the court thinks that it would not be in the child's best interests to explain a decision, it can take a different course of action.
>
> There are a number of routes whereby a court can explain a decision, so there could be practical solutions in that regard. For example, an explanation will not have to be given face to face, although I am sure that some sheriffs will take that route. An explanation could be given electronically or in writing.
>
> We anticipate that many such explanations will be provided by the child welfare reporter, who might not be in court. I think that we envisage a slight change in the role of the child welfare reporter, whereby we expect reporters to become more involved in cases. However, even if the reporter is not in court, they will be able to receive a copy of the written judgment, with an explanation of the reasoning behind it, so that they can deliver the information to the child.
>
> Source: Justice Committee, Official Report 25 February 2020, col. 5.

Conclusions and recommendations on children's participation in decisions affecting them

Removal of the 12+ presumption in relation to children's views

175. The Committee welcomes the removal of the current presumption in the 1995 Act that a child aged 12 or over is of sufficient age and maturity to form a view. A 12-year-old child is no more able to express a view than a child one day short of his or her 12th birthday. We heard consistent evidence that the presumption has meant that the views of younger children are not routinely heard in practice.

176. However, we also heard that the exception in the Bill which provides that a child's views do not need to be sought if the child is not capable of forming a view could disempower younger children. There was strong support from children's organisations and others for a positive presumption that all children, regardless of age, are capable of forming a view. This could send a stronger signal that the views of younger children should be heard wherever possible and ensure compliance with the UNCRC.

177. Recommendation: The Scottish Government should bring forward amendments at Stage 2 which address the concerns expressed to the Committee and will ensure that the views of all children, regardless of age, are heard.

178. Recommendation: No child should ever feel under pressure to express a view. The Scottish Government should therefore amend the Bill at Stage 2 to make it clear that it is up to the child whether to express a view, as is currently clear in the 1995 Act.

How children's views are heard

179. The Committee heard powerful evidence that the infrastructure for taking children's views needs to be strengthened, both to support existing approaches and to develop new approaches. Without this, the Bill may make very little difference in practice, particularly in relation to hearing the views of younger children where specific skills and more creative methods are required. If the Government's aim of ensuring that all children who wish to do so are able to express their views is to be met, then the necessary infrastructure and resources must be in place to support this.

180. Recommendation: The Scottish Government should before Stage 3 bring forward more detailed proposals on how it will ensure that the necessary infrastructure and resources are in place to support children, including very young children, to give their views. This may require the Government to revisit the estimates in the Financial Memorandum, which currently only covers the costs associated with children giving their views directly to a sheriff or child welfare reporter, and not via any other method which may be more appropriate.

181. Recommendation: The Scottish Government should amend the Bill at Stage 2 to provide for a review of the impact of the Bill on children's participation after three years following the commencement of the relevant provisions.

182. The Committee heard strong evidence in favour of a system of children's advocacy, to ensure that children involved in cases under section 11 of the 1995 Act have access to appropriate support and are able to express their views. The Committee recognises that further work would be required to introduce children's advocacy in section 11 cases. However, we are concerned that there is no clear commitment from the Scottish Government to ensure that children's advocacy or similar support will be made available in the future.

183. Recommendation: The Scottish Government should commit to ensuring that children's advocacy is available to all children involved in cases under section 11 of the 1995 Act. The Government should before Stage 3 bring forward more detailed plans and timescales on the work it plans to undertake to meet this commitment.

184. The Committee agrees that decision-makers must be able to take a flexible approach to hearing children's views, as the needs and wishes of every child will be different. We also recognise that new methods may evolve over time and the Bill should not stifle creativity. We therefore do not consider that it would be appropriate to set out a non-exhaustive list of methods for taking children's views in primary legislation.

185. However, we are persuaded that there is a need for guidance for decision-makers, including the courts, on taking children's views, particularly to ensure that there is consistency in the options available to children.

186. Recommendation: The Scottish Government should work with stakeholders including children's organisations, the legal profession and the judiciary to develop guidance for decision-makers on options for taking children's views. This guidance should be reviewed regularly to ensure that it reflects current best practice.

187. We note that the Scottish Government intends decision-makers to seek children's preferences on how their views should be taken. However, that is currently not made clear on the face of the Bill. It is important that children are asked how they wish to express their views, although we accept that in some cases it may not be possible to follow their preferences.

188. Recommendation: The Scottish Government should amend the Bill at Stage 2 to make it clear that decision-makers should ask children how they wish to express their views.

12+ presumption for instructing a solicitor

189. The Committee accepts that a child may require a certain level of maturity to instruct a solicitor. However, given the presumption in relation to legal capacity already exists in section 2(4A) of the Age of Capacity (Scotland) Act 1991, the Committee is not convinced that this presumption needs to be replicated in the Bill. We agree with the evidence from several stakeholders that this could send a

confusing message and is inconsistent with the removal of the 12+ presumption in relation to children's views.

190. Recommendation: The Scottish Government should amend the Bill at Stage 2 to remove the presumption in relation to instructing a solicitor.

Explanation of decisions

191. The Committee heard mixed views about the duty in section 15 of the Bill, which would require the court to explain most decisions in section 11 cases to most children. On the one hand, children's organisations argued that section 15 is a positive step in ensuring children's participation in section 11 cases. On the other hand, we heard real concerns from the judiciary about whether this duty is workable in practice.

192. On balance, we agree with the principle that children should receive an impartial explanation of decisions affecting them and therefore consider that the duty in section 15 should be retained. However, we recognise that more work needs to be done to ensure that practical solutions are found to ensure that the duty does not place an unmanageable burden on the courts. This includes resolving issues of who would provide the explanation to a child and in what form.

193. Recommendation: The Scottish Government should before Stage 2 set out how it will address the practical issues raised about the duty in section 15, particularly by the judiciary. This should include further details on how it will ensure that the courts have sufficient resources to fulfil this duty.

194. Recommendation: The Scottish Government should also consider whether to amend the Bill at Stage 2 to allow for greater flexibility over the methods that could be used by the court to fulfil its duty to explain decisions to children.

Confidentiality of information

Scottish Government consultation

195. In a court case, a procedure known as commission and diligence is used to recover and preserve documents or other material for use in the case. This can include information provided in confidence, for example, by a child to a support service.

196. During its 2018 consultation, the Scottish Government consulted on a specific legislative provision which would say that the court in a section 11 case should only provide confidential information to a party asking for it where:

- it is in the best interests of the child; and
- after the views of the child have been considered.

197. No such provision appears in the Bill. Instead, the Scottish Government intends to issue guidance to family law practitioners that says that the best interests of the child should be a primary consideration in section 11 cases when disclosing confidential documents. [40]

Evidence to the Committee

198. Children 1st raised particular concerns about the court requesting entire case files which could then be shared with other parties, including perpetrators of abuse. Children 1st (supported by some others including Scottish Women's Aid) argued that the Bill should therefore include a legislative provision along the lines of that consulted on by the Scottish Government.

199. In its written submission, Children 1st emphasised:

> It is important to recognise that this proposal does not suggest that no information should be shared – indeed many Children 1st services routinely provide proportionate and relevant information to assist with civil processes – but rather that there should be a measure in place to safeguard children's wellbeing when [case files] are requested. These measures are not intended to prevent a fair trial or to prevent relevant and proportionate information from being shared. These measures are intended, in line with the best interests of the child, to address the current absence of safeguards in place which mean that all of the contents of a service provider's case file can be revealed through the courts, regardless of how relevant the information is, and whether or not it would adversely affect the wellbeing of the child.
>
> Source: Children 1st, written submission.

200. In Children 1st's view, guidance or practice notes would not offer sufficient protection. Instead, primary legislation is required to "avoid doubt and put children's best interests and their voices at the centre of decisions". [41]

201. A separate but related point made by some organisations was that where a child provides views to, for example, a child welfare reporter, the child's permission should be required before those views are shared with other people.

202. This point was made powerfully by the young people from YELLO!. In their written submission, they said:

> Children should be told where their views are being shared and who is going to read or hear them. Children's views shouldn't be shared with anyone the child doesn't want to see them. A child's right to privacy is more important than the adult's need to know what is going on. Right now there isn't enough protection of children's information. Protection of children's information needs to be included in the Bill, not just in guidance.
>
> Source: YELLO!, written submission.

203. On the other hand, the Committee heard that parents' rights under Article 6 ECHR mean that confidentiality cannot be guaranteed in all circumstances. For example, Professor Sutherland told the Committee:

> If a decision that affects you is being taken on the basis of certain information, you have a right to have that information put to you so that you can correct it or dispute it if you think that it is wrong. That is an inescapable consideration. Although, in a perfect world, there might be full confidentiality for children, the adults cannot be denied their right to discuss the truth or otherwise of important things that are said about them.
>
> Source: Justice Committee, Official Report 17 December 2019, col. 27.

204. Similar arguments were made by the Faculty of Advocates. Both the Faculty and the Family Law Association also thought it would be difficult to legislate on this issue, given the different interests that would have to be balanced in an individual case. [42]

205. Evidence from the judiciary emphasised that there are already mechanisms in place for the courts to manage both the disclosure of information and the confidentiality of any views expressed by a child. [43]

206. Other evidence, while not expressing a view on the need for a legislative provision on confidentiality, highlighted the importance of explaining to children how the information they share will be used. For example, ASSIST said that part of the process must involve a trusted person with whom the child has an established relationship managing the child's expectations, so the child understood that confidentiality could not be guaranteed in all circumstances. [44] Ruth Innes QC, representing the Faculty of Advocates, told the Committee that in her work as a child welfare reporter she made it very clear to children how their views would be used. [45]

207. In her evidence to the Committee, the Minister said she would reflect on the points raised about the need for proportionality in the disclosure of information. However, she reiterated the difficulties in legislating in this area given the different rights that must be balanced, including the rights of other children as well as parents. The

Scottish Government's view is that it is better to leave it to the court to determine what to do based on the facts of the individual case. [46]

Conclusions and recommendations on confidentiality of information

208. The Committee agrees that a proportionate approach should be taken to the disclosure of information in section 11 cases and that the best interests of the child should be considered. We are concerned that some evidence suggests this is not happening in every case.

209. We therefore welcome the Scottish Government's commitment to provide further guidance in this area for family law practitioners. We also welcome the Minister's commitment in oral evidence to reflect on what steps could be taken to ensure that any information disclosed in section 11 cases is proportionate.

Welfare of the child

Background

210. When a court is reaching a decision under section 11 of the 1995 Act, the paramount consideration is the welfare of the child, sometimes referred to as the best interests of the child.

211. The various factors which the court considers in assessing the welfare of the child were first set out, not in legislation, but in case law, i.e. the law developed by the decisions of judges in individual cases.

212. The 2006 Act amended the law to put two factors on the face of the 1995 Act, relating to (1) the need to protect children from abuse or the risk of abuse and (2) the prospect of parental co-operation.

213. This has been referred to as a "partial statutory checklist". Many of the factors the courts take into account remain in case law. For example, although they do not feature in the Bill, the Policy Memorandum says the courts will continue to take into account the age, sex and background of the child. [47]

What the Bill does

214. Under section 1 of the Bill, the two existing statutory factors added by the 2006 Act would be retained (i.e. protection from abuse and parental co-operation).

215. Section 12 of the Bill would introduce two new statutory factors which must be considered by the court. These are:

- the effect that a court order might have on the involvement of the child's parent in bringing the child up; and
- the effect that a court order might have on the child's important relationships with other people.

216. By introducing these factors, the Scottish Government aims to increase consistency in the factors considered by the courts when making orders in section 11 cases. [48]

Evidence to the Committee

A checklist approach

217. Stakeholders were divided on the merits of a statutory checklist of factors.

218. In her report for the Committee, Dr Barnes Macfarlane noted that "valid human rights arguments can be made both for and against the creation of a statutory checklist". [49] She suggested that some of the potential merits of a checklist include:

- consistency: all professionals involved in family cases would be considering the same list of factors; and
- accessibility: a checklist could also make it easier for family members (particularly children) to understand the rationale for the decisions that have such great impact on their lives.

219. However, she also pointed out that there are potential disadvantages of a checklist. These include that it might hamper the discretion of the courts, that it could be unbalanced, and that it might become administratively burdensome for the courts and generate delay. She stressed therefore that "if there is to be a checklist, getting it right is crucial". [50]

220. Dr Barnes Macfarlane concluded that the checklist in the 1995 Act, if added to as proposed in the Bill, would not appear to be unbalanced from a human rights perspective.

221. However, she went on to say that "there is a dearth of substantive best interests (i.e. welfare) factors on the proposed checklist". [51] She noted that if a more comprehensive checklist was to be included in the Bill, then the list of factors set out by the UN Committee on the Rights of the Child could be a useful model. This list includes factors such as the child's identity, right to health and right to education. [52]

222. Other evidence similarly suggested that, if a checklist approach is to be retained, then it would be better to include a fuller list of factors rather than having a partial or selective list. In her written submission to the Committee, Professor Sutherland commented:

> It is familiar territory that the 1995 Act, quite deliberately, did not provide a "welfare checklist" for fear that it would be necessarily incomplete, might divert attention from other factors which ought to be considered and might result in judges taking a mechanical approach to decision-making. The Family Law (Scotland) Act 2006 departed from that approach … Thus, the present law embodies a partial welfare checklist, highlighting two relevant factors, but making no mention of other considerations that might be of equal or greater relevance in a given case. As I have said before, "having a partial checklist is worse than having none at all."
>
> That is not to suggest that a welfare checklist should seek to be comprehensive. Given the infinite variety of family situations, any attempt to cover every eventuality would be doomed to failure and it would carry the danger of undue rigidity. Again, the UN Committee offers sound guidance when it recommends a "non-exhaustive and non-hierarchical list of elements" to be used in assessing the child's best interests.
>
> Source: Professor Sutherland, written submission.

223. Like Dr Barnes Macfarlane, Professor Sutherland suggested that the list of factors could be expanded along the lines of the UN Committee list. She added that any list

should include at the end a final factor which states: "and any other relevant factor". Dr Barnes Macfarlane also thought that the Bill should make it clear that listing specific factors does not prevent other relevant issues being considered. [51]

224. Shared Parenting Scotland was also in favour of a more comprehensive checklist, arguing that the Bill is a "missed opportunity" to give sheriffs much more guidance on what should be considered in the context of the welfare of the child. It suggested that the checklist should cover issues such as shared parenting, parental alienation, and the involvement of grandparents. Its written submission highlighted the more detailed checklists used in other countries.[xvi]

225. Conversely, other evidence suggested that any form of checklist could be unhelpful, and it would be better to simply rely on the welfare principle rather than listing any factors in legislation. Clan Childlaw, for example, argued that a checklist approach risks the court missing an essential factor and could detract from the best interests of the child.

226. Similar arguments were made by the Faculty of Advocates. In oral evidence, Ruth Innes QC, told the Committee:

> Our view is that, obviously, the welfare test is paramount and that a checklist can be unhelpful, because it lists only certain things and there are other factors that will impact on an individual child, such as mental health, physical health and addiction issues. We could end up listing a whole number of issues in a checklist. The difficulty with that is that it potentially asks the court to focus on those issues and there is a danger that other issues are excluded. Our general view is that the welfare test itself allows the court to take into account all those kinds of factors.
>
> Source: Justice Committee, Official Report 28 January 2020, col. 17.

227. Like Dr Barnes Macfarlane and Professor Sutherland, the Faculty argued that, if a checklist is to be retained, then the Bill should make it clear that all circumstances of the case are to be taken into account.

228. The Senators of the College of Justice and Summary Sheriffs' Association also raised concerns about a checklist approach. The Senators emphasised that the relevant factors will vary in each case and a holistic view needs to be taken. The Summary Sheriffs' Association commented that a checklist could create a "perception that there is intended to be a ranking of different factors". [53]

Parental alienation

229. As noted above, Shared Parenting Scotland suggested that a factor relating to parental alienation should be included in the Bill. The term parental alienation is sometimes used when there is evidence of one parent unreasonably trying to influence the child against another parent.

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xvi See pages 28-29 of the SPICe comparative briefing for more detail on checklists used elsewhere.

230. The Scottish Government consulted on the inclusion of a specific factor relating to parental alienation but ultimately decided against it. Scottish Government officials told the Committee that the term parental alienation is "much disputed" and therefore the Government concluded that it would not be appropriate to include it in the Bill. [54]

231. In its written submission, Shared Parenting Scotland argued:

> When considering the views of a child, the court should query whether these views have been subject to undue influence by the child's parents, family or any other source … Adding this consideration to the legislation complements the existing provisions regarding the protection of children from domestic abuse. Both factors are serious issues in some parental separations.
>
> Source: Shared Parenting Scotland, written submission.

232. Some written submissions to the Committee from individual parents also argued that parental alienation should be acknowledged in the Bill.

233. However, Scottish Women's Aid (supported by others including Children 1st) was strongly against the inclusion of a factor relating to parental alienation or undue influence. Scottish Women's Aid argued:

> Allegations of parental alienation are often used against mothers as a tactic by perpetrators in contact cases to deny, minimise or counter abuse allegations.
>
> Source: Scottish Women's Aid, written submission.

The factors in the Bill

234. Aside from the debate about the merits of a checklist approach, most evidence to the Committee either did not comment on, or was broadly supportive of, the two new factors proposed in the Bill.

235. The new factor relating to a child's important relationships with others generated the most comment. Stakeholders suggested that this would improve the focus in section 11 cases on a child's contact with, for example, siblings and grandparents.

236. However, Dr Barnes Macfarlane and Professor Sutherland thought that the Bill should make it clearer whether the court is considering the adult's or the child's perspective about which relationships are important.

237. The Children's Commissioner gave qualified support to the new factors in the Bill, arguing that the focus of decision-making should remain on the best interests of the child. A similar point was made by Scottish Women's Aid.

238. Scottish Women's Aid also raised concerns about the way in which the existing factors in the 1995 Act have been reproduced in section 1 of the Bill.

239. Firstly, Scottish Women's Aid argued that the factor relating to protection from abuse should be updated to reflect the new definition of domestic abuse in the Domestic Abuse (Scotland) Act 2018, which includes coercive control.

240. Secondly, Scottish Women's Aid expressed concern that, under the proposals in the Bill, the prospect of parental co-operation would sit separately from the provision on abuse. It argued that the two factors were meant to be read together and that separating them could "dilute the duty that the legislation imposes on the court to consider the impact of domestic abuse when making a contact or residence order". [19]

241. Children 1st and Dr Whitecross made similar points in their written submissions to the Committee.

A shared parenting presumption

242. Currently, courts in Scotland apply a broad assumption (or general principle) that it will normally be beneficial for children to have an ongoing relationship with both parents. This can be distinguished from a presumption, which is a more formalised rule of law requiring evidence to disprove it. Normally, a court cannot overturn a presumption in an individual case unless enough evidence is produced to rebut (i.e. disprove) the presumption.

243. The Scottish Government consulted on a presumption that a child benefits from both parents being involved in the child's life (often referred to as a "shared parenting" presumption). No such presumption appears in the Bill.

244. Shared Parenting Scotland argued that the Bill should include a shared parenting presumption. Shared Parenting Scotland stated in its written submission:

> We suggest that the starting point should be equal care because there is considerable evidence that children who are in such shared care do significantly better on a whole range of measure than those in sole care, and that these advantages are maintained even when the parents are not in agreement.
>
> Source: Shared Parenting Scotland, written submission.

245. This was supported by written submissions from some individual parents. Dr Whitcombe (a psychologist) also made a similar suggestion. In her written submission, Dr Whitcombe said that both parents are usually involved in the daily care of children and post-separation parenting arrangements should reflect that. She argued that the "only exception to a presumption of shared parenting should be where there is evidence of harm, or likely harm, to a child". [55]

246. Evidence in support of a shared parenting presumption also highlighted other countries where such a presumption had been introduced. These include England and Wales, Australia, Sweden and various states in America. However, as is set out in the SPICe comparative briefing, some countries that have introduced presumptions have been criticised for making the law unduly complex or giving insufficient priority to safety concerns (see pages 29-33).

247. Children 1st and Scottish Women's Aid opposed any presumption of shared parenting, given the need to protect women and children in cases of domestic abuse. They emphasised that the focus should be on the best interests of the child.

Professor Sutherland also argued against a shared parenting presumption, saying that "such provisions expose children (and women) to domestic abuse, can be widely misunderstood and risk commodifying children". [21]

248. The Scottish Government's view is that a shared parenting presumption would cut across the best interests of the child and should therefore not be included in the Bill. [56] It considers that the new factor in section 12 of the Bill (which requires the court to consider the effect of an order on the involvement of the child's parents in bringing the child up) is a more appropriate approach.

Contact with grandparents

249. Grandparents in Scotland (as in the rest of the UK) have no automatic right to see their grandchildren. At present, a grandparent is entitled (as someone with "an interest") to apply for a contact order, with the courts treating the welfare of the child as the paramount consideration.

250. The Scottish Government consulted on a possible presumption in favour of contact between children and their grandparents. No such presumption appears in the Bill. Instead, the Scottish Government has said it will continue to promote the Charter for Grandchildren. [57]

251. The Charter for Grandchildren was introduced in 2006. The Charter highlights the role of the wider family and sets out that grandchildren can expect, amongst other things, to know and maintain contact with their wider family except in very exceptional circumstances.

252. In April 2018, the Scottish Government published Your Parenting Plan, providing a guide for parents who live apart or who are separating on agreeing practical arrangements for the care and wellbeing of their children. Included in Your Parenting Plan is a republication of the 2006 Charter for Grandchildren.

253. However, in its written submission, Grandparents Apart suggested that the Charter has not been effective at improving contact between grandchildren and grandparents. Grandparents Apart therefore argued that the Bill should include a right for grandchildren to have contact with their grandparents.[xvii]

254. This was supported by submissions from individual grandparents to the Committee. These submissions also highlighted that, while grandparents can apply to the court for contact, this can be a lengthy and expensive process.

255. However, other evidence to the Committee, including from legal professionals and children's organisations, argued against including a right of contact for grandparents in the Bill. These witnesses emphasised that routes already exist for grandparents to be granted contact with their grandchildren, and that the focus in section 11 cases should remain on the best interests of the child.[xviii] The Children's Commissioner also noted that children may have relationships with other adults,

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xvii A right of contact is arguably stronger than a presumption as a presumption can usually be overturned by the court in an individual case (if there is enough evidence to support this).

such as aunts or uncles, that could be equally as important as their relationships with grandparents. [58]

256. The Committee explored whether other steps could be taken to ensure that the courts consider a child's wider relationships, including with grandparents, when making an order under section 11. For example, it was suggested that lessons could be learned from the children's hearings system. Evidence from Children's Hearings Scotland outlined additional training and guidance that has been provided for children's hearings panel members to ensure a child's wider family relationships and support network are considered. The Scottish Children's Reporter Administration also highlighted that wider family members, and in particular grandparents, often play a direct part in a children's hearing.

257. Other evidence to the Committee stressed the importance of child welfare reporters exploring a child's relationships with his or her wider family and support networks. In oral evidence, Ruth Innes QC, representing the Faculty of Advocates, described current practice as follows:

> If the child welfare reporter has been asked to provide recommendations in relation to contact and residence, they will take into account wider relationships such as those with siblings, grandparents and wider family members. My practice as a child welfare reporter is to ask children about their wider family, so that I have a holistic picture.
>
> Source: Justice Committee, Official Report 28 January 2020, col. 13.

258. In oral evidence, the Minister said that she appreciated "the very important role that many grandparents play in children's lives". However, as with a presumption in favour of shared parenting, she considered that any right or presumption in favour of contact with grandparents would "cut across what was in the best interests of the child". She noted that the new factor in section 12 of the Bill relating to a child's important relationships with others could include grandparents. She also committed to promoting the Charter for Grandchildren more widely. [56]

Conclusions and recommendations on the welfare of the child

A checklist approach

259. The Committee recognises that there are arguments both for and against a statutory checklist of factors for the courts to consider when deciding cases under section 11 of the 1995 Act. On the one hand, we heard that a checklist could improve consistency in decision-making and help families to understand why decisions have been reached. On the other hand, we heard that a checklist could lead to other important factors being ignored and detract from a focus on the best interests of the individual child.

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xviii See e.g. Justice Committee, Official Report 7 January 2020, col. 14; Justice Committee, Official Report 28 January 2020, cols. 19-21.

260. The 1995 Act currently contains what has been referred to as a "partial checklist". The Bill would add another two factors to that list, however, a number of other important factors would not appear in primary legislation. While we accept that no list could ever be comprehensive, the UN Committee on the Rights of the Child suggests a range of other factors which should be considered in any best interests assessment. We think that this guidance provides a useful model that could be incorporated into the Bill. This may address some concerns that the more limited checklist currently provided for in the Bill could lead to other important factors being ignored.

261. Recommendation: The Scottish Government should bring forward amendments at Stage 2 to expand the list of factors in section 12 to include those suggested by the UN Committee on the Rights of the Child.

262. However, as we said above, no list could ever be comprehensive. It is important that any list included in legislation does not lead to other relevant factors being ignored. We therefore consider that the Bill should make it clear that the list of factors included in legislation does not prevent the court considering other relevant factors.

263. Recommendation: The Scottish Government should amend the Bill at Stage 2 to add at the end of any list "and any other relevant factor", to make it clear that all circumstances of the case should be considered.

The factors in the Bill

264. Recommendation: The Committee notes the concerns raised by Scottish Women's Aid and others about how the existing factors in the 1995 Act have been reproduced in the Bill. The Committee asks the Scottish Government to respond to these concerns before Stage 2 and to consider whether the Bill should be amended to reflect the definition of domestic abuse in the Domestic Abuse (Scotland) Act 2018, which includes coercive control. The Government should also consider amending the Bill to keep all factors in one section, rather than split across different provisions.

A shared parenting presumption

265. We note that the courts in Scotland currently apply a broad assumption (or general principle) that it will normally be beneficial for children to have an ongoing relationship with both parents. On balance, we are not persuaded that the Bill should include a presumption in favour of shared parenting. The welfare of the child must remain the paramount consideration. Any shared parenting presumption could cut across that key principle. We note that section 12 of the Bill would require the court to consider the effect of an order on the involvement of the child's parents in bringing up the child. This is a more appropriate approach than a shared parenting presumption.

Contact with grandparents

266. For similar reasons, we do not think that the Bill should provide a right or presumption in favour of contact between grandchildren and their grandparents. We fully recognise the important role that grandparents play in many children's lives. However, for some children other relationships may be equally as important. The new factor in section 12 of the Bill will require the courts to consider a child's important relationships with other people, and this is broad enough to include grandparents.

267. However, we consider that other steps could be taken to ensure that children's wider family relationships and support networks are maintained when decisions are made about contact and residence.

268. Recommendation: The Scottish Government should before Stage 2 provide further details on the steps it intends to take to promote the Charter for Grandchildren.

269. Recommendation: Training and guidance for child welfare reporters (a topic discussed in more detail in the next section of this report) should emphasise the importance of exploring a child's wider family relationships and support networks.

Court appointed officials

Background

270. Sections 8 and 13 of the Bill propose statutory regulation of two officials who can be appointed by the court in family cases:

- child welfare reporters, who can be asked to report on the views of the child or the welfare of the child and are usually solicitors;
- curators ad litem, who are solicitors appointed by the courts to safeguard and promote the interests of someone who lacks capacity, such as a child.

271. Both child welfare reporters and curators are separate from any solicitors representing the litigants.

272. There have been long-standing policy concerns about the lack of regulation of these court-appointed officials, particularly child welfare reporters.

273. Between 2013 and 2016, the Scottish Government chaired a working group on child welfare reporters. Key outcomes from the working group were:

- a guide to the child welfare report;
- non-statutory instructions to child welfare reporters;
- changes to court rules; and
- a proposed training scheme for child welfare reporters.

274. In relation to the proposed training scheme, the Lord President expressed concerns about establishing a scheme on an administrative basis. The Scottish Government therefore considers that primary legislation is necessary. [59]

What the Bill does

275. Section 8 of the Bill says Scottish Ministers must establish and maintain a register of child welfare reporters. Section 13 of the Bill makes equivalent provision for a separate register of curators.

276. Under the provisions of the Bill, the court could only appoint a registered child welfare reporter or curator.

277. Much of the detail of the proposed regulation will be left to future secondary legislation. For example, the Bill would give the Scottish Ministers the power, through regulations, to set out the training and qualifications required. Individuals would only be eligible to apply to be on the registers if they met the minimum standards set down in regulations.

278. Appointment to the registers would not be open-ended: a child welfare reporter or curator would have to be reappointed periodically. The Scottish Government says that this would allow for an assessment of whether the child welfare reporter or curator continues to meet the eligibility criteria, as well as whether there continues to be a need for the number of child welfare reporters or curators appointed. [60]

279. The registers could be run in-house by the Scottish Government or contracted out to a third party. For child welfare reporters, the Scottish Government estimates that if the register is operated in-house, there would be set-up costs of £1.56m to £1.61m and annual running costs of £1.97m to £2.33m. [61] For curators, the Scottish Government estimates the set-up costs to be £0.09m, with annual running costs of £0.063m. [62]

280. The Scottish Government would have the power to set fee rates for child welfare reporters and curators. The Government says it will fund the fees paid, rather than these being paid through legal aid or privately by the litigant as is currently the case. [63]

281. Any regulations made under section 8 or 13 would be subject to the negative procedure.[xix]

282. The Scottish Government considers that ensuring that child welfare reporters and curators are subject to suitable and consistent qualification and training requirements will mean that the best interests of the child are at the centre of any case. [64]

Evidence to the Committee

283. There was broad support for the regulation of child welfare reporters and curators.

284. Most evidence focused on the need to regulate child welfare reporters. Those who supported regulation highlighted the important role that child welfare reporters play in gathering the views of children and making recommendations to the court. They argued that regulation is necessary to improve the quality and consistency of reports. Stakeholders also emphasised the need to ensure that child welfare reporters have the appropriate knowledge and skills for the job.

Local or national lists?

285. When regulation is introduced, the Scottish Government intends that this will be at a national, rather than local, level. It will either manage the system in-house or contract it out to a third party. The Scottish Government will be able to set out both the process for how a person is appointed to the registers and the process for how a registered person is then selected as the child welfare reporter or curator in an individual case.

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xix For more information on the negative procedure, see this Guide to Scottish Statutory Instruments.

286. The main opposition to this approach came from the Faculty of Advocates and the judiciary. They argued that the lists of suitable individuals should still be managed by the courts at a local level. They were concerned that the approach in the Bill would limit the court's flexibility to appoint the most appropriate person in the circumstances of the individual case. While they welcomed additional training for child welfare reporters and curators, they thought that the existing system whereby the Lord President and the Sheriffs Principal maintain lists of child welfare reporters and curators should be retained.

287. For example, in their written submission to the Committee, the Sheriffs Principal stated:

> We are particularly concerned that the registration requirements and introduction of procedures for the removal of individuals from a list risk prejudicing the independence of the judiciary to appoint a person suitable to the role. In most cases the appointment follows a cab rank rule from the list of suitable persons, maintained in the court under the supervision of the Sheriff Principal, but there can be cases where the sheriff very properly wishes to appoint a particular reporter or curator ad litem who has skills and experience which are suitable to the individual circumstances of these cases. That is in the interests of the child and it would be unfortunate if that judicial discretion was lost by a formal rule about who should be appointed to a case.
>
> Source: Sheriffs Principal, written submission.

288. Similar points were made in the submissions from the Sheriffs' Association and the Senators of the College of Justice. In oral evidence, Lady Wise and Sheriff Tait both accepted there is a need for training but highlighted the benefits of sheriffs and judges having the flexibility to appoint the person with the most appropriate skills for the circumstances of the case. [65]

289. The Faculty of Advocates and Family Law Association also emphasised that the current system allows the court to appoint the most suitable individual for the case with, for example, relevant knowledge of local support services.

290. In oral evidence, Ruth Innes QC, representing the Faculty said that the approach in the Bill "might be disproportionate to the problem". [66] She suggested a compromise approach might be more appropriate, with national standards for certain issues (e.g. training) while retaining some local discretion in terms of managing the lists and appointing the most suitable individual for the case.

291. An option along these lines is considered but rejected by the Scottish Government in the Policy Memorandum, which states:

> The Lord President and Sheriffs Principal would need to take on responsibility for the appointment and reappointment process for CWRs [child welfare reporters]. They would also become responsible for reviewing the people appointed to ensure they continue to meet the eligibility criteria. Due to the extra resource implications this would place on the SCTS and the fact that this would not deal with the issue of access to justice (as parties and the Scottish Legal Aid Board would still be responsible for meeting the costs of CWRs) this is not considered a desirable option.
>
> Source: Policy Memorandum, paragraph 95.

292. (The issue of fees for child welfare reporters is discussed further below).

293. In her evidence to the Committee, the Minister reiterated the resource implications for the SCTS of maintaining lists at a local level. The Government's view is that a centralised approach is the best way to achieve consistency and transparency in relation to training, qualifications and the appointment process. [67]

Training for child welfare reporters

294. Many submissions to the Committee focused on the necessary training requirements for child welfare reporters. Children's organisations and women's groups suggested a wide range of areas that would need to be covered, including: child development and attachment; questioning and communication techniques; and domestic abuse and coercive control.

295. The young people from YELLO! also emphasised the need for training for child welfare reporters. They highlighted the Super Listener designed by children and young people as showing what anyone who comes to talk to children should be like. They also suggested that children and young people should be involved in approving who can be a child welfare reporter. Other evidence, for example from COSLA, argued that children and young people should be involved in the development of training for child welfare reporters.

296. Evidence from Shared Parenting Scotland, Dr Sue Whitcombe and individual parents argued that training for child welfare reporters should cover issues around undue influence and parental alienation. Dr Whitcombe highlighted that, in England and Wales, guidance for those taking the views of children covers these issues. [68]

297. The Financial Memorandum (at paragraph 32) suggests that four days training will be provided to each child welfare reporter. Some evidence questioned whether, given the extensive and ongoing nature of the training required, this would be sufficient. Dr Nick Child, a psychologist, argued that the level of training proposed was "grossly inadequate", noting that other professionals working with children are required to undertake several years of training. Children 1st and Scottish Women's Aid also suggested that four days training would not be enough, and that a full training needs assessment should be undertaken.

298. The Minister told the Committee that she would reflect carefully on this evidence. She went on to say:

> We will set the training requirements and qualifications through secondary legislation, which will be developed after the Bill is enacted. We will consult stakeholders on how we should develop the requirements. I envisage that the training will cover domestic abuse, coercive control and other areas that witnesses have mentioned in the evidence sessions. Four days of training a year might not be sufficient in some cases, but it might be more than sufficient for child welfare reporters who have been working in the field for many years.
>
> Source: Justice Committee, Official Report 25 February 2020, col. 8.

Skill set of child welfare reporters

299. Another key theme in the evidence was whether lawyers have the appropriate skill set to be child welfare reporters.

300. Currently 90% of child welfare reporters in Scotland are lawyers. All existing child welfare reporters will be given the opportunity to apply for reappointment under the proposed new scheme. However, the Scottish Government has also said that it wants to encourage other professionals, such as child psychologists and social workers, to become child welfare reporters. [69]

301. A number of stakeholders supported this approach, emphasising that as long as the person has the right skills for the role, then there should be flexibility about his or her professional qualifications. For example, Janet Cormack, representing Clan Childlaw, told the Committee:

> It is important to have an understanding of court procedures and legal tests, but equally important is having an understanding of child development and how to communicate with them. Regulation would bring consistency in standards and training … but it really does not matter what the professional background of a child welfare reporter is.
>
> Source: Justice Committee, Official Report 28 January 2020, col. 13.

302. COSLA also welcomed the intention to enable more non-solicitors to act as child welfare reporters, although it raised concerns about the resource implications for local authority social work departments if more staff were to take on this role and the associated training requirements.

303. Other evidence to the Committee questioned whether, even with enhanced training, lawyers should be acting as child welfare reporters. Joanna Barrett, representing NSPCC Scotland, said in her evidence to the Committee:

> We pose the question whether that skill set is conducive to best practice in engaging with children and fulfilling UNCRC obligations. It is not that lawyers cannot engage with children, but it is arguable that those in other professional disciplines are more skilled at doing so. ... We need to consider which is more important: that court welfare reporters have a skill set that fits into an existing legal system or that they have the ability to work effectively with children. We would argue that it is the latter.
>
> Source: Justice Committee, Official Report 7 January 2020, col. 17.

304. In a subsequent letter to the Committee, NSPCC Scotland argued that the proposals in the Bill "fall short of designing a system around children's rights and needs". It went on to say:

> We note that in England and Wales, CAFCASS, an independent body, staffed by specially-trained cadres of social workers already trained in child and family welfare, provide the child welfare reporting function in all family justice cases, private and public, reflecting the need for enhanced understanding of complex family issues and how they impact on children. … Whilst we are not suggesting an identical system be imported wholesale, we feel there is scope to be more ambitious in the system we create in Scotland.
>
> Source: Letter from NSPCC Scotland, 10 March 2020.

305. Similar arguments were made by Dr Whitcombe and Dr Child, both psychologists, who suggested that social workers should be undertaking the role of child welfare reporters. In her evidence, Dr Whitcombe raised significant concerns about the quality of child welfare reports prepared by solicitors, concluding that:

> I am of the opinion that solicitors do not have the necessary competence to investigate, report or make recommendations on the best interests of the child. I find it exceedingly difficult to comprehend how solicitors can acquire the required competence with the minimal level of training which seems to be being considered.
>
> Source: Dr Whitecombe, written submission.

306. In a supplementary submission, Dr Whitcombe also highlighted that, while evidence from the judiciary suggested that child welfare reporters do not provide recommendations to the court, research shows that their conclusions on child contact arrangements are implemented in the vast majority of cases. The Instructions to Child Welfare Reporters, published by the Scottish Government, also suggest that child welfare reports should make conclusions and recommendations to the court.

307. Nonetheless, evidence from the legal profession and the judiciary defended the use of lawyers as child welfare reporters. The Summary Sheriffs' Association, for example, said in its written submission that there are "good reasons" for appointing solicitors as child welfare reporters, including that they "understand what is required by way of dispassionate and forensic reporting".

308. The Family Law Association argued that solicitors "have a good understanding of the legal framework and how to apply it to particular facts and circumstances". [66] In oral evidence, Lady Wise similarly told the Committee:

> It might seem curious to some people that we send lawyers out to speak to children and to investigate the circumstances in which they live, but the lawyers in the case understand the backdrop to the dispute and that they have to deal in a particular way with allegations that have been made but which are, as yet, untested.
>
> Source: Justice Committee, Official Report 20 February 2020, col. 10

309. However, both she and Sheriff Tait emphasised that the courts can and do appoint other professionals to undertake child welfare reports in appropriate cases.

310. The skill set of the professionals used to write reports and represent the views of the child in other countries is explored in the SPICe comparative briefing (pages

20-24). In summary, other countries vary in their approach and the available research literature seems to offer mixed views on who is best placed to obtain a child's views.

311. In her evidence, the Minister said that she wanted to see a mix of professionals acting as child welfare reporters but would not take a "prescriptive view" on what that mix should be. She emphasised that the focus should be on "looking for the best professionals who are able to deliver the best service for the child". Eligibility criteria would therefore be based on competence and could be met by a variety of professionals. [70]

Fees for child welfare reporters

312. Currently, child welfare reporters are funded through legal aid or paid for privately by litigants themselves. The fees charged can vary considerably. The Financial Memorandum (at paragraphs 36 and 40) estimates that, for reports funded by the Scottish Legal Aid Board, the cost can range from under £500 to more than £3,000.

313. The Policy Memorandum (at paragraph 81) says that the Scottish Government will fund all fees paid to child welfare reporters in section 11 cases, rather than being funded by legal aid or by the litigants. The Government's view is that this will resolve issues around access to justice, which can arise where litigants are not eligible for legal aid but may struggle to pay the costs of a child welfare report themselves.

314. The Bill would give the Scottish Government the power to set the fee rates for child welfare reporters. The Policy Memorandum (at paragraph 80) says fee rates could be set in a variety of ways, such as by using an hourly rate, by report (although reports may vary in complexity and size), or by page (although the Government acknowledges this may encourage long reports).

315. Those who commented on this issue broadly supported the proposals in the Bill. The Children's Commissioner, for example, argued that the current approach "produces inequality of access for some families, particularly those with moderate incomes who do not qualify for legal aid". [17]

316. Clan Childlaw similarly commented that "clients who encounter obstacles in gaining legal aid struggle to afford a child welfare reporter, which can put them at a comparative disadvantage". [39] It therefore welcomed the proposed new approach, suggesting it would promote access to justice.

317. While not expressly against the proposals in the Bill, some evidence emphasised that the fee rates set by the Scottish Government need to be sufficient to attract skilled reporters. Professor Sutherland commented in oral evidence:

> We must be a bit careful that we do not, with training, regulation and payment, cause the supply of child welfare reporters to dry up. … we have to be realistic: people will only do the job if they can afford to pay their bills through doing it.
>
> Source: Justice Committee, Official Report 17 December 2019, col. 30.

318. The Summary Sheriffs' Association similarly stated:

> We would be concerned that the remuneration offered should be sufficient to attract applicants, especially solicitors, to be on any register. It seems to us that there is a danger that skilled reporters will be discouraged from registering because of insufficient remuneration, but conversely, that less skilled reporters would be attracted by the possibility of registration and a fixed remuneration.
>
> Source: Summary Sheriffs' Association, written submission.

319. The Sheriffs Principal, Senators of the College of Justice and the Family Law Association made similar points in their written submissions.

320. In oral evidence, the Faculty of Advocates and the Family Law Association suggested that fees should be paid according to an hourly rate, to reflect the work undertaken in preparing the report. [71]

321. The Minister told the Committee that the Scottish Government had not yet finalised how it would set fee rates. She said she would consider the evidence heard by the Committee and acknowledged that fee rates needed to ensure that the role attracts good-quality professionals. [72]

Other features of the regulatory scheme for child welfare reporters

322. Other suggestions were made in the evidence about the necessary features of the regulatory scheme for child welfare reporters. These included:

- mechanisms to review and feedback concerns about the quality of reports; and
- a complaints system which, in particular, allows children and young people to ask for changes to be made to child welfare reports and raise any concerns about their experiences with child welfare reporters.

The appointment of curators

323. As discussed earlier, section 13 of the Bill creates similar provisions on establishing a register for curators as section 8 does for child welfare reporters.

324. In addition, it provides that the court:

- may only appoint a curator if "it is necessary to do so to protect the child's interests"; and
- is to reassess the appointment every six months.

325. In her report for the Committee, Dr Barnes Macfarlane said that these requirements would likely reduce the number of curators appointed, as well as their ongoing involvement, in family cases. She suggested that this could have an impact on the best interests of vulnerable children, "who are particularly in need of support or assistance in accessing court processes". [73]

326. The Sheriffs' Association also expressed concern about the requirements in section 13, emphasising the value of curators in family cases:

> Curators are worth their weight in gold to family courts where a very large and increasing number of cases are conducted by party litigants. In such cases, the parents rarely present their case in a child-centred way or give the court the relevant information needed to resolve matters in the best interests of the child. It is vital that those interests are protected and that decisions are made in a child-centred way. Curators also speak to children, explain the process to them, see them in their home and at school, support contact and mediate outcomes.
>
> Source: Sheriffs' Association, written submission.

327. The Sheriffs' Association was particularly critical of the requirement to review the appointment of a curator every six months. The Association argued that the requirement was "arbitrary and pointless", as curators only become involved in a case where there is a need for them to perform a distinct role and that they carry out bespoke work for the court. The Summary Sheriffs' Association raised similar concerns, describing the requirement as "somewhat unrealistic".

328. The Minister told the Committee that she did not think that section 13 would result in a reduced role for curators. However, the Committee heard that the Government had received some complaints about curators being appointed when they are not needed. Section 13 therefore aimed to ensure that the courts consistently assess the necessity of any curators appointed. [74]

Choice of procedure for the regulations

329. As noted above, the details of the regulatory schemes for child welfare reporters and curators will be dealt with by way of secondary legislation, subject to the negative procedure. Some stakeholders, including the Family Law Association, raised concerns about this approach.

330. In oral evidence, the Minister committed to undertaking a full public consultation on the regulations. However, she said that she thought the choice of negative procedure was appropriate and noted that the Delegated Powers and Law Reform Committee had not raised any concerns in its report. [75]

Conclusions and recommendations on court appointed officials

331. The Committee welcomes the regulation of child welfare reporters and curators. These officials play a significant role in family cases and therefore we consider it is appropriate that they are subject to consistent and transparent requirements, including in relation to training and qualifications.

Local or national lists

332. The Committee recognises that the approach proposed in the Bill, which would see registers managed centrally, is intended to ensure consistency and transparency in the training requirements, qualifications and appointment process for child welfare reporters and curators. However, we heard significant concerns from the judiciary in particular about the impact that this approach would have on the court's ability to appoint the most suitable person in the circumstances of an individual case.

333. We think, therefore, that consideration should be given to a compromise approach, where national standards could be set on issues such as training but some local discretion retained in the management of the lists of child welfare reporters and curators. This could help to ensure that the courts have sufficient flexibility over the appointment of child welfare reporters and curators to best suit the circumstances of individual cases.

334. Recommendation: The Scottish Government should explore with the Scottish Courts and Tribunals Service (SCTS) and other relevant stakeholders whether responsibility for managing lists of child welfare reporters and curators could be retained at a local level, alongside national standards on training and qualifications. This should include consideration of the potential cost and other resource implications of such an approach compared with managing the lists centrally.

Training for child welfare reporters

335. Evidence to the Committee strongly suggested a need for extensive and ongoing training for child welfare reporters, covering a range of topics from child development to domestic abuse and coercive control. It is crucial that appropriate resources are in place to deliver this training and we are not persuaded that the four days suggested in the Financial Memorandum will be sufficient. We therefore welcome the Minister's commitment to reflect on the evidence we heard on this issue.

336. Recommendation: The Scottish Government should undertake a more thorough assessment of the training needs of child welfare reporters and fully consult on the proposed training requirements before bringing forward secondary legislation to give effect to the new regulatory scheme.

337. Recommendation: Children and young people should be involved in the development of training for child welfare reporters.

Skill set of child welfare reporters

338. The Committee heard a strong challenge to the assumption that lawyers have the appropriate skill set to act as child welfare reporters. We therefore support the Scottish Government's intention to encourage other professionals, such as social workers and psychologists, to undertake this role.

339. However, we recognise that lawyers also have skills and experience that can be relevant to the role of a child welfare reporter. We therefore agree with the Minister that the focus should be on ensuring that all child welfare reporters have the necessary skills and experience, regardless of professional background.

340. Recommendation: The Scottish Government should before Stage 2 provide further details on the steps that it will take to encourage other professionals, such as social workers and psychologists, to act as child welfare reporters. This should include working with relevant professional bodies to ensure, for example, that resources are available to allow people to undertake the necessary training.

Fees for child welfare reporters

341. Recommendation: We welcome the Minister's commitment to reflect on the evidence to the Committee on fees for child welfare reporters. Fee rates for child welfare reporters should be set in a way that will attract good quality professionals, while still representing an efficient use of public resources. Any system for fees should ensure that we do not reduce the number of professionals available for this important role or create perverse incentives that, for example, reward the length rather than the quality of a report. The Scottish Government should consult fully on the proposed fee rates.

The appointment of curators

342. The Committee recognises that the requirements in section 13 of the Bill are intended to ensure a consistent approach to the appointment of curators. However, we are concerned that the provisions could result in a reduction in the use of curators, which we heard may not be in the best interests of children involved in section 11 cases. Moreover, while the courts should be keeping any appointment under review, the Committee did not hear compelling evidence in favour of requiring that review to happen every six months.

343. Recommendation: The Scottish Government should amend the Bill at Stage 2 to respond to the concerns raised about the requirements in section 13 in relation to the appointment of curators. For example, the Scottish Government could remove the requirement to review appointments every six months and replace it with a general requirement to keep any appointments under review.

Choice of procedure for the regulations

344. The Committee welcomes the Minister's commitment to undertake a full public consultation on the details of the proposed regulatory schemes for child welfare reporters and curators. Given the significant impact that these proposals will have in practice, there is likely to be considerable public interest in the regulations. We are therefore concerned that the regulations would only be subject to the negative procedure, which does not necessarily allow for the same level of scrutiny as the affirmative procedure.

345. Recommendation: The Scottish Government should amend the Bill at Stage 2 so that regulations made under sections 8 and 13 of the Bill are subject to the affirmative procedure.

Vulnerable people in the courtroom

346. Sections 4 to 7 of the Bill relate to special measures in certain family cases. Special measures are things a court does to help vulnerable individuals to give evidence effectively, or otherwise appear in court, with as little fear and distress as possible.

347. The policy intention of these provisions is to ensure greater protection for vulnerable persons in family cases, including victims of domestic abuse. [76]

Background on special measures

348. The Vulnerable Witnesses (Scotland) Act 2004 ("the 2004 Act") sets out special measures for civil cases, including family cases. It only applies to court hearings where formal evidence is being taken from a witness. Other court hearings, including child welfare hearings, are not covered.

349. Current special measures for vulnerable witnesses in civil cases include giving evidence by video link, from behind a screen or with a supportive person sitting next to the witness.

350. In civil cases, a child under the age of 18 automatically qualifies as a vulnerable witness. Whether an adult is a vulnerable witness in an individual case can be established by the court applying a statutory test which considers a range of factors.[xx]

351. The same can happen in criminal cases. However, since 2014, certain categories of people are deemed vulnerable witnesses in criminal cases. This means they are presumed to be vulnerable and usually have a right to certain special measures when giving evidence. Deemed vulnerable witnesses in criminal cases include victims in cases involving a sexual offence, human trafficking, domestic abuse or stalking.

352. The Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019 also set out a new approach to child witnesses involved in certain serious criminal cases. The Act generally requires the court to enable a child's evidence to be taken in advance of trial.

What the Bill does

353. One of the challenges associated with the scrutiny of this part of the Bill is that the provisions are very complex. An explanation of the key features of the provisions is set out below.

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xx Broadly speaking, these factors relate to the characteristics of that person; the behaviour of the other litigant (and his or her family and associates); the relationship between the witness and the litigant; and the nature of the evidence the witness is likely to give.

Sections 4 to 6: key features

354. Sections 4 to 6 of the Bill concentrate on those cases that go to a proof, i.e. a formal hearing where witnesses give evidence and are cross-examined on it. For these cases, sections 4 to 6 build on existing protections for vulnerable witnesses in the 2004 Act.

355. Two different types of court proceedings are covered by sections 4 to 6:

- court proceedings under section 11 of the 1995 Act, where the courts are resolving parenting disputes;
- sheriff court proceedings under the children's hearings system. These are not to be confused with children's hearings themselves, which are heard before a panel of volunteers from the local community. An example of a situation where the sheriff court has a role in a children's hearing case is where one person disputes that the grounds for referral to the children's hearing system are present in the individual case.

356. In keeping with the existing provisions in the 2004 Act, sections 4 to 6 of the Bill would apply to child witnesses as well as to adults.[xxi]

357. Building on recent changes for criminal cases, sections 4 to 6 would also introduce the concept of a deemed vulnerable witness to family cases. The proposed criteria which must be satisfied for someone to be a deemed vulnerable witness would differ between section 11 cases and children's hearings court cases (this is discussed further below).

358. Where a witness is deemed to be vulnerable, they have the advantage that their vulnerability is assumed, rather than having to establish it in the individual case (by reference to the existing statutory test in the 2004 Act).

359. However, unlike in criminal cases, a deemed vulnerable witness in a family case will have no automatic right to the existing special measures under the 2004 Act (such as the use of a screen or supporter). These measures will have to be applied for in the usual way or can be granted by the court if no application is made.

360. Sections 4 to 6 of the Bill would also introduce a ban on a litigant personally conducting a case as a new possible special measure in section 11 cases and children's hearings court cases. This means that they would not be able to question a vulnerable witness.

361. The Bill sets out two sets of circumstances in which the court is to presume there should be a ban on the personal conduct of the case, although evidence can overturn this presumption in an individual case. For children's hearings court cases, there are also circumstances where the ban is mandatory (this is discussed further below).

362. When someone has been banned from personally conducting their case, he or she may appoint a solicitor themselves, either privately funded or through applying in the usual way for legal aid. However, the Bill also caters for the situation where the person fails to appoint a solicitor. Section 4 of the Bill says that the court must

[xxi] Scottish Government email to SPICe, 20 January 2020.

appoint a solicitor to conduct this person's case. This must be a solicitor from a register established by the Scottish Government for this purpose. The solicitor will not be paid for by the person concerned.

Sections 4 to 6: when is someone a deemed vulnerable witness?

363. The definition of deemed vulnerable witness differs between section 11 cases and children's hearings court cases.

364. For section 11 cases, a person will be a deemed vulnerable witness if:

- the person is protected by a court order,[xxii] banning certain conduct towards the person by a litigant in the section 11 case; or
- a litigant in the section 11 case has been convicted of committing, or is being prosecuted for committing, certain offences against the person (including domestic abuse and sexual offences).

365. For children's hearings court cases, the definition of a deemed vulnerable witness is linked to the Reporter's statement of grounds associated with the case. It is a key feature of the children's hearings system that a Reporter investigates concerns about a child, before deciding whether to refer a case to a children's hearing. In the statement of grounds, the Reporter sets out which of the statutory grounds he or she considers are met to justify a referral, and the supporting facts on which that view is based.

366. Under sections 4 to 6 of the Bill, if the statement of grounds alleges that the person has been the victim of certain conduct, including domestic abuse and certain sexual offences, the person will be a deemed vulnerable witness.

Sections 4 to 6: when will the ban on personal conduct of a case apply?

367. The approach to the potential application of the ban on personal conduct of a case also differs between section 11 cases and children's hearings court cases. Overall, there is a wider ban on personal conduct of cases under the children's hearings system compared to section 11 cases.

Where the litigant carried out the conduct associated with the witness's deemed vulnerability

368. The Bill caters for the scenario where someone is:

- a deemed vulnerable witness; and

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xxii Such as a non-harassment order.

- a litigant in the case (who wishes to examine or cross-examine a witness) is the person who carried out, or is alleged to have carried out, the relevant conduct towards the vulnerable witness.

369. In this scenario:

- in a section 11 case, there is a presumption that prohibiting that litigant from conducting his or her own case is the most appropriate special measure. This presumption can be rebutted in certain circumstances, for example, where it would give rise to a significant risk of prejudice to the fairness of the proceedings and that risk significantly outweighs any risk of prejudice to the interests of the witness if the special measure is not used;

- in a children's hearing court case, there is a mandatory ban on the litigant personally conducting his or her case (unless he or she does not wish to examine or cross-examine the witness).

Other situations

370. For a children's hearing court case, there is also a presumption that prohibiting personal conduct of a case is an appropriate special measure in a wider set of circumstances than where the litigant was the (alleged) perpetrator of the relevant conduct.

371. Specifically, the presumption would operate where **any** litigant intends to examine or cross-examine a deemed vulnerable witness or vulnerable witness. The presumption can be rebutted in similar circumstances as set out above. Broadly speaking, the risk of prejudice to a litigant is weighed up against the interests of the witness in question.

372. For section 11 cases, a ban on personal conduct of the case by a litigant can also be authorised by the court as a special measure in circumstances other than where the litigant was the perpetrator of the relevant conduct. However, unlike for children's hearings court cases, no presumption operates in these other circumstances.

Section 7

373. A very small number of section 11 cases go to proof (around 4%). Instead, most are resolved at a child welfare hearing or a series of such hearings, where formal evidence is not being taken.

374. Section 7 of the Bill would apply to hearings under section 11 of the 1995 Act where formal evidence is not being taken, including child welfare hearings. Child welfare hearings are relatively informal proceedings, held in private.

375. Section 7 would allow the court to order the use of special measures to protect a litigant in the proceedings. Special measures can be ordered at any time, whether a litigant has applied for them or not. Possible special measures include giving

evidence by video link, from behind a screen or with a supportive person sitting next to the litigant.

376. This is a major policy development, as vulnerable people taking part in such proceedings cannot currently be protected through the use of special measures.

377. However, section 7 is narrower in scope than sections 4 to 6 of the Bill, in terms of the type of proceedings covered. It only applies to cases heard under section 11 of the 1995 Act.

378. Also, unlike sections 4 to 6, nobody is deemed vulnerable in the context of section 7. Instead, an individual's vulnerability must be established before the court in each case. The test for establishing whether someone is vulnerable has a number of elements to it, including the characteristics of that person, the behaviour of the other litigant (and his or her family and associates), and what the particular hearing will cover.

379. Children are not explicitly referred to in section 7. The Scottish Government has confirmed that, in practice, it could apply to a child litigant (e.g. a child applying for contact with their sibling). However, it would not cover a child appearing at a child welfare hearing as the subject of the dispute in question.[xxiii] At present, children rarely appear at child welfare hearings. This might change if more sheriffs take children's views directly in court. However, in practice, it seems that when sheriffs do take children's views directly at the moment, this tends to be in their private chambers rather than in the court room.

Evidence to the Committee

380. Overall, there was broad support for the measures in sections 4 to 7 of the Bill, including from children's organisations and legal academics.

381. Key issues raised in the evidence included:

- the approach across different types of cases;
- the practical implications of establishing a register of solicitors; and
- the practical and resource implications of implementing special measures in child welfare hearings.

382. These issues are explored further below.

The approach across different types of cases

383. One of the recurring points made by stakeholders in relation to sections 4 to 7 of the Bill was that, as much as possible, the approach to child and vulnerable witnesses should be the same across all criminal and civil proceedings, including children's hearings.

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xxiii Scottish Government email to SPICe, 20 January 2020.

384. This point was made strongly by NSPCC Scotland, who argued that separate, siloed systems "fundamentally undermine" a child-centred approach. In a letter to the Committee, NSPCC argued that the recent publication of the Independent Care Review provided the opportunity to "pause and consider how the 'family justice system' in its broadest sense needs to reform to serve children's best interests and realise their rights".

385. The Children's Commissioner argued in relation to child witnesses that any child should be afforded the same protections and special measures across all settings, including children's hearings. In oral evidence, Megan Farr, representing the Commissioner, told the Committee:

> A child is a child is a child: they are just as much a child in the children's hearings system as they are in the criminal courts, and they should be afforded the same protections across all forms of proceedings.
>
> Source: Justice Committee, Official Report 7 January 2020, col. 24.

386. Scottish Women's Aid suggested that if a person has been eligible for special measures in one setting, then they should be eligible for special measures in any other setting.

387. The Scottish Children's Reporter Administration argued that the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019 should be extended so that children's evidence in children's hearings court proceedings is treated in the same way as in serious criminal cases (i.e. taken in advance).

388. Other evidence, including from Children's Hearings Scotland, the Children's Commissioner and Dr Whitecross, went further, arguing that the Bill should extend special measures to children's hearings themselves, instead of just applying to court cases relating to children's hearings.

389. Children's hearings are less formal than the ordinary civil court system. A children's hearing is not the type of hearing where evidence is taken from witnesses (and they are cross-examined on it). Accordingly, stakeholders seem to be suggesting that section 7 of the Bill (as opposed to sections 4 to 6) should be extended to cover children's hearings themselves.

390. One key feature of a children's hearing is that a child has an absolute right and a duty, unless excused, to attend the hearing.

391. In addition, being a relevant person is significant in the context of the children's hearings system, as the status has rights and responsibilities attached to it. All parents are automatically relevant persons. As such, they have a duty to attend the hearing, unless excused or excluded. In practice, this requirement of attendance can apply to both adult victims and perpetrators of domestic abuse.

392. Currently, children and relevant persons can be excused on grounds including those relating to a child or adult participant's vulnerability.

393. A parent may be an alleged or convicted perpetrator of abuse. As a relevant person, that parent could be excluded in limited circumstances, namely if their presence is:

- causing, or is likely to cause, significant distress to the child;

- is preventing the hearing from obtaining the views of the child; or
- is preventing the hearing from obtaining a response to a statutory ground from someone who is required to accept or deny the ground.

394. In its evidence, Children's Hearings Scotland argued that the Bill is a missed opportunity to extend additional protection to vulnerable relevant persons and children affected by domestic abuse in the children's hearings system. It suggested consideration should be given to "putting in place a framework of special measures" for vulnerable participants required to attend children's hearings. [77]

395. For example, Children's Hearings Scotland wanted more powers for panel members to authorise attendance by video link or to hear a relevant person's contribution separately, where the relevant person's presence may present a risk of harm to the child or other people present at a hearing.

396. Children's Hearings Scotland also commented on the potential distress that could be caused to children by requiring them to attend children's hearings where their presence is not essential.

397. Similar points were made by NSPCC Scotland, who said that "attendance of young children at children's hearings is very seldom helpful and does not provide a reliable means by which to understand a child's experience or views". [78] In oral evidence, Joanna Barrett, representing NSPCC, told the Committee:

> The Bill is attempting to introduce in the civil system measures to enable children and other vulnerable witnesses to give their views in a way that is safe without their having to attend fora directly, but in our children's hearings system children are compelled to attend. … There is a complete lack of synergy in what our expectations are and what our protections are as regards the interests of children in our various legal systems.
>
> We are trying to get children out of the criminal system altogether, whereas in our hearings system we are making children be in the same room as people who, it could be argued, have harmed them.
>
> Source: Justice Committee, Official Report 7 January 2020, col. 23.

398. In a supplementary submission, the Scottish Children's Reporter Administration said that discussions were ongoing with the Scottish Government about changes to available powers of exclusion and using alternative means of attendance for children's hearings.

A register of solicitors

399. There was broad support for the proposed new special measure in sections 4 to 6 of the Bill, which could be used to prevent a litigant from personally conducting his or her case. However, some evidence raised concerns about the practical implications of the proposal to create a register of solicitors to act for litigants in these cases.

400. In its written submission, the Family Law Association stated:

> A civil case which is proceeding to evidence, tends to require months of careful preparation. The court papers or pleadings have to be in appropriate form and if a person has been representing him or herself, it is likely that the pleadings will need significant alteration or amendment to focus the issues in dispute for the proof. A solicitor taking on these cases would need considerable court experience and expertise. In practice, the Family Law Association would anticipate that sufficiently qualified solicitors may be reluctant to put themselves forward for inclusion on the list of solicitors who might be appointed.
>
> Source: Family Law Association, written submission.

401. The Family Law Association also suggested that if fee rates for these solicitors were set at legal aid rates or lower, then it would be unappealing to solicitors to be on the register given the amount of work and potential difficulties that might be involved in these cases. They also argued that the approach may lead to delays, as a solicitor becoming involved at a late stage may need to ask for the case to be postponed in order to adequately prepare.

402. While not opposed to a register, the Faculty of Advocates raised similar concerns about the practical implications of the proposals, including the need to ensure that the register had geographic coverage. [79] Nadine Martin, a solicitor with Harper Macleod LLP, said that these practical issues would have to be addressed before solicitors would feel comfortable about being on a register. [80]

403. Shared Parenting Scotland also had concerns about the proposed approach, suggesting that it would be difficult for solicitors to pick up complex cases at short notice.

404. In response to this evidence, the Minister told the Committee:

> I do not envisage the register being used very often. So far as we can tell from the data, there could be between 10 and 20 cases per year – we do not have an exact number. We would have the power to set fee rates for the lawyers who are appointed to the list, which we would do by secondary legislation. I recognise that lawyers taking on cases at a late stage might be a challenge. However, I think that the legal profession will recognise the need to protect vulnerable parties and I expect some solicitors to welcome the challenge and be willing to join the list.
>
> Source: Justice Committee, Official Report 25 February 2020, col. 24.

Special measures in child welfare hearings

405. Evidence from the Scottish Courts and Tribunals Service (SCTS), the Sheriffs' Association and the Sheriffs Principal focused on the practicalities of implementing special measures in child welfare hearings (as provided for in section 7 of the Bill). They said that the facilities for special measures were sometimes, but not always, available in the civil courts. Consequently, they suggested there may be delays while special measures were arranged for a particular hearing.

406. In its written submission, the SCTS said:

> The Financial Memorandum notes that there will be no costs to the SCTS as a result of the provision which authorise the use of special measures in proceedings such as child welfare hearings and evidential hearings. This is noted as being due to the fact the courts should already have access to facilities such as live links and screens as they are used in criminal proceedings. Whilst courts do have access to these, their use has, and is likely to continue to increase. Additionally, in a number of courts child welfare hearings take place in chambers, jury rooms and other rooms within court buildings. Facilities may therefore not always be available for use in these proceedings. Whilst the frequency in which this equipment would be used in child welfare hearings etc. is currently unclear, if its use was to be frequent, it could result in delays in the progress of cases as they may be continued to await availability of the equipment. The alternative would be to provide sufficient funding to enable additional special measures equipment to be made available in the courts.
>
> Source: Scottish Courts and Tribunals Service, written submission.

407. The Minister told the Committee that she would listen to the points that had been made by the SCTS, but "generally the infrastructure should already be in place". [81]

Conclusions and recommendations on vulnerable people in the courtroom

408. The Committee welcomes the provisions in sections 4 to 7 of the Bill, which will provide greater protection for vulnerable people involved in family cases. However, we share the concerns expressed by children's organisations and others that there appears to be a lack of consistency in the approach to special measures across different legal settings. It is often the same children and families who are involved in cases in the criminal courts, civil courts and children's hearings system. Greater consideration should be given to ensuring that they receive consistent support as they move through these different systems.

409. Recommendation: The Scottish Government should undertake a review of special measures to ensure that, where possible and appropriate, the approach to children and vulnerable individuals is the same across all criminal and civil proceedings, including children's hearings themselves.

410. The Committee heard broad support for the provisions in sections 4 to 6 of the Bill, which would create a new special measure prohibiting a litigant from personally conducting his or her case. It is important that a litigant in these circumstances is able to access legal representation and therefore we welcome the Scottish Government's proposal to create a register of solicitors to take on these cases. However, it is clear that there are still practical issues which must be addressed to ensure that solicitors are willing to be on this register. This includes setting fee rates at a sufficient level to reflect the work involved in taking on potentially complex

cases at short notice. There must also be enough solicitors appointed to act for litigants in all areas across Scotland.

411. Recommendation: The Scottish Government should work with the Law Society of Scotland and other relevant stakeholders to address the practical issues raised in evidence to the Committee about the register of solicitors to act for litigants who have been prohibited from conducting their own case.

412. Recommendation: When recruiting solicitors for the register, the Scottish Government must ensure that representation will be available for litigants across all areas of Scotland.

413. The Committee also heard concerns about the practical and resource implications of section 7 of the Bill, which would allow special measures to be used in child welfare hearings. While the facilities may be available for criminal cases, the Scottish Courts and Tribunals Service (SCTS) and the judiciary suggested current levels of provision may not be sufficient to meet increased demand if special measures are used frequently in child welfare hearings. We heard that this could lead to delays in these cases.

414. Recommendation: The Scottish Government should ask the SCTS to review the facilities available to implement special measures in child welfare hearings and, if necessary and requested by the SCTS, provide additional resources to ensure that cases are not delayed.

Contact centres

Background

415. Child contact centres provide venues for contact between children and parents, as well as other people in the child's life such as grandparents. Families can be referred to child contact centres from the sheriff court, under a contact order. They can also be referred from other sources, such as the parents' solicitors or social work departments. Some families can self-refer.

416. Two types of contact are offered at contact centres. Supported contact takes place where there is no significant risk to the child. Contact centres only record that the contact took place and not details of how it went. Supervised contact takes place in the constant presence of an independent person, with the aim of ensuring the safety of those involved. A record of the contact can be sent to the court, which can be used to inform further decisions about contact. Some centres also provide handover support, which usually means parents do not need to see each other when a child is dropped off or collected.

417. Members of Relationships Scotland are the main providers of child contact centres. These providers also offer wider services such as mediation and counselling. Relationships Scotland has 42 child contact centres across Scotland, organised through a network of affiliated, but independent, local offices. In addition, there are three independent centres in Aberdeen, Inverclyde and Glasgow that operate outwith Relationships Scotland.

418. Contact centres are run by a mixture of paid staff and volunteers, although there is a move towards employing more paid staff. According to the most recent figures from Relationships Scotland, there are 152 paid staff and 128 volunteers in Relationships Scotland's contact centres. Training is provided depending on the role being undertaken.

419. In 2017/18, Relationships Scotland's contact centres dealt with 3,412 adult clients and 1,947 child clients. This involved 3,275 supervised contact sessions (usually ordered by the court) and 8,800 supported contact sessions (requested by a court, solicitor, social work or self-referral). In addition, 6,074 handover sessions were facilitated. [82]

What the Bill does

420. Section 9 of the Bill would give the Scottish Government the power to regulate the provision of contact centres through secondary legislation (made under the affirmative procedure). This would include the power to set minimum standards in relation to training of staff and accommodation for contact centres. The Bill would not regulate the other services provided in these centres (such as mediation).

421. Section 9 would also give the Scottish Government the power to appoint a body to oversee standards for contact centres and report on them on a regular basis. The Scottish Government provided the Care Inspectorate with £56,000 in 2019/20 to

undertake a study to determine the feasibility of the Care Inspectorate regulating child contact centres. **Unfortunately, this study was not published until 3 March 2020, after the Committee finished taking evidence on the Bill. This means we have not been able to fully consider the findings or recommendations made by the Care Inspectorate.**

422. Section 9 of the Bill says that, where a court orders contact to take place in a contact centre, this must be at a regulated centre. Referrals from other sources, for example, solicitors would not have to be to a regulated centre.

423. The Scottish Government intends the new regulatory regime to be operational from April 2023. Its view is that regulation will ensure that all contact centres are safe locations for children and their families. [83] The Government has committed to a full public consultation on the regulations made under section 9 of the Bill. [75]

Evidence to the Committee

Regulation of contact centres

424. The Committee heard broad support for the regulation of contact centres, particularly from children's organisations and women's groups. This evidence recognised the important role contact centres can play in facilitating safe contact, but emphasised that there was a need for regulation to improve standards and ensure consistency in approach.

425. Stakeholders also highlighted negative experiences of contact centres which, they argued, demonstrated the need for regulation. For example, in a supplementary submission to the Committee, Children 1st stated:

> Our support workers shared significant concerns about a lack of understanding and awareness of domestic abuse, a lack of training about domestic abuse, child development and other issues and a concern about safety arrangements for both women and children who have experience of domestic abuse and for those staff working in the contact centres. They also spoke about their concern for children where their views were not fully taken into account or whose worries about seeing a parent were ignored and where they were exposed during contact sessions to disturbing or unregulated behaviour from parents that was not prevented by contact centre staff.
>
> We are clear that this is the experience of particular families that we support in our very specific services relating to domestic abuse and family support in two particular geographical areas. We do not have experience of all contact centres across Scotland. In Children 1st's view, this supplementary evidence very clearly makes the case for the regulation of contact centres as proposed by the Children (Scotland) Bill, including – as we have stated in our previous evidence – investment in widespread training and support for contact centre staff as well as in the material infrastructure.
>
> Source: Children 1st, supplementary written submission.

426. Evidence to the Committee suggested a number of necessary features of any regulatory regime for contact centres, including:

- training on the dynamics of domestic abuse and the way in which perpetrators may use contact arrangements to continue to exert coercive control;
- training on child development, communication and trauma;
- improvements to physical premises to increase safety and enjoyment, such as CCTV, separate entrances and waiting areas for parents, and more child-friendly spaces and activities for different age groups;
- inspections which involve speaking directly to the children who use the contact centres; and
- clear and child-friendly complaint policies and procedures.

427. Some evidence also suggested that regulation should be used as an opportunity to clarify the role of contact centres and their staff, particularly in situations where there are concerns about what is happening in a centre. Children 1st and Scottish Women's Aid were among those who said that currently staff do not always intervene if a child is distressed. The Committee heard that these sorts of practice issues should be addressed through regulation and the associated training and guidance for contact centre staff.

Funding for contact centres

428. While there was broad support for the regulation of contact centres, many stakeholders also emphasised the need for regulation to be proportionate and for sufficient funding to be provided to avoid centres having to close.

429. Relationships Scotland, the main provider of contact centre services in Scotland, was supportive of statutory regulation. However, it argued that for child contact centres to continue to operate, they need to be funded adequately. In its submission to the Finance and Constitution Committee, Relationships Scotland suggested that some of the costs of regulation and the set-up costs for a regulatory body seem disproportionate to the operating costs of the centres. It argued that "a balance needs to be made between the funding costs associated with regulation of child contact centres in this Bill and the funding for operation of child contact centres".

430. Other stakeholders (including some children's organisations, the judiciary, legal professionals and others such as Social Work Scotland) were concerned that, if the financial burden of regulation is too great, centres may have to close. For example, the Children's Commissioner argued that "standards should not be excessive, nor should they result in any significant impact on the availability of provision". [17]

431. Similar points were made by the Family Law Association and Law Society of Scotland, who argued that regulation must be proportionate and adequate funding provided to ensure that centres do not have to close. The Family Law Association raised particular concerns about the impact of regulation in rural areas, where families can already face difficulties accessing contact centres.

432. In her report for the Committee, Dr Barnes Macfarlane suggested that any reduction in the availability of contact centres would raise concerns in terms of compliance with Article 3 UNCRC (child's best interests). [84]

433. More broadly, evidence to the Committee highlighted ongoing uncertainties about the future funding arrangements for contact centres. Over the past six years, Relationships Scotland has received around £750,000 in funding annually to run child contact centres. This funding ended on 31 March 2020.

434. Relationships Scotland is currently in discussion with the Scottish Government about future funding arrangements for their contact centres. In oral evidence, Stuart Valentine, Chief Executive of Relationships Scotland, told the Committee that very few funders in Scotland could provide the level of support previously provided by the Big Lottery. He said that while there are, and would continue to be, a range of funding sources for contact centres, Relationships Scotland would not be able to make up the loss of £750,000 through, for example, a range of applications to other charitable trusts. [85]

435. The Scottish Government will provide Relationships Scotland with interim funding of £200,000 from 1 April 2020 until the end of June 2020, to support Relationships Scotland's contact centres during that period.

436. Some evidence suggested that it may not be appropriate for contact centres to remain a charitable, rather than statutory, service, particularly once the new regulatory regime is in force.

437. In its written submission, Children 1st stated:

> We also understand that there is currently no statutory funding available for contact centres, so centres are dependent on precarious funding streams in order to deliver services. Children 1st would welcome discussion about how this may impact on the quality of safe contact arrangements and what could be better put in place to ensure continuity and sustainability.
>
> Source: Children 1st, written submission.

438. Dr Gillian Black, an academic and trustee of a charity providing contact centres, said:

> I am uncomfortable with the current situation whereby the state, through the courts, will specifically refer families to contact centres (and in some cases, failure to comply with a court order in that regard could constitute contempt of court), but yet the state does not actually provide contact centres for families to use. … if they are to be regulated, then they will need far more financial support than is currently available: their charitable status does not sit easily with a greater degree of oversight, regulation, and use by the state.
>
> Source: Dr Gillian Black, written submission.

439. The Scottish Government estimates that the total set-up costs for contact centres because of regulation will between £0.76m - £2.52m, with ongoing costs of £0.32m per year. However, the Financial Memorandum does not suggest that any funding will be provided by the Scottish Government to meet these costs. Nor does it suggest that there will be any changes to how contact centres are currently funded.

440. In oral evidence, the Minister told the Committee that the Government is actively looking at the "on-going sustainability of funding for contact centres" but could not say anything further at this stage about future funding decisions. [86]

Source of referral

441. For Relationships Scotland contact centres in 2017/18, 39% of referrals were from court, 40% from solicitors, 16% self-referrals, and 5% from other agencies.

442. As noted earlier, the Bill only requires referrals from courts to be to regulated centres. Referrals from other sources, such as solicitors, could be to unregulated centres.

443. The Scottish Government says that it "would expect parties and solicitors to use a regulated centre". [87] The Family Justice Modernisation Strategy (at paragraph 3.19) suggests that the Scottish Government will write to the Law Society of Scotland and the Faculty of Advocates to seek their views on issuing guidance "encouraging" lawyers to refer clients to a regulated centre.

444. In its evidence to the Committee, Relationships Scotland said that this two-tier approach would be "impractical". Provided sustainable long-term funding is available for contact centres, it would support a requirement that all referrals (regardless of source) must be to a regulated centre. [88]

445. Scottish Women's Aid and ASSIST also argued that solicitors should be under a duty to refer clients to regulated centres, in order to ensure consistent practice and quality of provision. Scottish Women's Aid said that solicitors being encouraged to refer to regulated centres was not sufficient.

446. In response to this evidence, the Minister said she agreed that all contact referrals should be made to a regulated centre but was not sure how the Government could enforce solicitors to do so. [89]

Role of contact centres

447. Some organisations, including Scottish Women's Aid, while supportive of regulation, raised more fundamental questions about the role of contact centres. They questioned whether contact centres, and in particular supervised contact, should be used in domestic abuse cases where, without professional supervision, such contact could be unsafe.

448. In oral evidence, Marsha Scott, Chief Executive of Scottish Women's Aid, said to the Committee:

> if the first principle of contact is that it cannot and should not be ordered unless we are absolutely clear that it is safe for the mother and the child – or the victim and other victims who are children – and in the child's best interests, why do we need an industry of contact centres to protect children? If we have any concerns about their safety, why are we allowing contact?
>
> Source: Justice Committee, Official Report 7 January 2020, col. 42.

449. In Scottish Women's Aid's view, even regulated contact centres should not be used to facilitate contact which is in itself unsafe for women and children.

450. Expressing similar views, Children 1st said in its written submission:

> Contact arrangements themselves should be the focus of scrutiny initially, not the contact centre. If contact is unsafe for survivors and children, it should not happen, regardless of potential changes and regulation relating to contact centres. This means ensuring that children's voices are heard and their best interests are taken into account. If they express a view that they are worried about contact arrangements or feel unsafe, they must be taken seriously – even if they change their mind.
>
> Source: Children 1st, written submission.

451. Other evidence to the Committee, however, suggested that contact centres can play an important role in facilitating contact in a wide range of circumstances and that the court did not just use supervised contact due to safety concerns. Isobel Bilsland, from Relationships Scotland Borders, told the Committee that supervised contact could also be ordered, for example, in cases where a child has not seen a parent for a long time. [90] Similar points were made by other stakeholders including the Family Law Association and Grandparents Apart UK.

452. In its evidence to the Committee, Relationships Scotland emphasised that it is the court's decision whether or not to order contact in a contact centre. However, once that contact is ordered, Relationships Scotland would undertake its own risk assessment and would not facilitate contact if this was assessed to be unsafe. In such circumstances, Relationships Scotland would tell the court that it could not accept the referral. Stuart Valentine told the Committee that "the safety of everyone involved is our first and main priority". [91]

453. However, Relationships Scotland also argued that more could be done to ensure that the courts only refer children and families to contact centres when it is safe to do so.

454. In its 2018 consultation, the Scottish Government asked whether it should do more to promote the use of domestic abuse risk assessments once cases are in court. Relationships Scotland expressed disappointment that no provision on domestic abuse risk assessments appears in the Bill, nor is any further work in this area set out in the Family Justice Modernisation Strategy. In a supplementary written submission to the Committee, Relationships Scotland said:

> We are strongly of the view that specialist risk assessment should be undertaken where concerns about safety of children or adults are raised. This should be part of the process of protecting victims of domestic abuse, which includes children, and ensuring information is communicated effectively between civil and criminal courts.
>
> Source: Relationships Scotland, supplementary written submission.

455. Relationships Scotland argued that such assessments could play a "vital role" in ensuring "that only safe referrals are made to child contact centres and that contact only takes place when it is safe to do so". [92] It suggested that there should be a pilot to evaluate the use of specialist risk assessments.

456. In response to Relationships Scotland's evidence on risk assessments, the Minister told the Committee she was not clear on what provision could be included in the Bill, but that she would consider further what could be done in this area. [89]

457. Relationships Scotland also suggested that improvements could be made in the information provided by the courts to contact centres once contact has been ordered. In oral evidence, Stuart Valentine told the Committee:

> There are sometimes gaps in the information that our contact centres get from the court. They often do not get the full picture and are faced with the task of making sure that they get as much information as possible. There is certainly a weakness in the process in that the courts do not give a full picture of all the circumstances that it would be best for us to be aware of before we go ahead with contact.
>
> Source: Justice Committee, Official Report 14 January 2020, col. 36.

Care Inspectorate feasibility study

458. As discussed earlier, the Scottish Government asked the Care Inspectorate to undertake a study to determine the feasibility of it regulating child contact centres. The report from this study was not published until 3 March 2020, after the Committee finished taking evidence on the Bill, and therefore we have not been able to give detailed consideration to its findings.

459. The report contains an analysis of the benefits and risks of regulating contact centres. The benefits identified include:

- improvements to the standards of premises;
- increased assurance of staff practice;
- more comprehensive provision of staff training; and
- public assurance and information.

460. The report, however, states that there will be "some significant risks and challenges that will need to be considered should a decision be made to regulate child contact centres". Risks identified include:

- limitations of existing and available premises;
- cost implications for services;
- complexities around providing training for volunteers; and
- the "significant" risk that some services may close and some staff may leave.

461. The report nonetheless recommends that contact centres should be regulated. It makes a number of other recommendations, including that:

- the Scottish Government considers making funding available to support the provision of contact centre staff training and the development of contact centre accommodation;
- the appointed body develops a bespoke quality improvement framework for the scrutiny of contact centres, subject to being resourced to do so; and
- the Scottish Government considers the appointment of a professional oversight body for contact centres.[xxiv]

Conclusions and recommendations on contact centres

462. The Committee heard that contact centres can play an important role in facilitating contact which might not otherwise be possible. However, we also heard concerns about the current safety of contact centres for children and families. We therefore strongly welcome the proposal in the Bill to regulate contact centres. Consistent standards for, for example, training and premises should help to ensure that contact centres are safe for all those who use them.

463. However, it is clear from the evidence we heard that there are significant concerns about the impact of regulation on the ability of contact centres to continue to operate. The closure of contact centres could mean families who need to use them to maintain contact are no longer able to do so, which would not be in the best interests of the children involved.

464. The Financial Memorandum suggests that there could be significant costs for contact centres in meeting the new regulatory requirements, yet no additional funding is proposed. We do not consider that legislation should be passed if it is not clear that there are sufficient means to fund the changes proposed. We also note that in its feasibility study of regulation, the Care Inspectorate recommended that the Scottish Government considers making funding available to meet the costs of regulation. The study, however, made no comprehensive assessment of the costs that may be involved.

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xxiv The report suggests that this could be similar to the National Association of Child Contact Centres, which is the supporting membership body for 350 child contact centres and related services in England, Wales, Northern Ireland and the Republic of Ireland.

465. There is also the broader issue of the future funding arrangements for contact centres, as the funding provided by the Big Lottery to Relationships Scotland, the main provider of contact centres in Scotland, has now ended. This leaves a significant gap in the current funding available for contact centres. Moreover, the money that has previously been provided by the Big Lottery funds existing services and not any future, enhanced service under the proposed new regulatory regime. The Scottish Government has not yet made any public comment on how the gap in the existing funding model will be filled in the absence of money from the Big Lottery.

466. Some evidence also suggested that, particularly in light of the proposed regulatory requirements, it is no longer appropriate for contact centres to rely on charitable rather than statutory funding. We note that discussions are ongoing between the Scottish Government and Relationships Scotland about future funding arrangements. However, we also note that, to date, there have been no announcements on the outcome of these discussions prior to the Parliament's Stage 1 consideration of the Bill.

467. Recommendation: The Scottish Government should before Stage 2 provide details on how it will ensure that sufficient funding will be available for contact centres to meet both their existing level of service provision and the new regulatory requirements (including improvements to premises and additional training).

468. Recommendation: The Scottish Government should before Stage 2 provide the Committee with an update on its ongoing discussions with Relationships Scotland about securing a sustainable funding arrangement for child contact centres in Scotland.

469. Recommendation: The Scottish Government should before Stage 2 set out its detailed response to the recommendations made in the Care Inspectorate's feasibility study report.

470. The Bill currently only requires the courts to refer families to regulated contact centres. Referrals from other sources, including solicitors, could continue to be made to unregulated centres. We heard that this two-tier approach would not be workable in practice. Moreover, given that 40% of referrals to contact centres come from solicitors, we are concerned that this approach could undermine the aim of ensuring that contact takes place in a safe and secure environment for all children and families. We are not persuaded that issuing guidance for solicitors will be sufficient to address these concerns.

471. Recommendation: The Scottish Government should amend the Bill at Stage 2 so that referrals to contact centres from other sources, including solicitors, must be to a regulated centre.

472. We recognise the concerns expressed by Scottish Women's Aid and others that, even when regulated, contact centres should not be used to facilitate unsafe contact. We also heard from Relationships Scotland that, while safety is the primary concern for contact centres, further measures could be put in place to ensure that the court only orders contact when it is safe to do so. In particular, Relationships Scotland suggested that more should be done to promote the use of domestic abuse risk assessments by the courts. It also suggested that more information should be shared by the courts with contact centres when referrals to contact centres are made.

473. Recommendation: The Scottish Government should work with the Scottish Courts and Tribunals Service, Scottish Women's Aid, Relationships Scotland and others to address the concerns raised about the safety of court referrals to contact centres. This should include piloting and evaluating the use of domestic abuse risk assessments by the courts when making decisions about contact. This work should also include exploring how to improve the information provided by the courts to contact centres at the point of referral about the detailed circumstances of a case, particularly where it involves domestic abuse.

Breaches of court orders

What the Bill does

474. Currently, if someone believes that a contact order has been breached, the person can go back to court and ask the court to find the person breaching the order in contempt of court. In the sheriff court, contempt of court has a maximum penalty of three months' imprisonment, a fine up to £2,500 or both. Imprisonment is used rarely.

475. The person can also go back to court and ask for the existing order to be varied or discharged. Where the court is considering varying or discharging an existing order, the welfare of the child remains the paramount consideration.

476. Section 16 of the Bill provides that, where the court is satisfied that a person has breached a court order, the court must seek to establish the reasons for that failure. This duty would apply where the court is considering whether to:

- find a person in contempt of court for failure to obey an order; or
- vary or discharge an order on the basis (solely or partly) that a person has failed to obey it.

477. Section 16 goes on to say that the court may appoint a child welfare reporter to investigate and report on the person's failure to comply with an order.

478. Section 16 would apply to both final orders of the court and interim orders.

479. The Scottish Government considers that "understanding the reasons behind non-compliance could help the court to ensure the order remains in the child's best interests". [93] The Policy Memorandum (at paragraph 196) suggests that non-compliance should be investigated by the court in the first instance. If a more detailed investigation is required, then this may require a child welfare reporter to be appointed.

Evidence to the Committee

Necessity of section 16

480. Evidence to the Committee was divided on whether section 16 of the Bill is necessary or would add anything to existing practice.

481. Those in favour of section 16 included children's organisations and women's groups. Children 1st, for example, suggested that there was "anecdotal evidence" that the courts do not consistently investigate the reasons for non-compliance with contact orders. [94] Similarly, the Children's Commissioner said that there was "mixed practice" and that the organisation had "heard of cases in which the reasons behind contact not happening were not properly investigated". [95]

482. Scottish Women's Aid argued that section 16 of the Bill would act as an important safeguard in domestic abuse cases. In its written submission, Scottish Women's Aid stated:

> in the vast majority of cases, women and children who have experienced domestic abuse who do not comply with court-ordered contact do so for good reason: they fear for their safety. We believe that investigation into non-compliance could help to highlight unsafe contact arrangements and protect victims of domestic abuse if the investigation is carried out by professionals who understand the dynamics of domestic abuse, coercive control, and the effects of trauma.
>
> Source: Scottish Women's Aid, written submission.

483. On the other hand, evidence from the Faculty of Advocates, the Family Law Association and the judiciary suggested that the provision would not add anything to current practice, as the courts already investigate the circumstances behind breaches of contact orders. This evidence also noted that the courts already have the power to appoint a child welfare reporter at any stage of a case, including where there has been an alleged breach of a court order. These stakeholders argued that section 16 of the Bill is therefore unnecessary.

484. They also expressed concern that section 16 could encourage litigants to try to reopen issues that had already been decided by the court or encourage people to disobey court orders. The Family Law Association, for example, said that it was important to ensure that any investigation does not simply lead to a "rehashing" of matters already decided by the court. [34]

485. In their submission, the Senators of the College of Justice said that the provision could encourage people to disobey a court order "in order to draw attention to what they perceive to be its injustice, and so indirectly seek to bring about its variation or discharge". [96] A similar point was made by the Sheriffs Principal, who also said that they were "unaware of any empirical evidence which suggests that the manner in which sheriffs deal with such circumstances is deficient such that a change in the law is required". [37]

486. In oral evidence, Sheriff Tait told the Committee:

> If a parent considers that the decision is not in the best interests of the child for whatever reason, they have the right to appeal the order. It is important that a proposed section of the Bill does not confuse an appeal against a decision with the proceedings that look at the failure to obtemper [obey a court order].
>
> Source: Justice Committee, Official Report 20 February 2020, col. 8.

487. In response to this evidence, the Minister said that the courts do already have the power to investigate the reasons behind non-compliance but suggested that practice varied across the country. She added that section 16 would place a "clear duty" on the courts to establish why an order has not been complied with. [97]

Views of the child

488. The Policy Memorandum (at paragraph 198) states that the Government would "expect" that the court would need to obtain the views of the child as part of any investigation under section 16 of the Bill.

489. However, several children's organisations argued that there should be an explicit requirement to this effect on the face of the Bill. Children 1st, for example, highlighted that children's views about contact may change over time and suggested that section 16 should therefore make it clear that the views of the child must be sought.

Alternative responses to breaches of court orders

Alternative sanctions for contempt of court

490. As discussed above, currently if someone believes a contact order has been 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. The sanctions available to the court if a person is found in contempt are imprisonment and/or a fine.

491. In its 2018 consultation, the Scottish Government consulted on whether primary legislation should provide for alternative sanctions for a person found in contempt following a breach of a contact order. Alternatives suggested in the consultation included unpaid work, attending a parenting class, or paying compensation to the person affected by the breach.

492. No proposal for alternative sanctions appears in the Bill. In the Policy Memorandum (at paragraph 205), the Scottish Government suggests that there are "concerns that requiring a person to attend a parenting class or do unpaid work may take a parent away from a child and could have a negative impact on the child".

493. However, some evidence to the Committee argued that alternative sanctions should be included in the Bill, in order to encourage compliance with court orders and to give the courts more options when responding to breaches. For example, Shared Parenting Scotland supported additional options including unpaid work and parenting classes. Relationships Scotland also suggested that an option to require someone to attend parenting classes could have a positive impact on a child's welfare which would "far outweigh any minimal time that the parent is away from their child". [98]

494. In its written submission, the Sheriffs' Association suggested additional sentencing powers for contempt of court would be welcome, such as a community payback order with the requirement to engage with social work, a requirement to attend parenting classes, or a deferral of sentence for good behaviour to allow contact to take place.

495. Other evidence, however, expressed similar concerns to those set out in the Policy Memorandum, namely that imposing sanctions such as unpaid work on a parent may not be in the best interests of the child. Professor Sutherland, for example,

suggested that "a lot of the solutions are likely to have a disproportionate impact on people who are already financially struggling". [99] Nadine Martin, a solicitor from Harper Macleod LLP, similarly questioned whether it helps the child to penalise the parent with whom the child lives. [100]

Problem-solving approaches

496. Another suggestion made by some stakeholders was that the Bill should provide for the use of problem-solving approaches to respond to breaches of contact orders. This was not an option specifically consulted on by the Scottish Government in 2018.

497. One option, suggested by Shared Parenting Scotland, would be to introduce parenting co-ordinators to support families to resolve issues which lie behind a breach. According to Shared Parenting Scotland's written submission:

> Parenting co-ordination is defined by the Association of Family and Conciliation Courts as "a child focussed alternative dispute resolution process in which a mental health or legal professional with mediation training and experience assists high-conflict parents to implement their parenting plan by facilitating the resolution of their disputes in a timely manner, educating parents about children's needs, and, with prior approval of the parents and/or the court, making decisions within the scope of the court order or appointment contract."
>
> Source: Shared Parenting Scotland, written submission.

498. The Scottish Government previously explored introducing a role similar to the parenting co-ordinator role suggested by Shared Parenting Scotland. During the parliamentary passage of what became the 2006 Act, the then Scottish Executive announced a family contact facilitator pilot project. The idea was that the facilitator would help families resolve issues around contact (where there was a breach or risk of breach). A procurement exercise was run but no tender was received which met the requirements. The Scottish Government says in the Policy Memorandum (at paragraph 202) that, based on this experience, it considers "that a child contact facilitator role could be too ambitious".

499. Other stakeholders supported greater use of alternative dispute resolution (ADR) methods in responding to breaches of contact orders. The Children's Commissioner, for example, suggested that mediation or family group decision making could be used, while recognising that such methods may not be appropriate in cases involving domestic abuse.

500. Professor Sutherland and Dr Whitecross suggested other difficulties in using ADR to deal with non-compliance, as there may be a high level of conflict and those involved may be too entrenched in their positions. [101]

501. There is currently a court rule which allows the court to refer a section 11 case to mediation at any stage.[xxv] In theory, this rule is potentially broad enough to allow the court to refer people to mediation at the point of a breach of a contact order, although the Committee heard no suggestion that this currently happens in practice.

[xxv] See Ordinary Cause Rule 33.22.

502. In her evidence to the Committee, the Minister suggested that it may be better to signpost people to ADR rather than to include any provision in the Bill. [102] The Scottish Government has also highlighted concerns that mediation is not a viable option where there has been domestic abuse. [103]

Scottish Government review of evidence from international jurisdictions

503. On 6 February 2020, towards the end of the Committee's evidence-taking on the Bill, the Scottish Government published a review of the evidence from international jurisdictions relating to the enforcement of contact orders. This was based on a "rapid" review of existing research literature, rather than any new research that has been conducted.

504. Key findings from the review included:

- the majority of courts across international jurisdictions have the power to use a variety of different interventions and sanctions in response to breach of contact orders, however in practice courts use a limited range of options, depending on the reasons behind the breach of order;
- problem-solving interventions are used in the majority of child contact enforcement cases across international jurisdictions;
- problem-solving interventions include parenting support (for example, in England and Wales, courts can refer parents to a Separated Parents Information Programme); settlement (where the court amends the existing order, although courts rarely use this to punish wilful non-compliance); safeguarding/protective measures (across jurisdictions, courts often use contact centres to supervise contact and also employ a number of evidence gathering processes to investigate concerns); and child-led approaches (where children's views are sought by the court);
- across jurisdictions, punitive responses (such as unpaid work, fines and imprisonment) are rarely used;
- some jurisdictions offer preventative interventions to reduce the number of cases that reach or return to the family court (for example, educating parents on the court process and court orders and providing information on alternatives to court). Post-order counselling is used in some jurisdictions.

505. The review, however, noted that the evidence base on the enforcement of contact orders within Scotland, the UK and other jurisdictions is limited. The findings of the review itself were based on a small number of studies, many of which are at least tem years old.

Conclusions and recommendations on breaches of court orders

Necessity of section 16

506. Evidence to the Committee was divided on the merits of section 16 of the Bill, which would require the courts to investigate the reasons why someone has breached a court order made under section 11 of the 1995 Act. On the one hand, we heard that section 16 could ensure more consistent practice in this area and, in particular, could act as an important safeguard in domestic abuse cases. On the other hand, we heard that the provision is unnecessary as the courts already investigate the reasons for non-compliance. Moreover, some legal professionals and the judiciary suggested that section 16 could encourage parties to disobey court orders in the hope of reopening issues already decided by the court.

507. Recommendation: The Scottish Government should before Stage 2 set out further details as to why it considers the provision in section 16 of the Bill is necessary and, in particular, any empirical (not anecdotal) evidence it has to support this view. The Scottish Government should also set out how it will address the concerns expressed by the judiciary and others, namely that section 16 could encourage people to disobey court orders in order to reopen issues already decided by the court.

508. Recommendation: If section 16 of the Bill is retained, the Scottish Government should amend it at Stage 2 to make it clear that, as part of any investigation, the views of the child or children involved should be sought, where they wish to give their views.

Alternative approaches

509. It is clear from the evidence we heard that there is no easy solution in cases where people refuse to comply with court orders relating to contact. While alternative sanctions, such as unpaid work or attending a parenting class, could provide the courts with more flexibility when responding to a breach, we are not persuaded on the basis of the evidence that we heard that such an approach would be in the best interests of the child.

510. We also recognise the difficulties in using alternative dispute resolution (ADR) methods, such as mediation, in high-conflict cases. Moreover, as we have said earlier in this report, the use of ADR should not put victims of domestic abuse and their children at risk. However, we do think that more consideration could be given to encouraging, in appropriate cases, the use of ADR as an option to deal with breaches of contact orders.

511. Recommendation: The Scottish Government should before Stage 2 provide details on the steps it will take, as part of its wider commitment to support the use of ADR, to encourage where appropriate people to use ADR to resolve issues around breach of contact orders.

Delay in disputes affecting children

What the Bill does

512. Research carried out for the Scottish Government in 2010 found that 39% of child contact cases in the sheriff courts were still active after 18 months. More recent data from the Scottish Legal Aid Board similarly found that, in contact and residence cases where litigants received legal aid, 40% of cases took over 18 months.

513. Senior judges have expressed frustration with delays in family cases in the sheriff courts. In 2017, the Court of Session said:

> The time taken to resolve disputes about contact should be measured not in years but in weeks or, at most, months.
>
> Source: SM v CM, 2017

514. Section 21 of the Bill says that, when considering a child's welfare, the court is to "have regard to" any risk of prejudice to the child's welfare that delay in proceedings would pose.

515. Section 21 does not specify the length of delay that would have a negative effect on the child's welfare. The Explanatory Notes to the Bill (at paragraph 85) say this is because this would vary from case to case.

516. Section 21 would apply to cases under section 11 of the 1995 Act. It would also apply to section 16 of the 1995 Act (which relates to various child protection measures which can be granted by the courts); children's hearings and court proceedings relating to children's hearings; and adoption cases. It would not apply to permanence proceedings.

517. The Scottish Government's view is that delays in court proceedings will usually not be in the best interests of the child. It argues that an express provision in primary legislation "complements" ongoing work by the Scottish Civil Justice Council to reduce delays. [104]

518. The Scottish Civil Justice Council is the independent body responsible for making recommendations to the Lord President on proposed new court rules, which cover the more detailed aspects of how courts operate.

519. Some relevant changes have already been made to the existing court rules for section 11 cases, but these are only for the small minority which go to proof (a full hearing on the evidence). For the vast majority of section 11 cases resolved by child welfare hearings, work has been ongoing in the Scottish Civil Justice Council since 2017, with the aim of proposing additional court rules on case management.[xxvi]

520. The Scottish Civil Justice Council's recommendations to the Lord President on new court rules on case management in family cases are not yet finalised and therefore not enough details are known to assess their likely impact.

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xxvi Case management involves the pace of litigation being managed by sheriffs and/or fixed timescales, as opposed to being determined by litigants and their solicitors.

Evidence to the Committee

521. Some stakeholders, including Children 1st, NSPCC Scotland, Clan Childlaw and Shared Parenting Scotland, welcomed section 21 of the Bill. They argued that delays are a common feature of the current system and can have a negative impact on children. CELCIS, while supportive of section 21, suggested that it should be extended to cover court proceedings in relation to permanence orders.

522. Legal professionals and the judiciary, however, said the negative impact of delay is already considered by the courts. They argued that section 21 is therefore unnecessary and that the focus instead should be on addressing the root causes of delay.

523. Professor Sutherland, for example, told the Committee that "simply articulating the problem in statute does nothing to solve it". While she accepted that the provision might not do any direct harm, she questioned whether it was harmful for "us to feel as though we have addressed something when we have not". [105]

524. The Law Society, Faculty of Advocates, and Family Law Association all suggested that the issue of delay would be more effectively resolved through court rules on case management.

525. This evidence also suggested that section 21 of the Bill could in fact be detrimental to a child's welfare if it resulted in speed being prioritised over, for example, robust enquiries into the child's circumstances. Professor Sutherland made this point in her evidence to the Committee, when she said:

> for cases that are incredibly complex I would be reluctant to create a climate in which there might be pressure for undue haste, when we really need properly to consider a child's life and what is going on in it, and to take time to reach the best decision.
>
> Source: Justice Committee, Official Report 17 December 2019, col. 33.

526. A similar argument was made by the Summary Sheriffs' Association in its written submission, which stated:

> Some delay is unavoidable and indeed necessary, for example to allow for sufficient preparation of the case to be presented to the court and for any investigation needed, including by a child welfare reporter. If this provision is to be retained, it may be beneficial to specify undue delay.
>
> Source: Summary Sheriffs' Association, written submission.

527. On the other hand, in her report for the Committee, Dr Barnes Macfarlane said of section 21:

> The focus of the section is delay that is prejudicial to the child – rather than unavoidable, or necessary delay in a family case. This is compatible with the key aims of the Bill and is not, on the face of it, inconsistent with ensuring a fair balance of rights.
>
> Source: Dr Barnes Macfarlane, Balancing the Rights of Parents and Children Report, page 60.

528. The Scottish Government acknowledges in the Policy Memorandum (at paragraph 251) that "complex cases may not be resolved quickly". However, in its view, the provision in the Bill "strikes an appropriate balance by imposing a duty on the court to have regard to the risk that delay would pose to the welfare of the child, without being prescriptive about any decision the court must make". The Scottish Government also highlighted that a similar provision exists in England and Wales. [xxvii]

529. In her evidence to the Committee, the Minister accepted that section 21 would not solve the issue of delays by itself but would "send a clear signal across the country that delays in family cases can prejudice children's welfare". [106]

530. In a subsequent letter to the Committee, the Minister provided further details on the work being undertaken by the Scottish Civil Justice Council on case management rules in family cases. Draft rules were last considered at a meeting on 27 January 2020 and the Minister said she hoped that new rules could be in place by the end of 2020.

Conclusions and recommendations on delay in disputes affecting children

531. The Committee heard that delays remain a common feature in the family courts and that such delays can have a negative impact on children. While section 21 could send a signal that delays can prejudice a child's welfare, we also heard that this would do very little to address the root causes of delays in family cases.

532. We therefore welcome the ongoing work being undertaken by the Scottish Civil Justice Council on new court rules for case management in family actions. The Committee notes, however, that our consideration of the merits and necessity of section 21 of the Bill would have been easier if a finalised (or near finalised) version of these new rules had been available.

533. We also heard some concerns that section 21 of the Bill could encourage undue haste in family cases, which may be detrimental to a child's best interests.

534. Recommendation: The Scottish Government should respond to the concerns raised about section 21 of the Bill and provide details of other measures that will be taken to address the root causes of delays in family cases. Going forward, the Scottish Government should provide regular updates to the Committee on the progress of these measures, including the new case management rules being developed by the Scottish Civil Justice Council.

[xxvii] 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.”

Contact with siblings

What the Bill does

535. Section 10 of the Bill places a duty on local authorities in relation to looked after children (i.e. those in the care of the local authority) and their siblings. Section 10 says that a local authority must "take such steps to promote, on a regular basis, personal relations and contact" between a child and his or her siblings, as appear to be "both practicable and appropriate".

536. This replicates an existing statutory duty on local authorities relating to the parents of looked after children.[xxviii]

537. For the purposes of section 10, a sibling includes:

- a sibling "by virtue of adoption, marriage or civil partnership and whether of the half-blood or of the whole-blood"; and
- "any other person with whom the child has lived or is living and with whom the child has an ongoing relationship with the character of a relationship between siblings".

538. The aim of section 10 is to ensure that priority is given to sibling relationships at the earliest point when children are being taken into care. [107]

Evidence to the Committee

539. Most evidence to the Committee supported section 10, including evidence from the Care Inspectorate, the Children's Commissioner, Children 1st, CELCIS, Stand Up For Siblings, and Who Cares? Scotland. This evidence emphasised that sibling relationships continue to be particularly vulnerable to disruption when children come into care. Who Cares? Scotland, for example, told the Committee that up to 70% of children in care are separated from brothers or sisters when they enter care. [108]

540. Stakeholders also highlighted the negative impact that separation and lack of contact with siblings could have on a child. The most powerful testimony on this came from Oisín King, a member of Who Cares? Scotland, who was himself separated from his sister when he went into care. Oisín told the Committee that he "took the separation as a loss; it was something like a death". [109]

541. Oisín also described his experience of contact with his sister once he was in care as being "very structured" and "stifling". He told the Committee:

> I think that contact, as we currently understand it, does not create the vital space for the love between brothers and sisters to flourish and develop.
>
> Source: Justice Committee, Official Report 21 January 2020, col. 18.

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xxviii See s.17(1)(c), Children (Scotland) Act 1995.

542. Those in support of the duty in section 10 thought that it would ensure that greater priority is given to sibling relationships, as well as provide an important mechanism to hold local authorities to account.

543. NSPCC Scotland, on the other hand, expressed some concerns that the duty in section 10 could be interpreted as a presumption in favour of contact. It argued that "the focus should instead be on making considered and informed decisions on a case by case basis that focus on the best interests of all children involved". [78] NSPCC Scotland emphasised the need for skilled professionals to assess whether contact is in the best interests of all children, as well as the need for appropriate support where sibling contact is taking place.

Resources to implement the duty in section 10

544. Stand Up For Siblings, Who Cares? Scotland, Clan Childaw and CELCIS all expressed concern that the Financial Memorandum does not set out any cost implications for local authorities in implementing the duty in section 10.

545. These stakeholders emphasised that the main reason siblings are separated and have limited contact at present is due to resources. They argued that in many circumstances, increased promotion and support of sibling relationships will involve additional financial resources.

546. The Financial Memorandum, on the other hand, suggests that there are no resource implications for section 10 because no new burden has been created by the duty. Instead, it says that the duty gives "greater prominence" to the obligations already placed on local authorities to protect the Article 8 ECHR rights of children to family and private life, which includes promoting contact. [110]

547. In response to this, Stand Up For Siblings said in its written submission:

> this argument fails to hold, as by virtue of the legislative advancements proposed, it is clearly recognised that the current protection of siblings' rights to contact are not being upheld satisfactorily.
>
> Source: Stand Up For Siblings, written submission.

548. Social Work Scotland, while not disagreeing with the principle of promoting contact with siblings, said that without significant, more fundamental changes in the structure and resourcing of the care system, realising the policy aim in practice may be difficult. It argued that the duty in section 10 would likely place "considerable new burdens on local authority workers" and that there "is not the capacity within the current social work profession to accommodate additional tasks without cost elsewhere". [111]

549. In oral evidence, Ben Farrugia, representing Social Work Scotland, told the Committee that the Bill "will possibly change only people's expectations of what they should receive and experience, but not the reality". [112] When asked whether the issue was more one of practice rather than resources, he argued that the two could not be separated. He told the Committee:

> Cultures emerge and are sets of learned and adapted behaviours among workers, which have come about because of their environment. People have to adapt to their situation. If we really want to change culture, we have to attend to the things that create the culture. Having really large caseloads and having limited spaces to facilitate contact arrangements and so on all inform how we work.
>
> Source: Justice Committee, Official Report 21 January 2020, col. 19.

550. Social Work Scotland urged the Scottish Government to work with COSLA and others to undertake a more detailed financial assessment of the changes in the Bill, and to commit to resourcing both the implementation and delivery of them.

551. In its written submission, COSLA also expressed concerns about local government capacity to meet the increased workload and resource implications associated with section 10.

552. Towards the end of the Committee's evidence-taking on the Bill, the Independent Care Review published its report. The Promise, which sets out the foundations for the overall new approach for the care system, states:

> Where living with their family is not possible, children must stay with their brothers and sisters where safe to do so and belong to a loving home, staying there for as long as needed.

553. The Scottish Government has committed to delivering the "radical overhaul" demanded by the Review. [113] The initial focus will be on developing a plan to implement the Promise. Work on a budget for delivering the first year of that plan will take place between November 2020 and March 2021.

554. In oral evidence, the Minister reiterated that the Scottish Government does not consider that the duty in section 10 places a new burden on local authorities. She said:

> Section 10 strengthens a piece of practice that should already be happening … Local authorities have to act in support of the welfare of the children they have responsibility for. We know that practitioners already recognise the protection of relationships between brothers and sisters as something that is necessary for the welfare of children who are in care. … The provision is designed to reinforce that responsibility for maintaining sibling relationships. We know that local authorities have signed up to the Care Review's Promise to deliver the changes to the system that are needed. If they have difficulties implementing the measure, we stand ready to work with them.
>
> Source: Justice Committee, Official Report 25 February 2020, col. 17.

Wording of section 10

555. While supportive of the duty in section 10, some stakeholders suggested changes to the current wording of the duty in the Bill.

556. Firstly, some expressed concerns that the "practicable" qualification to the duty could be used to limit contact on resource grounds or to justify decisions which are not in the child's best interests.

557. In oral evidence, the Minister told the Committee that contact with siblings might not be practical, for example, where a child has a sibling whom they have never met, who lives at the other end of the country, or who is not interested in maintaining a relationship. [114]

558. However, in response to this evidence, Stand Up For Siblings argued that the Minister had conflated two separate issues – whether promoting contact is "appropriate" or whether contact is "practicable". It suggested that the primary question in all situations should be whether contact is appropriate. If so, then practical solutions should be found to allow contact to happen. It therefore argued that the word "practicable" should be removed from section 10, saying that:

> Without the removal of 'practicable' there is a high risk that decisions will continue to be led by resourcing issues and the proposed legal changes will be utterly ineffective.
>
> Source: Stand Up For Siblings, supplementary submission.

559. Stand Up For Siblings went on to say that if the wording is retained, there should be clear recording and accountability measures where a decision is taken that direct contact between siblings is not practicable.

560. The second concern expressed by some stakeholders in relation to the wording of section 10 was the references to "half-blood" and "whole-blood" in the definition of siblings. The Children's Commissioner, for example, argued that this is not how children in a care setting understand their lives. CELCIS suggested that the wording reflected "antiquated legal language which may be alienating to some". [115]

Siblings' participation rights

561. Stand Up For Siblings, Clan Childlaw and CELCIS argued that, in addition to the duty in section 10, other measures should have been included in the Bill to promote siblings' participation in family cases.

562. For example, these stakeholders argued that siblings' views should be sought in cases under section 11 of the 1995 Act. They also argued that, in relation to children's hearings, siblings should be given rights including the right to be notified of hearings, the right to attend hearings, the right to make representations, and a right of appeal or review.

563. Responding to this evidence, the Scottish Children's Reporter Administration (SCRA) said that proportionality was required in terms of siblings' involvement in children's hearings. SCRA argued that the child who was the reason for the hearing should remain at the centre, and that there were other ways to ensure that siblings participated in the children's hearing process rather than granting siblings a full range of rights. [116]

564. At the time of publication of this report, a judgement by the Supreme Court on siblings' rights in the children's hearings system is pending. This will be important in informing any potential future changes in this area.

Conclusions and recommendations on contact with siblings

565. The Committee strongly welcomes the duty placed on local authorities in section 10 of the Bill to promote personal relations and contact between looked after children and their siblings. This is a significant step in recognising the importance of maintaining sibling relationships when children go into care.

566. We did, however, hear concerns that no new resources are to be provided to support this duty. While we recognise that local authorities should already be promoting sibling contact, we heard that currently contact can be limited on resource grounds.

567. The recently published Independent Care Review calls for a radical overhaul of the current care system and we welcome the Scottish Government's commitment to deliver the vision set out by the Review. One of the foundations of the new approach will be to ensure that sibling relationships are maintained. The changes associated with the Independent Care Review could, therefore, support local authorities to deliver the duty in section 10 of the Bill.

568. However, it is not yet clear how quickly these changes will be implemented or if, and when, additional resources will be made available to local authorities to address issues around sibling contact. In the shorter term, it may be that other measures, including additional resources, are required to enable local authorities to implement the duty in section 10.

569. Recommendation: The Scottish Government should before Stage 2 provide further details on how the changes which will result from the Independent Care Review will enable local authorities to fulfil the duty in section 10 of the Bill. This should include information on proposed timescales and specific budgets that will be provided to individual local authorities for the purposes of promoting sibling contact.

570. Recommendation: The Scottish Government should work with COSLA and others, such as Stand Up For Siblings, to assess what measures are required in the short term to implement section 10 of the Bill. This should include an assessment of any additional resources required by local authorities.

571. The Committee shares the concerns expressed by some stakeholders that the "practicable" qualification to the duty in section 10 could be used to justify refusing contact for reasons other than the child's best interests. We consider that the focus should be on whether contact is appropriate. If so, solutions should be found to facilitate such contact, even if that cannot always be face-to-face.

572. Recommendation: The Scottish Government should amend the Bill at Stage 2 to remove the "practicable" qualification from section 10.

573. While we welcome the broad definition of sibling in section 10 of the Bill, we heard that the terms "half-blood" and "whole-blood" were outdated and could be alienating to some.

574. Recommendation: The Scottish Government should amend the Bill at Stage 2 to remove references to "half-blood" and "whole-blood" from section 10.

Parental rights and responsibilities

The rights of unmarried fathers

Background

575. Since 2009, just over half of all births have been to unmarried parents. [117] However, in Scotland unmarried fathers do not have automatic parental rights and responsibilities (PRRs) in respect of their children. Here they differ from mothers and from fathers who are, or ever have been, married to the child's mother.

576. In the 1995 Act, in its original form, the main way an unmarried father could get PRRs was by court order. While this is still possible, since 2006, the main way an unmarried father can get PRRs is by joint registration of the birth, so the father's name appears on the birth certificate.

577. Joint registration is common but not compulsory. It requires the mother's co-operation. In 2018, 2,178 births in Scotland (4% of all births) were sole registrations, where only the mother's name was registered. [118]

578. A related issue is that sometimes it is only the mother (as the sole parent with PRRs) who can give her consent to DNA testing of a child in relation to a paternity dispute. If consent is refused, a court in Scotland cannot order DNA testing in these circumstances, although it can draw an "adverse inference" from the refusal. The current approach can present challenges for unmarried fathers trying to prove paternity (in order that their name can be added to the child's birth certificate).

579. The issue of PRRs for unmarried fathers has been considered and debated in several other countries. As is set out in the SPICe comparative briefing (at pages 26-27), other legal systems vary in how they approach unmarried fathers and their equivalents to PRRs.

580. For example, in England and Wales, the ways in which unmarried fathers can acquire parental responsibility are virtually identical to those in Scotland, with the main method now being joint birth registration. However, in the event of a dispute over registration or genetic parentage, the courts in England and Wales have the power to order paternity testing to resolve the dispute. There is also legislation on the statute book requiring compulsory joint registration, but this legislation has never been brought into force.

581. In Australia, all genetic parents (including unmarried fathers) automatically have the equivalent of PRRs, although these can later be removed by the court if necessary.

582. In New Zealand, automatic rights for fathers are linked to being married to the child's mother or living together at any time during the period beginning with conception and ending with birth. In other instances, rights for unmarried fathers can be acquired by joint registration (which is usually compulsory) or by court order.

Scottish Government consultation

583. In its 2018 consultation, the Scottish Government consulted on various options for strengthening the rights of unmarried fathers, including:

- automatically giving PRRs to unmarried fathers because of their genetic parentage;
- introducing, with some exceptions, compulsory joint birth registration; and
- giving the courts the power to order DNA testing to resolve paternity disputes.

584. There was a fairly even split of views about each of the possible reform options. Support was strongest for automatic PRRs based on genetic parentage.

585. Ultimately, no proposals relating to unmarried fathers were included in the Bill.

Evidence to the Committee

586. When the Scottish Government Bill team gave evidence to the Committee, they said they looked at the balance of rights overall (i.e. the mother's, the father's and the child's) and thought it best to make no changes to the current law. This provides most fathers with PRRs and provides some protection for women in certain situations (e.g. when the father is abusive or violent). Furthermore, they noted that registrars had expressed concerns about the practical implications for them of a system of compulsory joint registration of births. [119]

587. In relation to automatic PRRs for unmarried fathers, the Scottish Government acknowledged in its consultation document the difficult issue of a child born as a result of rape. It saw this as one "potential disadvantage" of automatic PRRs. However, it also pointed out that a child can be born as a result of rape within marriage and the father would have automatic PRRs in such circumstances. [120]

588. In her report for the Committee, Dr Barnes Macfarlane suggested that the current law in relation to unmarried fathers may raise issues in terms of compliance with human rights law. This included compliance with (1) a father's rights under Article 8 ECHR (right to respect for private and family life) and (2) the child's rights under Article 2 UNCRC (right not to be discriminated against based on birth status), Article 7 UNCRC (right to birth registration, name and, as far as practicable, to know and be cared for by parents), and Article 8 UNCRC (right to identity). In relation to Articles 7 and 8 UNCRC, Dr Barnes Macfarlane commented that:

> Taken together, Articles 7 and 8 are often used to support the argument that all children should have the right to possess basic information about who they are and who their parents are. This way, children can know, understand and preserve fundamental aspects of themselves, their family background and culture.
>
> Source: Dr Barnes Macfarlane, Balancing the Rights of Parents and Children Report, page 21.

589. Dr Barnes Macfarlane also concluded that the current law on unmarried fathers is outdated. Her report stated:

> The rationale for the difference in position between married and unmarried fathers is archaic, deriving from a time when the law sought to discourage any intimate relationship other than heterosexual marriage. One way it did this was to ensure that 'illegitimate' children were treated less favourably in Scottish law and society than those born to married parents.
>
> Source: Dr Barnes Macfarlane, Balancing the Rights of Parents and Children Report, page 17.

590. The report acknowledged the "very strong arguments" against requiring a mother to name her child's father if she is the victim of rape, or because she is protecting herself or her child from violence. However, the report highlighted that the current approach disadvantages some men who have not been violent. It also highlighted that the courts can, after consideration of the case concerned, remove PRRs of violent or abusive parents.

591. Dr Barnes Macfarlane suggested that the Bill could, as recommended by the Scottish Law Commission in 1992, provide that all parents hold PRRs, regardless of marital status. She also suggested providing the courts with a discretionary power (similar to that which exists in England and Wales) to order DNA testing.

592. Other evidence to the Committee also expressed concern that the position of unmarried fathers had not been strengthened in the Bill. The Faculty of Advocates, for example, suggested it "seems disproportionate" to require a father not named on a birth certificate to go to court to get PRRs. [121]

593. Shared Parenting Scotland argued in favour of automatic PRRs for unmarried fathers. Ian Maxwell, representing Shared Parenting Scotland, told the Committee that fathers find it difficult to progress their contact and involvement with their children because the law requires them to be named on the birth certificate to get PRRs. He fully accepted the need to protect women, for example, in cases of rape, but emphasised that other fathers were being disadvantaged by the current law. [122]

594. On the other hand, Professor Sutherland argued against giving automatic PRRs to unmarried fathers. However, she suggested that the Bill should provide for the courts to order DNA testing. She told the Committee:

> As things stand, the court can order DNA testing of a child in the parentage area only when there is no one with the authority to deal with that or when such a person is unwilling to take the responsibility. That means that, where there are unmarried parents and the mother is the only person who has responsibilities and rights, because the father has not registered, she can refuse consent to the child being tested. She does not have to give any reasons but can just flat-out refuse. As things stand, the court has no power to overrule that mother and require testing. Reform on those lines has been mooted for quite some time and it is possible for the court in some jurisdictions simply to look at the circumstances and order testing in the face of the mother's opposition. The decision was taken not to include in our statutes a provision along those lines, but I think that that was a missed opportunity and that such a provision could have been helpful.
>
> I should say that, when the court is considering its decision about the child's paternity, given that it does not have the best evidence that it could have - their DNA test results - it can draw an inference from the mother's refusal. Make of that what you will, but the court could say that she was refusing consent because she had something to hide. However, that whole area is kind of uncomfortable and fluffy. The simple solution would have been to say that, in the circumstances that I have described, a court can order DNA testing because the information is knowable and we should ensure that it is known and that we can be clear about the child's paternity. Thereafter, we can look quite separately at the whole issue of registration and parental responsibilities and rights - that is the other way to go about it. I should have said that this is not just about the parents' dispute; it is about a child's right to know about their identity, as guaranteed by the UN Convention on the Rights of the Child.
>
> Source: Justice Committee, Official Report 17 December 2019, cols. 44-45.

595. In closing evidence, the Minister emphasised that only a very small number of fathers do not get PRRs and that, in some of those cases, there might be good reasons why the mother does not jointly register the birth. On balance, she said she had decided to "keep the status quo". [123]

596. In relation to the issue of DNA testing, the Minister said:

> Under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, the court may draw an adverse conclusion from a refusal or failure to give consent to the taking of a DNA sample. On balance, that seems appropriate here.
>
> Source: Justice Committee, Official Report 25 February 2020, col. 30.

Updating the language associated with parental rights and responsibilities

597. At present, two of the main orders the court can make under section 11 of the 1995 Act are a residence order (setting out where the child will live, which can be with two parents) and a contact order (setting out arrangements for seeing parents and other relatives, if they are not to be living with those people).

598. The Scottish Government consulted on, but did not include in the Bill, a proposal to update the terminology associated with court orders.

599. One criticism of the current terms is that they suggest that one parent has a closer (legal and emotional) relationship with the child than the other parent. Shared Parenting Scotland, for example, argued in its written submission to the Committee:

> The use of the terms "residence" and "contact" is inaccurate and it also risks leading the parent who receives a residence order to wrongly assume that this gives them overall control of all the arrangements for the children covered by the order.
>
> Source: Shared Parenting Scotland, written submission.

600. Shared Parenting Scotland suggested calling residence and contact orders "general issue orders", as the legislation already provides for "specific issue orders".

601. Other evidence argued that the term "contact" was inappropriate to describe a relationship that a child has with a parent. Suggestions for alternative terminology included "parenting order" and "children's order".

602. As is set out in the SPICe comparative briefing (at pages 10-12), several other countries have made changes to the terminology associated with court orders. For example, in Australia and Canada, the term "parenting order" is used. In England and Wales, residence and contact orders were replaced with "child arrangement orders".

603. The Minister told the Committee that the current terminology is "not meant to be pejorative in any way". She went on to say:

> The terms "contact" and "residence" have gradually gained acceptance and I think that they are well understood. I am not sure that there are useful alternatives that could be brought in, so I think I am quite comfortable with keeping them as they stand at present.
>
> Source: Justice Committee, Official Report 25 February 2020, col. 28.

Conclusions and recommendations on parental rights and responsibilities

Rights of unmarried fathers

604. The Committee recognises that the issue of parental rights and responsibilities for unmarried fathers is complex, with a number of different rights having to be balanced. We also recognise the need to protect women and children in cases, for example, of rape or domestic abuse. On the basis of the evidence we have heard, we do not consider that it would be appropriate for the Bill to extend automatic PRRs to unmarried fathers or require compulsory joint birth registration.

605. However, Dr Barnes Macfarlane's report raised some important issues about whether the current law on unmarried fathers complies with human rights law. In

particular, we are concerned that the current law is not compliant with a child's rights under the UNCRC, which includes the right to know his or her identity.

606. We also think that there would be merit in exploring further the possibility of introducing a discretionary power for the courts to order DNA testing in a parenting dispute. This approach could offer a route to balance the different interests of those involved.

607. Recommendation: The Scottish Government should before Stage 2 respond to the conclusions in Dr Barnes Macfarlane's report on PRRs for unmarried fathers and, in particular, provide further details as to whether it considers that the current law complies with its human rights obligations under the ECHR and UNCRC.

608. Recommendation: The Scottish Government should also consider whether a discretionary power for the courts to order DNA testing would provide a useful mechanism to address some of the issues identified in Dr Barnes Macfarlane's report, including ensuring that a child's right to know his or her identity is respected.

Language associated with parental rights and responsibilities

609. The Committee heard that the current terminology associated with parental rights and responsibilities, particularly the use of the terms "residence" and "contact", could wrongly imply that one parent has a closer relationship with a child or more decision-making powers than the other parent. We also heard concerns that the term "contact" was inappropriate for describing a child's relationship with a parent.

610. Recommendation: The Scottish Government should before Stage 2 respond to the concerns raised about the current terminology associated with PRRs.

General principles

611. The Committee recommends to the Parliament that the general principles of the Bill be approved.

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[2] Scottish Government. (2008, March 12). 2007 Scottish Child Contact Survey, para 4.44. Retrieved from https://www.webarchive.org.uk/wayback/archive/20161007190205/http://www.gov.scot/Publications/2008/03/12145638/8

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[4] Mackay, K. (2012). The Voice of the Child in Private Law Contact Disputes in Scotland (PhD thesis). Retrieved from https://era.ed.ac.uk/bitstream/handle/1842/6398/MacKay2012.pdf?sequence=2&isAllowed=y

[5] Scottish Government. (2019, September). Family Justice Modernisation Strategy, para 7.19.

[6] Justice Committee. (2020, January 28). Official Report 28 January 2020, col. 3.

[7] Justice Committee. (2020, January 28). Official Report 28 January 2010, cols. 3-6.

[8] Justice Committee. (2020, January 7). Official Report 7 January 2020, col. 21.

[9] Justice Committee. (2019, December 17). Official Report 17 December 2019, col. 45.

[10] Justice Committee. (2019, December 17). Official Report 17 December 2019, col. 46.

[11] Justice Committee. (2020, February 20). Official Report 20 February 2020, cols. 16-17.

[12] Justice Committee. (2019, November 26). Official Report 26 November 2019, cols. 5, 11.

[13] Justice Committee. (2020, February 25). Official Report 25 February 2020, col. 27.

[14] Scottish Government. (2019, September). Policy Memorandum, paras 18, 28.

[15] UN Committee on the Rights of the Child. (2009). General Comment No. 12, para 21.

[16] Dr Barnes Macfarlane. (2019, October). Balancing the Rights of Parents and Children Report, page 48.

[17] Children and Young People's Commissioner Scotland. (2019). Written submission.

[18] Justice Committee. (2020, January 7). Official Report 7 January 2020, col. 4.

[19] Scottish Women's Aid. (2019). Written submission.

[20] Justice Committee. (2020, February 25). Official Report 25 February 2020, col. 3.

[21] Professor Sutherland. (2019). Written submission.

[22] Dr Barnes Macfarlane. (2019, October). Balancing the Rights of Parents and Children Report, page 49.

[23] Scottish Government. (2019, September). Policy Memorandum, para 32.

[24] Dr Barnes Macfarlane. (2019, October). Balancing the Rights of Parents and Children Report, page 50.

[25] Scottish Government. (2019, September). Policy Memorandum, para 36.

[26] Scottish Government. (2019, September). Policy Memorandum, para 33.

[27] Scottish Government. (2019, September). Policy Memorandum, para 39.

[28] Justice Committee. (2019, December 17). Official Report 17 December 2019, cols. 20-21.

[29] Justice Committee. (2020, January 7). Official Report 7 January 2020, col. 5.

[30] Scottish Government. (2019, September). Policy Memorandum, para 179.

[31] Scottish Government. (2019, September). Financial Memorandum, para 45.

[32] Scottish Government. (2019, September). Financial Memorandum, paras 93-94.

[33] Justice Committee. (2020, January 7). Official Report 7 January 2020, col. 9.

[34] Family Law Association. (2019). Written submission.

[35] Dr Barnes Macfarlane. (2019, October). Balancing the Rights of Parents and Children Report, page 51.

[36] UN Committee on the Rights of the Child. (2009). General Comment No. 12, para 45.

[37] Sheriffs Principal. (2019). Written submission.

[38] Justice Committee. (2020, January 28). Official Report 28 January 2020, col. 16.

[39] Clan Childlaw. (2019). Written submission.

[40] Scottish Government. (2019, September). Family Justice Modernisation Strategy, para 6.18.

[41] Justice Committee. (2020, January 7). Official Report 7 January 2020, col. 12.

[42] Justice Committee. (2020, January 28). Official Report 28 January 2020, cols. 10-11.

[43] Justice Committee. (2020, February 20). Official Report 20 February 2020, cols. 6-7.

[44] Justice Committee. (2020, January 7). Official Report 7 January 2010, col. 38.

[45] Justice Committee. (2020, January 28). Official Report 28 January 2020, col. 10.

[46] Justice Committee. (2020, February 25). Official Report 25 February 2020, cols. 28-30.

[47] Scottish Government. (2019, September). Policy Memorandum, para 148.

[48] Scottish Government. (2019, September). Policy Memorandum, para 143.

[49] Dr Barnes Macfarlane. (2019, October). Balancing the Rights of Parents and Children Report, page 55.

[50] Dr Barnes Macfarlane. (2019, October). Balancing the Rights of Parents and Children Report, page 56.

[51] Dr Barnes Macfarlane. (2019, October). Balancing the Rights of Parents and Children Report, page 62.

[52] UN Committee on the Rights of the Child. (2013). General Comment No. 14.

[53] Summary Sheriffs' Association. (2019). Written submission.

[54] Justice Committee. (2019, November 26). Official Report 26 November 2019, col. 7.

[55] Dr Whitecombe. (2019). Written submission.

[56] Justice Committee. (2020, February 25). Official Report 25 February 2020, col. 16.

[57] Scottish Government. (2019, September). Family Justice Modernisation Strategy, para 3.22.

[58] Justice Committee. (2020, January 7). Official Report 7 January 2020, col. 14.

[59] Scottish Government. (2019, September). Policy Memorandum, para 92.

[60] Scottish Government. (2019, September). Policy Memorandum, paras 79, 152.

[61] Scottish Govenrment. (2019, September). Financial Memorandum, paras 18, 33.

[62] Scottish Government. (2019, September). Financial Memorandum, paras 60, 61.

[63] Scottish Government. (2019, September). Financial Memorandum, paras 35, 62.

[64] Scottish Government. (2019, September). Policy Memorandum, paras 85, 158.

[65] Justice Committee. (2020, February 20). Official Report 20 February 2020, cols. 9-10.

[66] Justice Committee. (2020, January 28). Official Report 28 January 2020, col. 12.

[67] Justice Committee. (2020, February 25). Official Report 25 February 2020, cols. 6-7.

[68] Justice Committee. (2020, January 14). Official Report 14 January 2020, cols. 10-11.

[69] Scottish Government. (2019, September). Policy Memorandum, para 89.

[70] Justice Committee. (2020, February 25). Official Report 25 February 2020, cols. 8-10.

[71] Justice Committee. (2020, January 28). Official Report 28 January 2020, cols. 13-14.

[72] Justice Committee. (2020, February 25). Official Report 25 February 2020, col. 9.

[73] Dr Barnes Macfarlane. (2019, October). Balancing the Rights of Parents and Children Report, page 70.

[74] Justice Committee. (2020, February 25). Official Report 25 February 2020, cols. 11-12.

[75] Justice Committee. (2020, February 25). Official Report 25 February 2020, col. 15.

[76] Scottish Government. (2019, September). Policy Memorandum, paras 50, 68.

[77] Children's Hearings Scotland. (2020). Supplementary written submission.

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[79] Justice Committee. (2020, January 28). Official Report 28 January 2020, col. 29.

[80] Justice Committee. (2020, January 28). Official Report 28 January 2020, col. 28.

[81] Justice Committee. (2020, February 25). Official Report 25 February 2020, col. 23.

[82] Care Inspectorate. (2020, March). Child contact centre regulation feasibility study report.

[83] Scottish Government. (2019, September). Policy Memorandum, para 103.

[84] Dr Barnes Macfarlane. (2019, October). Balancing the Rights of Parents and Children Report, page 20.

[85] Justice Committee. (2020, January 14). Official Report 14 January 2020, col. 42.

[86] Justice Committee. (2020, February 25). Official Report 25 February 2020, col. 12.

[87] Scottish Government. (2019, September). Policy Memorandum, para 105.

[88] Justice Committee. (2020, January 14). Official Report 14 January 2020, col. 43.

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[90] Justice Committee. (2020, January 14). Official Report 14 January 2020, col. 40.

[91] Justice Committe. (2020, January 14). Official Report 14 January 2020, col. 34.

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[95] Justice Committee. (2020, January 7). Official Report 7 January 2020, col. 27.

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[99] Justice Committee. (2019, December 17). Official Report 17 December 2019, col. 37.

[100] Justice Committee. (2020, January 28). Official Report 28 January 2020, col. 33.

[101] Justice Committee. (2019, December 17). Official Report 17 December 2019, col. 38.

[102] Justice Committee. (2020, February 25). Official Report 25 February 2020, col. 25.

[103] Scottish Government. (2019). Policy Memorandum, para 205.

[104] Scottish Government. (2019, September). Policy Memorandum, para 245.

[105] Justice Committee. (2019, December 17). Official Report 17 December 2019, cols. 33-34.

[106] Justice Committee. (2020, February 25). Official Report 25 February 2020, col. 26.

[107] Scottish Government. (2019, September). Policy Memorandum, para 121.

[108] Justice Committee. (2020, January 21). Official Report 21 January 2020, col. 15.

[109] Justice Committee. (2020, January 21). Official Report 21 January 2020, col. 14.

[110] Scottish Government. (2019, September). Financial Memorandum, Annex.

[111] Social Work Scotland. (2019). Written submission.

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[114] Justice Committee. (2020, February 25). Official Report 25 February 2020, col. 18.

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[120] Scottish Government. (2018, May). Consultation on Part 1 of the Children (Scotland) Act 1995, para 7.43.

[121] Justice Committee. (2020, January 28). Official Report 28 January 2020, col. 35.

[122] Justice Committee. (2020, January 14). Official Report 14 January 2020, col. 17.

[123] Justice Committee. (2020, February 25). Official Report 25 February 2020, cols. 29-30.