



Law Society
of Scotland

Consultation Response

Review of Part 1 of the Children (Scotland) Act 1995
and creation of a family justice modernisation
strategy

September 2018



Introduction

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We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Family Law sub-committee welcomes the opportunity to consider and respond to the Scottish Government's consultation: Review of Part 1 of the Children (Scotland) Act 1995 and creation of a family justice modernisation strategy. The sub-committee has the following comments to put forward for consideration.

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

c) No – leave the presumption in.

We are not aware of this causing any difficulties in practice, and it provides a useful guideline. 12 is a significant age of capacity in other areas of Scots law, including for making a will or consenting to their own adoption.¹ However, it is important to ensure that any presumption does not have the consequence of implying that those below the set age are not normally treated as able to form a view. The presumption should not inhibit recognition that each individual child's view should be valued, listened to and given weight in decision making, consistent with their rights under the United Nations Convention on the Rights of the Child (UNCRC).

We are aware that the practice in the taking of views can vary across Scotland. Greater awareness of the duties and options for taking a child's views through guidance and training of Sheriffs and other relevant groups may improve consistency of approach.

¹ s 2, Age of Legal Capacity (Scotland) Act 1991

Question 2): How can we best ensure children's views are heard in court cases?

- a) The F9 form
- b) Child welfare reporters
- c) Speaking directly to the judge or sheriff
- d) Child support workers
- e) Another way

We have selected all available options, as there is no single way to best ensure children's views are heard in court cases. It is important to maintain a range of options for a child to be heard, depending on different children's needs and circumstances. This must include options that consider the differing needs of children with disabilities. We do not believe that the child being heard directly by the judge or sheriff should be promoted above other options. The most appropriate option will depend on the child and the circumstances of the case. There may be good reason why a child's views should be taken by a child welfare reporter in a safe, less intimidating environment (such as at school or at home) rather than court. In other cases, the sheriff taking the child's views may be appropriate where there are allegations of undue influence, or disputes about the child's views. It might also be helpful for members of the judiciary to receive training in relation to communicating with and obtaining views from children.

The UNCRC entitles children to give views for all decisions that affect them. Consideration should also be given to how to ensure that children's views are heard at all stages of a court case, and in relation to each decision being made. This is particularly relevant in the context of some cases taking place over an extended period of time – a child's views may change, and many individual decisions are likely to be made as a case progresses. Increased use of a children's advocate type role, with involvement from an early stage and lasting the duration of a case, could assist children to understand and participate more fully in the process. A right to express a view in the abstract without a proper understanding of the process is arguably nothing more than superficial compliance with Art 12 UNCRC. For the right to be meaningful, the child has to have informed knowledge (age and stage appropriate) of the context of what their view relates to. The right to express a view also dovetails with the right to effectively participate: an informed understanding allows a child to elect to express a view to the extent they wish and would allow older children to make an informed decision about whether they want to participate in the process beyond that.

It may also be helpful to establish a mechanism to explain why a child is not giving views. This could help to emphasise that the norm should be for views to be provided and would also provide an opportunity for any obstacles to be identified and managed if they are preventing a child from expressing their views.

While this question relates to court cases, there are also likely to be issues with cases where parents are reaching agreement outside of the court process. There is still a requirement for children's views to be taken in those cases, but it is much more difficult to assess whether that is happening. Further support and guidance for parents in these situations may be helpful, including raising awareness of child inclusive mediation as an option in suitable cases, as well as encouraging solicitors and sheriffs who are dealing with memorandums of agreement to ask questions around whether and how a child's views were sought and considered.

Further, where there is a dispute between the adults (parents or other care givers) as to whether or in what form a child's view ought to be obtained, consideration should be given to those adults providing details of their position. Preferably this would be done in writing, such as an affidavit, prior to a decision being taken, for example before a Child Welfare Hearing. In doing so it is anticipated that firstly minor disputes maybe capable of being swiftly resolved and secondly such details may assist the individual obtaining the child's views to have a better understanding of the circumstances surrounding the child and how best to obtain the child's views.

For example, this approach could be taken in a situation where a child has told his mother that he wishes to have a say about the future arrangements of having contact with his father because he is too tired to attend football training at 8.30am on a Saturday. The mother wishes views to be obtained in writing with assistance from the school. The father wishes child to be spoken to directly as he is of the view that child is being unduly influenced by mother and individuals at school who support mother's position.

Lastly, we are mindful that much has changed since 1995 in the way in which children communicate. Some consideration ought to be given to widen the scope of how a child's views can be taken and whether electronic means could be used for this purpose.

Question 3): How should the court's decision best be explained to a child?

c) Another option

As discussed at question 2, above, a range of options is necessary to suit the individual needs and circumstances of each child.

We support the provision of feedback to the child in a manner that is clear and appropriate. The best method might depend on the approach to taking the child's views. If there is an appointed person in relation to the child (such as a Children's Rights Officer; curator; advocacy worker; or solicitor) then that person is likely to be best placed to do so. However, in cases where the child does not have an appointee of some form, there is no mechanism for the child to be advised of and helped to understand the decisions the sheriff has taken. Often, it is left to the parties to explain and, in acrimonious cases, this may not be a suitable approach.

To fill that gap, in cases where there is no appointee and the sheriff does not consider it necessary to appoint one, the sheriff could be required to prepare a short explanation for the child as to the decision taken and why. That would give the child a neutral explanation, tailored to that child's level of understanding and circumstances. In the case of decisions made after proof (i.e. a final order), a child friendly explanation of what the sheriff was asked to decide, what was decided and the reasons why could

be prepared. We commend the approach taken by Sheriff Anwar in a case where she explained her decision on contact in a letter to the children involved.²

Question 4): What are the best arrangements for child welfare reporters and curators *ad litem*?

a) There should be no change to the current arrangements

We believe that the current system is generally working well. Each court is best placed to determine its needs, and sheriffs can familiarise themselves with individual reporters. Appointment is ultimately dependent on the quality of the reports provided, as assessed by the court.

We are aware that in some jurisdictions concerns have been raised about the appointment of and quality of reports provided by certain child welfare reporters. The suggestion is that both the local bar and bench share those concerns. Maintaining consistency of quality of bar reporter and reports is critical to ensure courts are well placed to make informed decisions about children. In the first instance, we consider that it may be helpful for Sheriff Principals in individual Sheriffdoms to seek views from their Sheriffs about these concerns.

We observe that it would be open to any Sheriff Principal to issue a practice note on the arrangements for appointment of reporters, as well as on the form and standards expected in relation to any such report. This would not require any change to the primary legislation or court rules.

Child welfare reporters are generally all solicitors with experience in the particular court for which they are appointed. Familiarity with the practice and expectations of that court and sheriffdom is helpful. While training for bar reporters may be beneficial, individual courts should be able to control their own lists.

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

No

A child's views and best interests are certainly highly relevant, but there is also a need for other considerations to be taken into account. We suggest that an approach consistent with that of section 79(3)(d) of the 2011 Act and Rule 16 of the Children's Hearings (Scotland) Act 2011 (Rules of Procedure in

² *Mr Patrick (a pseudonym) v Mrs Patrick (a pseudonym)* [2017] SC GLA 46

Children's Hearings) Rules 2013 where the potential for significant harm to the child or another party is considered when deciding whether disclosure should be made.

Question 6): Should child contact centres be regulated?

Yes

Contact centres are regularly required to handle challenging situations and work with vulnerable children, and so it would be appropriate to subject them to some form of regulation. However, overregulation should be avoided to minimise the risk of eroding these limited resources which significantly depend upon volunteers, rather than paid employees. In addition, adequate funding is required to ensure that contact centres are safe, clean, and properly operated.

We are also aware that the majority of child contact centres are part of the Relationships Scotland (RS) network and operate under RS's national policies and guidelines, and as such are subject to national quality assurance audits. Some consideration ought to be given as to whether these are adequate for this purpose. If not, some form of external quality assurance and agreed national standard/policies could be a way forward. However, as mentioned above, this is likely to have resource implications and would need to be properly funded.

Further, and in addition to our concerns about overregulation, we are of the view that the definition of regulation will be key. It is anticipated that if regulation was to be introduced it would require to be robust enough to be meaningful yet flexible to meet the individual needs of families and the services available in any local area, which can vary considerably.

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

The UNCRC puts high importance on family unit, and gives broad definition to family, with child entitled to contact with persons with whom the child has a strong personal relationship, unless contrary to their best interests. The focus of any question of contact must be on the rights of the child, not rights of others to the child. The provisions of section 11 of the 1995 Act are already flexible and enable a wide range of relationships to be preserved. Anyone with an interest can seek an order for contact under section 11. With the exception of siblings (addressed at Question 9, below) we are not aware of any suggestion that particular relatives have found themselves prevented from raising actions to seek contact. There are a range of options for facilitating ongoing contact and relationships with family members, where this is in the best interests of the child, and what steps are appropriate will vary from case to case.

The issue is arguably of greater significance in the context of public law proceedings under the 2011 Act. These cases are often dealing with children who are accommodated by the Local Authority. A grandparent or sibling often does not meet the test of 'relevant person' under section 81 of the 2011 Act. This section

arguably represented a step back from the equivalent in the 1995 Act after the Supreme Court's decision in *Principal Reporter v K*.³ Subsequent decisions have not directly addressed the inconsistency between that case and the (arguably) more narrow construction of 'relevant person' in the 2011 Act. A recent case has confirmed that the legislation should be read down to include anyone with engaged article 8 rights, consistent with the decision in *K*.⁴ This means that these relatives are often excluded from the children's hearing that is making welfare decisions on an ongoing basis for the child. These secondary but significant familial relationships can suffer in pursuit of the aim of protecting a child from harm caused by being in the care of a parent.

The 2011 Act includes a requirement for the children's hearing or sheriff to consider making a contact measure (section 29A). The section doesn't specify with whom, and is so vague that it appears to make little difference in practice. Consideration should be given to amending this to require consideration of a measure for contact "between the child any his parents, siblings, any individual holding the parental right within section 2(1) of the Children (Scotland) Act 1995, and any other individual with whom the child exercises or has recently exercised regular or significant contact".

There is conflicting case law as to whether a child may raise an action under section 11 of the 1995 Act to seek an order for contact with a sibling. Consideration should be given to amending that section to allow a child to raise such an order (see our response to Question 9, below).

Question 8): Should there be a presumption in law that children benefit from contact with their grandparents?

No

We do not support this type of statutory presumption.

Each case deserves to be handled individually without the onus of proof being an issue for either party, and with the focus on the welfare of the individual child in those circumstances. The 1995 Act already makes clear provisions which allow a grandparent with whom a child has an existing, important relationship to maintain/develop that in a manner commensurate with his or her best interests.

³ [2010] UKSC 56

⁴ *ABC v Principal Reporter and Others* [2018] CSOH 81

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

Yes

At the moment, section 11 frames contact orders as an element of parental rights and responsibilities. The controversy as to whether siblings may apply for contact is a significant deficit in our system. The dispute is encapsulated in the cases of *D v H*⁵ (where it was decided a sibling could not apply) and *E v E*⁶ (where the sheriff declined to follow *D v H*, citing *inter alia* the UNCRC). Amending the 1995 Act to settle the point by expressly allowing siblings to apply for contact would be beneficial.

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

We are not aware of any issues with the existing guidance, which is clear and comprehensive. If there are issues with how this is being implemented in practice, we would suggest that this should be addressed through training rather than any additional regulations.

Question 11): How should contact orders be enforced?

d) Another option

We support there being a range of options available for the enforcement of contact orders, including alternative sanctions such as those suggested by option b). Imprisonment is rarely used, and will often not be suitable, but should be retained as an option for the court in extreme cases. We do not support option c), criminalising a breach of a contact order.

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

No

⁵ *D v H* 2004 SLT (Sh Ct) 73

⁶ *E v E* 2004 Fam LR 115

We are not aware of any issues with the current situation. The Court of Session aligns with the High Court in England and Wales, providing consistency across the UK. It also provides a single court covering Scotland, simplifying issues by providing one place to check for orders, and allowing people to move around Scotland without complicating the arrangements for registering, searching for, or enforcing orders.

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

No

The Family Law Act 1986 and the 1995 Act cover the issue of jurisdiction in cross-UK border family cases, and works well in practice. Making any significant changes to the 1986 Act would require a wider consultation across the UK.

Question 14): Should the presumption that the husband of a mother is the father of her child be retained in Scots law?

Yes

The presumption does not arise frequently, and is open to challenge in any situation where the relevant parties are not content with the result. Giving the court a discretion to order DNA testing when parentage is disputed would help to ensure that the presumption could be rebutted if necessary.

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

No

Although we accept that there can be an issue in parentage disputes when a mother may refuse consent to DNA testing of the child, we do not believe that compulsory testing in all cases would be a proportionate response. Enabling the court to order DNA testing without the mother's consent would allow for the specific circumstances to be taken into account and would allow the court to use its discretion as to the best approach in a case. This should be subject to a welfare test, with the court able to refuse to order a DNA test when it would not be in the best interests of the child. These situations are likely to be infrequent.

Creating a route for DNA testing without the consent of the mother would help to rebalance the current situation which results in mothers holding significant control over the ability of a purported father to gain acknowledgement of parentage both through the registration process and DNA testing.

A related issue arises regarding the provisions for registration of a father on a child's birth certificate and the acquisition of parental rights and responsibilities. At present, an unmarried father, in effect, requires the

acquiescence or favour of the mother to be named on the birth certificate in order to secure parental rights automatically. The mother is the gatekeeper of registration. A father with a declarator of paternity cannot use that to register himself as father without the consent or cooperation of the mother. However, the mother can use that order (without the father's knowledge or consent) to have the father registered on the birth certificate, thereby conferring legal rights and responsibilities on him. This has far reaching implications, including in adoption cases where the threshold test to dispense with consent applies only to a parent with parental rights.

Question 16): Should a step parents parental responsibilities and rights agreement be established so that step parents could obtain PRRs without having to go to court?

No

In the current situation, a step parent can make an application under section 11 of the Children (Scotland) Act 1995 for PRRs which is an administrative function carried out with the consent of both birth parents. There is no appearance in court. The application is by writ supported by affidavits which have been intimated. A new procedure would not improve upon the current procedural position. In general terms, a step parent who is fulfilling a truly parental role should have little difficulty in meeting the section 11(7) test to justify an order. The process of doing so is proportionate to the significance of those rights and responsibilities. Other than the assumption afforded in law to parents, it is right and proper that the court should require to assess whether persons seeking PRRs are meritorious before conferring those.

Section 5 of the 1995 Act makes provision for people who do not have PRRs but who have care or control of a child. This will allow many step parents to take a range of decisions and actions in care of a child without the need to formally acquire PRRs with the significant implications those carry.

There is a minority view that step-parent agreements, along similar lines to agreements under section 4, may be beneficial to children as they will allow a consensual, non-court based, provision that reflects the reality of a child's family life. They are less drastic than adoption, which may be inappropriate. The drawback has always been the difficulty in ensuring that children's views are appropriately reflected, but older children could consent (and consent should be required from age 12, consistent with adoption). There could also be provision for certification of the child's view by an independent adult such as a teacher or health professional. If there were any new form of agreement, it would be important to ensure that a best interest test was incorporated, as well as a means of allowing the child to express a view and be informed of any agreement.

Question 17): Should the term "parental rights" be removed from the 1995 Act?

No

Section 2 of the 1995 Act already provides that a parent has parental rights to enable him or her to fulfil parental responsibilities. The two are complementary to one another. They co-exist, but are discrete and the recognition of that is proper. If there are objections to or issues with the use of the term 'rights', consideration might be given to replacing that with the term 'powers' to emphasise the link to fulfilling parental responsibilities.

It should be noted that changing the approach and wording would impact on other sections of the 1995 Act, and other existing legislation. For example, permanence order applications under section 84 of the Adoption and Children (Scotland) Act 2007 refer to the rights provided in the Children (Scotland) Act 1995.

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

No

We are not aware of any particular issues around the use of the terms 'contact' and 'residence', which are now well understood. These terms were originally introduced, in part, in the hope that they would remove some of the acrimony associated with the terms 'custody' and 'access'.⁷ In practice, changing the statutory language is unlikely to resolve the animosity that can exist in these situations. It is unclear that any benefit would derive from replacing these terms with one such as 'child's order'. The term 'child's order' is vague, and the proposal is unclear in what range of orders this would apply to. In addition, the term 'child's order' has the potential to cause confusion, as it could be thought to place some responsibility or onus on the child, rather than the parent.

Question 19): Should all fathers be granted PRRs?

No

The starting point for any consideration of PRRs must be an understanding that PRRs are conferred for the interests of the child, not the parents. The distinction between mothers and fathers in relation to PRRs is increasingly difficult to justify.

However, an automatic grant of PRRs to all fathers would not necessarily offer a solution. There would continue to be difficulties in cases where there is a dispute over the fact of paternity. There are other issues associated with all fathers automatically being granted PRRs, including the concerns raised in the consultation document relating to domestic abuse and rape.

⁷ Scottish Law Commission, *Report on Family Law*, Report No 135 (1992)

However, there are also strong arguments in favour of rebalancing rights of fathers and mothers in relation to the acquisition of PRRs. There are currently difficulties in situations where a father applies for an order granting PRRs, and the mother contests the application. If a mother refuses to permit a DNA test, then it can be difficult to resolve this, notwithstanding the Law Reform (Parent and Child) (Scotland) Act 1986, section 6. It would be helpful to clarify that the court may authorise a sample, even where a mother withholds consent, as discussed at Question 15 above. In addition, we suggest that a proportionate change would be to enable a father who has obtained a declarator of parentage to be able to change the child's birth certificate to register himself as the father, without the mother's consent.

In any system, the rights and welfare of the child must be the primary consideration.

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

No

The consequences of making the change retrospective do not justify making the change at this stage. We do not believe that it is appropriate to change the framework under which both mothers and fathers had consented to registration. At the time, that decision was made on the clear understanding that PRRs would not follow. We do not know whether such a change is desired by any of the affected parties, and alternative means exist for acquiring PRRs. The number of individuals affected is limited, and will continue to decrease as children born prior to 2006 reach the age of 16.

Question 21): Should joint birth registration be compulsory?

No

We do not support compulsory joint birth registration. Difficulties would include managing situations where paternity is doubted or unknown. However, we suggest again (see our comments at Questions 15 and 19, above) that some changes to assist fathers facing resistance from the mother, in situations where it is in the best interests of the child, should be considered.

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

Yes

Clarification of the position is desirable.

Question 23): Should there be a presumption in law that a child benefits from both parents being involved in their life?

No

This presumption in favour of both parents being involved in bringing up the child, unless this is contrary to the child's best interests, is already the situation as a result of sections 1 and 2 of the 1995 Act. It is however subject to consideration of both practicability and the interests of the child. Each case deserves to be handled individually without the onus of proof being an issue for either party, and with the focus on the welfare of the individual child in those circumstances. The introduction of such a presumption is unnecessary and would result in the law becoming more complex and confusing, as well as risking drawing the focus from the child to the parents.

Question 24): Should legislation be made laying down that courts should not presume that a child benefits from both parents being involved in their life?

No

A non-resident parent has a responsibility and a right of contact with his or her child (in terms of sections 1(1)(c) and 2(1)(c) of the 1995 Act). As with the question on presumption in favour of parental involvement at Question 23, above, we do not support creating a presumption that would establish a burden of proof. The focus should be on the welfare of the individual child in their specific circumstances.

Question 25): Should the Scottish Government do more to encourage schools to involve non-resident parents in education decisions?

c) Yes – other

Decisions relating to health and education are already covered in the specified PRRs, including the right to act as the child's legal representative – which broadly covers the relevant rights to make decisions and access information. This, together with the requirement in section 6 of the 1995 Act for holders of PRRs to consult one another provides the necessary tools for involvement in health and education decisions. It is however unhelpful that 'parent' is differently defined in the Education (Scotland) Act 1980, section 135, resulting in a different set of rights. The issue of involvement in education is not essentially an issue of PRRs, or residence. The 1980 Act has a much broader definition of parent.

Difficult issues can arise in these situations, including child protection issues and concerns over revealing the location of a child and family members. However, the general approach should be to support the involvement of non-resident parents when possible. Improving guidance and training on these issues may assist parents and schools to understand their rights and responsibilities in this area.

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

b) Yes - guidance

This is an area with significant difficulties. It places a considerable burden on health practitioners, and requires an assessment of best interests (though it is not entirely clear who is to make that assessment). In addition, it is necessary to consider children's rights, in particular at the stage when they have the capacity to get independent and confidential medical advice and treatment. In addition, similar safety concerns may arise as discussed in relation to education at Question 25 above.

Consideration should be given to how best to support health practitioners in making these decisions around when and how to share any information.

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

No

With the exception of the issue regarding siblings, discussed at Question 9 above, the current law is already clear and no change is required. The system at present is intended to set out the general rights and responsibilities recognised (sections 1-2) and then to make provisions for a wide range of orders to either impose, affect, restrict or fetter those rights; or alternatively to make important decisions where those rights do not exist or arise.

Question 28): Should the Scottish Government take action to try and stop children being put under pressure by one parent to reject the other parent? If you selected yes what should be done?

No

The 1995 Act and associated legislation is based upon a presumption-less, welfare centric approach to determine what is in the best interests of a child. The courts are already well adept at assessing and determining the factual circumstances in a case and then determining whether there is good reason or not for a parent to have contact or parental rights.

If it is suspected that a child is being put under this type of pressure, there are existing tools to address the issue. A child welfare report can be ordered to investigate the situation, and there are a range of options for assisting a child to give their views. In particular, the use of independent advocacy or support could help to

identify any situations where such pressure was being used, as well as to provide a means of allowing a child to give their views in an unpressured environment.

Question 29): Should a person convicted of a serious criminal offence have their PRRs removed by the criminal court?

c) No – leave as a matter for the civil courts

Again, we would emphasise that the focus must be on the best interests of child, rather than the impact on a parent. A parent's relationship with their child is not a matter for criminal sanction. A conviction for a serious criminal offence may be a relevant consideration when assessing what is in the best interests of the child. However, the criminal court is unlikely to be the most suitable forum for PRRs to be considered, and it is likely that there would be considerable difficulties with this proposal in practice. A judge in a criminal case may wish to refer a situation to the relevant social work department or children's reporter if they have concerns.

Question 30): Should the reference in section 2 of the 1995 Act to “exercising” parental rights be changed to reflect that a person may not be exercising these rights because the child is now outwith the UK?

Yes

Although we are not aware of the current wording causing any difficulties in practice, it would be possible to change the wording to reflect that of Article 3 of the Hague Convention on the Civil Aspects of Child Abduction 1980, which talks about rights that “were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention”.

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

No

It is not clear what advantage would be gained by criminalising such removal in addition to the existing common law and statutory offences that apply in Scotland, as discussed in the consultation document.

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

Yes

In most cases, Sheriffs are able to exercise their discretion to ensure that cases are conducted appropriately using a range of case management options. As a last resort, it would be appropriate to ban personal cross-examination, but in these cases it would be important to provide for appointment of a representative to the person who has been prevented from cross-examining. This is currently the case in criminal proceedings. Such a ban should extend to wider victims of abuse, including children of the household, in particular where a child may have been used as a part of the abuse (for example as an element of coercive control).

Question 33): Should section 11 of the 1995 Act be amended to provide that the court can, if it sees fit, give directions to protect domestic abuse victims and other vulnerable parties at any hearings heard as a result of an application under section 11?

Yes

Although we agree in principle with this proposal, further detail is needed on the proposed scope of powers.

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

b) Yes – but amend

The factors listed in section 11(7A)-(7E) of the 1995 Act contain very important matters to be taken into account in any case. However, it is important to make clear that this is not a comprehensive list. Other relevant factors must also be considered. If adding to the list, the issues discussed in relation to Question 41, below, are likely to be relevant.

Question 35): Should section 11 of the 1995 Act be amended to lay down that no further application under section 11 in respect of the child concerned may be made without leave of the court?

No

Second and subsequent proceedings are summary in nature, dealt with by minute in terms of rule 14 of the OCR 1993. The court has the power to summarily dismiss a minute at the first hearing if it is not meritorious. There has been some confusion in the case law, and it may help to clarify in legislation that an applicant is required to show a material change of circumstances, or that a new matter has arisen. However, in proper practice, rule 14 should already confer sufficient power upon a sheriff to address the concerns noted and halt non-meritorious or abusive proceedings at the earliest possible stage.

It is not obvious that requiring leave of the court would improve the current situation. Firstly, there is already likely to be notification of intention to make an application (e.g. notification of a legal aid application and grant; pre-litigation correspondence). Secondly, a leave system necessarily involves the defender having no input. The current system of a summary decision on the merits being taken at the first stage following the appearance of the defender allows an opportunity for representations, in contrast to a system where leave is granted on a single party's account.

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

Yes

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

e) Other

There are existing measures that work to ensure that civil courts have information on domestic abuse, including the operation of section 11 (7A)-(7E) and the role of child welfare reporters and solicitors whose clients are making the allegation of abuse.

We do not support introducing a proactive duty on the civil courts. This would be an unusual step to take, and not consistent with the normal operation and function of the Scottish civil courts. In addition, the factors required to be taken into account by a court in the context of determining the best interests of a child are deliberately non-hierarchical. Although domestic abuse is undoubtedly a very important factor, placing a proactive duty on the court in relation to just one factor would risk creating a hierarchy.

In relation to child welfare reporters, we consider that evidence of domestic abuse is already considered a key issue, and there is not a need for a specific statutory duty.

It may be that additional guidance for practitioners would be helpful, and we would be happy to discuss this further with the Scottish Government.

Question 37): Should the Scottish Government do more to promote domestic abuse risk assessments?

No

Sheriffs already have a range of tools, and it is important to acknowledge that a domestic abuse risk assessment will not always be the best option in a particular case. In addition, evidence of abuse is a ground of referral to the Reporter, whether or not there has been a criminal conviction, and the content of s 11 ensures that there is a focus on the issue of domestic abuse.

However, domestic abuse risk assessments are potentially a powerful instrument to assist the court in making appropriate decisions about contact in particular. We are aware of useful work in this area developed by Relationships Scotland in conjunction with other agencies. In cases where domestic abuse is alleged or established, the sheriff could be given the power to refer to VIA, MARAC or another third party agency, in the same way as occurs in criminal proceedings.

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

Yes

Each court should be aware of relevant actions in the other, and we would support efforts to improve communication between criminal and civil courts. Proposals for an integrated court would be a significant and complex change requiring careful further investigation.

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

No

Although ensuring expeditious management of cases is a good aim, we do not believe that it would be effectively achieved through legislation. The impact of delay in cases involving children is well understood, and a simple statement in primary legislation is unlikely to address the issues that cause delay.

It would be more helpful to approach this issue by considering whether the relevant rules can be streamlined, and whether there is opportunity to create a more frontloaded case management system for these cases. It will also be necessary to ensure that there are sufficient resources, in terms of court time, to address children's cases expeditiously.

Court practice notes may be a useful tool for setting guidelines on timeframes for different hearings. Care is required to balance structure and consistency with the need for flexibility.

Question 40): Should cases under section 11 of the 1995 Act be heard exclusively by the Sheriff Court?

No

We believe that it is helpful to have the option of being able to access the Court of Session in some situations, and that the Act should retain the flexibility to choose the most appropriate forum. In particular, if a divorce is proceeding in the Court of Session then it is logical that that Court also considers whether orders should be made in respect of children of the marriage. However, it is helpful that the Court of Session may remit cases to the Sheriff Court *ex proprio motu* (under the Courts Reform (Scotland) Act 2014, section 93), when this is considered appropriate.

Question 41): Should a checklist of factors for courts to consider when dealing with a case be added to section 11 of the 1995 Act? If you answered yes what should be in such a checklist?

Yes

A checklist is used in a number of other jurisdictions, and it is possible that it could be useful in Scotland. However, it is important to ensure that, in accordance with the UNCRC, any checklist is clearly 'non-exhaustive and non-hierarchical', which can be challenging in practice.

Question 42): Should the Scottish Government do more to encourage Alternative Dispute Resolution in family cases?

b) Yes – better signposting and guidance

We support the appropriate use of ADR, but care must be taken when encouraging ADR use. It is important that mediation and other forms of ADR are only used in appropriate cases, and are not a mandatory step in the process. There are a wide range of situations that would not be suitable for ADR, including but not limited to situations of abuse. Excessive pressure to undertake ADR would not be appropriate, and any mandatory meetings or sessions may result in further unnecessary delays. Ensuring that adequate funding for ADR can be accessed through Legal Aid will be necessary to encourage its availability and use.

Question 43): Should the Scottish Government make regulations to clarify that confidentiality of mediation extends to cases involving cross border abduction of children?

Yes

The case of *FJM* decided that the content of family mediations, though inadmissible in civil court cases, was admissible in cases relating to abductions under the Hague Convention.⁸ This has had the effect of discouraging the use of mediation.

Question 44): Should Scottish Government produce guidance for litigants and children in relation to contact and residence?

Yes

Guidance in this area for both adults and children would be a useful tool. The guidance should be available in different formats and languages, and contact details for children's rights officers and advocacy workers should be included in the guidance offered to children.

Question 45): Should a person under the age of 16 with capacity be able to apply to record a change of their name in the birth register?

Yes

Those under the age of 16 are recognised as having the potential to have the capacity to make decisions in a wide range of contexts, including in relation to medical treatment and making a will. Allowing a child with capacity to change their name in the birth register would be consistent with this approach.

Question 46): Should a person who is applying to record a change of name for a young person under the age of 16 be required to seek the views of the young person?

Yes

⁸ *FJM Petitioner* [2015] CSOH 130

The obligation to take a child's views in relation to major decisions that affect them applies to a change of name. Efforts should be made to ensure that those views are in fact taken. If the ability of someone other than the child to make a name change is retained past the point that a child gains capacity, consideration should be given to whether a child's consent should be required if they have capacity, with the presumption that a child has capacity from the age of 12.

Question 47): Should SI 1965/1838 be amended so that a father who has a declarator of parentage and has PRRs can re-register the birth showing him on the birth certificate?

Yes

As discussed at Questions 15 and 19 above, we suggest that re-registration should be available to a father who has a declarator of parentage, without the requirement that he also has PRRs.

Question 48): Do you think the Principal Reporter should be given the right to appeal against a sheriff's decision in relation to deemed relevant person status?

No

The function of the Principal Reporter at the children's hearing stage is largely to ensure the effective conduct and administration of the hearing. Appealing a decision on relevant person status would not be consistent with their role. The Principal Reporter already has the right to convene a Pre Hearing Panel at any time to consider a person's relevant person status (where they consider the person may no longer meet the test). The 2011 Act also provides for constant review of deemed relevant person status. All relevant persons have a right to appeal such a decision, as does the child. This gives a number of checks and balances on such decisions.

Question 49): Should changes be made which will allow further modernisation of the Children's Hearings System through enhanced use of available technology?

Yes

There is already a move towards use of video links, and this is to be encouraged. In particular, we would support allowing remote attendance of a child in situations where it would assist in their ability to participate. The current rules have the effect of first requiring the child to be excused from attendance

before steps can be taken to allow them to attend remotely.⁹ The request could be made by application to a pre-hearing panel. This would require a change to section 79 of the 2011 Act.

It would also be helpful to allow parents or other relevant persons to attend remotely, in particular in situations where a child may not want them to be there in person.

It will be necessary to ensure that the means of remote access being used is suitable, with regard to concerns around privacy, security, and support.

Question 50): Should safeguarder reports and other independent reports be provided to local authorities in advance of Children’s Hearings in line with other participants?

No

We do not believe there is any need for these reports, which contain significant and sensitive personal information, to be provided to local authorities as a general rule. The representatives of the local authority have no rights engaged or at issue in a hearing. It is appropriate for the reporter to decide what information to provide in each case. Safeguarder Practice standards and guidance make it clear that it is best practice for safeguarders to share their recommendations with the local authorities and families in advance of any hearing. There is no need for the whole report to be disclosed to the local authority.

Question 51): Should personal cross examination of vulnerable witnesses, including children, be banned in certain Children’s (Hearings) Scotland Act 2011 proceedings?

Yes

We refer to our response to Question 32 above, and suggest that the reasons for banning personal cross examination in criminal and civil cases also apply to children’s hearings.

⁹ Rule 19, Children’s Hearings (Scotland) Act 2011 (Rules of Procedure in Children’s Hearings) Rules 2013/194

Question 52): Should section 22 of the Family Law (Scotland) Act 2006 which prescribes where a child is deemed to be domiciled be amended?

The question is unclear as to how section 22 would be amended, and cannot comment in the absence of any further detail. However, we are not aware of any immediate need for change.

Question 53): Do you have any comments about, or evidence relevant to:

- a) The partial Business and Regulatory Impact Assessment;**
- b) The partial Child Rights and Wellbeing Impact Assessment;**
- c) The partial Data Protection Impact Assessment; or**
- d) The partial Equality Impact Assessment?**

No

Question 54): Do you have any further comments?

Yes

Many of the issues being considered in this consultation are complex, and would require significant further consideration and consultation. The length of the consultation makes it challenging to provide full and detailed answers to all of the issues, made more challenging by the fact that many of the questions are general and lacking in specification.



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