

Briefing for the Citizen Participation and Public Petitions Committee on petition [PE1917](#): Provide full legal aid to all parents fighting for access to their children, lodged by Amy Stevenson

Brief overview of issues raised by the petition

The system for resolving parenting disputes

The [Children \(Scotland\) Act 1995](#) (as amended) ('the 1995 Act') sets out various parental responsibilities and rights (PRRs) in respect of children living in Scotland. These exist where practicable and in the best interests of the child.

Where a child does not live with a parent, PRRs include the right and the responsibility to have **contact** with that child. Contact was referred to as **access** under the predecessor legislation to the 1995 Act, and the latter term is still somewhat in use in practice.

Under section 11 of the 1995 Act, if a parent or other person cannot resolve a dispute about PRRs on their own, they can apply to the court for a court order aimed at resolving that dispute.

One type of court order under section 11 is a **contact order**. If parents can't reach agreement about the arrangements for a parent to see a child they do not live with, the court can grant this type of order stipulating the future arrangements.

In considering any application under section 11, the court must apply various statutory criteria. The welfare of the child is the paramount (i.e. most important and overriding) consideration.

If a court order, including a contact order, is later disobeyed ('breached'), the person affected by the breach usually has to raise

fresh court proceedings. These aim to draw the court's attention to the breach and ask the court for a remedy to the problem. Further legal costs are typically incurred, associated with these enforcement proceedings.

Legal aid and family cases

The legal aid system provides support to people on low and moderate incomes to access legal advice on an issue and legal representation in court. Solicitors who carry out legal aid work are paid a fee, set in legislation, for their work.

There are two main types of assistance that can be accessed from the legal aid budget for family cases, including those associated with a dispute about PRRs under the 1995 Act. **Advice and Assistance** provides advice but not representation in court by a solicitor. **Civil Legal Aid** provides representation from a solicitor in court. To qualify for either type of assistance, **financial eligibility tests** must be met. [In the case of Civil Legal Aid](#), there are other requirements as well.

The normal rule in litigation is that **expenses follow success**, in other words, that the losing party in litigation pays their opponent's legal fees, as well as their own. However, if a litigant who is legally-aided is found liable for their opponent's expenses, they can apply to the court to restrict the amount to one they can afford to pay. In many cases, this will be nothing at all. This approach is known as [modification of expenses](#) and it is a significant advantage for legally-aided litigants. It reduces the risks and costs of taking court action.

A significant proportion of the Scottish population ([thought to be around 70%](#)) qualifies for some assistance out of the legal aid budget. However, in some circumstances, people need to contribute from their own income towards the costs of the legal services they receive. This contribution increases as income increases. People who, on the face of it, qualify for legal aid can be put off by this requirement.

Automatic legal aid, i.e. legal aid without any financial or other eligibility tests being applied, is currently available to legal aid applicants in criminal cases in Scotland [in some specified circumstances](#). These cover situations where it is in the interests of

justice for the accused to be represented. However, it is **not** available in relation to applications to court under section 11 of the 1995 Act.

Legal aid reform

The Scottish Government commissioned an independent review of legal aid to look at reform of the current system. [A report of the review was published in 2018](#). The report recommended a citizen-centred system which was flexible and focussed more on matching advice provision to identified need. It envisaged greater co-ordination between the services provided by lawyers and those of other publicly funded advice providers. [The Scottish Government responded to the review in 2018](#). It accepted most of the recommendations but noted the need for further consultation on how they were to be delivered.

The Scottish Government went on to [issue a consultation in 2019](#). The [analysis of responses](#) showed broad agreement with the principles set out in the review. However, there was a lack of consensus about how change should be delivered, with contrasting views between the legal profession and the third sector in many cases.

Key Organisations and relevant links

[Shared Parenting Scotland](#)

[Family Law Association](#)

[Law Society of Scotland](#)

[Scottish Legal Aid Board](#)

[SPICe Briefing: Legal Aid – How it Works](#) (August 2021)

[SPICe Briefing: Legal Aid – Policy Issues](#) (September 2021)

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