This document relates to the Children (Scotland) Bill (SP Bill 52) as introduced in the Scottish Parliament on 2 September 2019

Children (Scotland) Bill

Policy Memorandum

Introduction

1. As required under Rule 9.3.3 of the Parliament's Standing Orders, this Policy Memorandum is published to accompany the Children (Scotland) Bill introduced in the Scottish Parliament on 2 September 2019.

2. The following other accompanying documents are published separately:

- Explanatory Notes (SP Bill 52–EN);
- a Financial Memorandum (SP Bill 52–FM);
- statements on legislative competence by the Presiding Officer and the Scottish Government (SP 52–LC).

3. This Policy Memorandum has been prepared by the Scottish Government to set out the Government's policy behind the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

Policy objectives of the Bill

4. The overarching policy objectives 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.

Background

5. The Children (Scotland) Act 1995 ("the 1995 Act") is centred on the needs of children and their families. It defines parental responsibilities and rights (PRRs) in relation to children, as well as who have those responsibilities and rights. It also sets out duties and powers available to public authorities to support children and their families and to intervene when the child's welfare requires it. Part 1 of the 1995 Act covers PRRs and contact and residence cases relating to children when parents are no longer together.

6. At the time, the 1995 Act was seen as ground-breaking. However, the Scottish Government is aware that many children, parents and organisations are expressing concerns about how Part 1 of the 1995 Act works in practice. The Bill aims to improve the court process in contact and residence cases.

7. Contact and residence disputes can be heard in both the sheriff court and the Court of Session. However, Scottish Courts and Tribunals Service (SCTS) statistics show that the vast majority are heard in the sheriff court. In 2017/18, only two cases initiated in the Court of Session involved seeking PRRs as the primary crave (the main order sought from the court), as opposed to 2,414 cases initiated in the sheriff court.[1]

8. When contact and residence disputes reach the sheriff court they are usually heard by the sheriff at Child Welfare Hearings.[2] Child Welfare Hearings are normally held in private with both parties present. They are intended to allow the sheriff to speak to the parties directly, identify the issues and establish how the issues are to be dealt with. Child Welfare Hearings are generally informal procedures. The procedure for them is set out in Chapter 33 of the Ordinary Cause Rules for the sheriff court[3].

---

[1] https://www.gov.scot/publications/civil-justice-statistics-scotland-2017-18/pages/6/#Table_6

[2] 2010 research on "Understanding Child Contact in Scottish Sheriff Courts" has a chapter on Child Welfare Hearings: https://www.webarchive.org.uk/wayback/archive/20180516111427/http://www.gov.scot/Publications/2010/12/08145916/7

[3] https://www.scotcourts.gov.uk/rules-and-practice/rules-of-court/sheriff-court---civil-procedure-rules/ordinary-cause-rules

9. The Scottish Government and others such as the Family Law Committee of the Scottish Civil Justice Council have been doing work to improve the family courts over the last few years. For example the Scottish Government chaired a working group between 2013 and 2015 on Child Welfare Reporters (CWRs), who provide advice to the court in contact and residence cases[4]. This led to a number of changes and in particular to rules clarifying the remit of CWRs.

10. The Bill also covers changes to aspects of the Children's Hearings System. The Children's Hearings System deals with children and young people in Scotland under the age of 18 who are in need of help. The Children's Hearings System can help a child or young person who is in need of care and protection or who has got into trouble with the police.

Wider context

11. The Bill is an important step in improving the family courts. However, this is only part of a wider programme of work to improve the court process. Primary legislation is only part of the action necessary to improve the operation of family justice. A Family Justice Modernisation Strategy was published when the Bill was introduced.[5] This sets out work that is ongoing by Scottish Government and others, work that can be done via secondary legislation or by improved guidance and areas for longer term consideration.

12. Policy in this area is aligned with the Equally Safe strategy[6], with relevant commitments around reforming family law reflected in the delivery plan for that strategy published in 2017. In addition, recommendations from Power Up Power Down[7], a participation project with children and young people carried out by the Children and Young People's Commissioner Scotland and Scottish Women's Aid, have been taken on board in relation to provisions regarding ensuring the views of the child are heard in contact and residence cases.

Consultation

13. The Bill is informed by the outcome of a consultation on the Review of Part 1 of the 1995 Act. The consultation ran between 15 May and 28

[4] https://www2.gov.scot/Topics/Justice/law/17867/reporters
[5] http://www.gov.scot/ISBN/9781839601149
[6] https://www.gov.scot/publications/equally-safe/
[7] https://womensaid.scot/project/power-up-power-down/

September 2018[8]. The Scottish Government produced child friendly questions which were available via SurveyMonkey. The child friendly consultation ran for the same period.

14. The Scottish Government received approximately 250 responses to the main consultation and 300 to the child friendly questionnaire. The Scottish Government held a number of meetings with a range of stakeholders across the country during the consultation period, including with children and young people. The responses to the main consultation have been published where the Scottish Government has permission to do so[9]. In addition, an analysis report has been published[10].

15. The Bill covers a range of areas and this Policy Memorandum considers each area individually.

Ensuring the views of the child are heard

Background

16. Sections 1 to 3 of the Bill remove the legal presumption that a child aged 12 or over is considered mature enough to give their views in sections 6, 11 and 16 of the 1995 Act, as well as in sections 14 and 84 of the Adoption and Children (Scotland) Act 2007 and section 27 of the Children's Hearings (Scotland) Act 2011.

17. It is understood from a number of stakeholders that the current presumption in those sections that a child aged 12 or over is considered of sufficient age and mature enough to give their views is leading, in some circumstances, to the views of a child under 12 not being taken into consideration. When the 1995 Act was originally enacted, the intention was not for this provision to limit under 12s from giving their view. The Scottish Law Commission in its report on Family Law implemented by the 1995 Act said: "The presumption would not be intended, however, to discourage courts from having regard to the clearly expressed views of children below

[8] https://consult.gov.scot/family-law/children-scotland-act/
[9] https://consult.gov.scot/family-law/children-scotland-act/consultation/published_select_respondent
[10] https://www.gov.scot/publications/analysis-consultation-responses-consultation-review-children-scotland-act-1995/

the age of 12 who are capable of forming their own views"[11]. This is also reflected in the current wording of the 1995 Act.

18. It is proposed to remove this presumption to ensure the position of younger children is fully considered by all parties. The changes will apply in relation to major decisions involving PRRs (see section 6 of the 1995 Act in particular). They will require the courts or other decision maker to give the child a suitable opportunity to express their views in a manner suitable to the child. This includes seeking the preferences of the child on how they wish to give their views.

19. In cases under section 11 of the 1995 Act, it is the responsibility of the court to consider the steps to be taken to obtain the views of the child. The court rules provide: "where a child has indicated his wish to express his views, the sheriff shall order such steps to be taken as he considers appropriate to ascertain the views of that child[12]". There is equivalent provision in the Court of Session Rules[13].

20. In adoption and permanence cases, a similar court rule allows the sheriff to order such procedural steps to be taken as the sheriff considers appropriate to ascertain the views of the child[14]. In addition, the court rules require a curator ad litem[15] to be appointed in every case. It is also intended that a child could, if the curator considers it appropriate, speak directly to the court.

---

11 https://www.scotlawcom.gov.uk/files/5912/8015/2668/Report%20on%20family%20law%20Report%20135.pdf (paragraph 5.25).

12 Rule 33.19(2) of the Ordinary Cause Rules https://www.scotcourts.gov.uk/rules-and-practice/rules-of-court/sheriff-court--civil-procedure-rules/ordinary-cause-rules

13 Rule 49.20 of the Court of Session Rules https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/rules-of-court/court-of-session/chap49.pdf?sfvrsn=24

14 The Act of Sederunt (Sheriff Court Rules Amendment) (Adoption and Children (Scotland) Act 2007) 2009 https://www.legislation.gov.uk/ssi/2009/284/contents/made

15 Someone appointed by the court to safeguard and promote the interests of a child (or other person who lacks capacity) in litigation. It can be translated as a 'guardian in the litigation'. See further below.

21. Rule 6 of the Children's Hearings rules of procedure prescribes 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[16]. In relation to Children's Hearings, the introduction of advocacy services in 2020 to support implementation of section 122 of the Children's Hearings (Scotland) Act 2011 will be available to support younger children to give their views. The Scottish Government also expects digital developments in the future will offer greater flexibility for the ways in which children can give their views.

22. In applications to the sheriff in relation to Children's Hearings, rule 3.5 of the Act of Sederunt (Child Care and Maintenance Rules) 1997[17] includes a similar provision to that in adoption and permanence cases.

Consultation responses

23. The majority of parents' organisations who responded to the consultation were in favour of removing the presumption, stating that every child is different in terms of when they are able to form a view. In addition, these organisations reflected the fact that with the right support young children can give a view.

24. The children's organisations were all in favour of removing the presumption and replacing it with a new one that all children are capable of expressing a view. This view is supported by the local authorities and NHS boards who responded.

25. Law firms and the Law Society of Scotland were in favour of retaining the current presumption, as this is a rebuttable presumption, and because the court does take on board the views of younger children where appropriate. The Senators of the College of Justice were in favour of removing the presumption,

26. Half the academic responses expressed concern that removing the presumption could lead to children over 12 not being able to give their views.

[16] https://www.legislation.gov.uk/ssi/2013/194/article/6/made
[17] https://www.scotcourts.gov.uk/rules-and-practice/rules-of-court/sheriff-court---civil-procedure-rules/child-care-and-maintenance-rules

The other half were in favour of removing the presumption as there would be no barrier to younger children being able to express their views.

27. Consultation respondents were overwhelmingly in favour of using a variety of ways to obtain the views of the child and that this should be dependent on what is in the best interests of the child.

Policy analysis

28. The policy intention is for all children who are capable and wish to do so to be able to give their views including in family court cases, Children's Hearings, exclusion order proceedings, permanence and adoption court cases. This will also apply when a person with PRRs is making a major decision about the child. The weight given to their views will depend on the child's age and maturity. By not specifying an age limit, the Scottish Government is aiming to ensure that there is no barrier to younger children who are capable and wish to do so expressing their views. This could lead to more empowered children. Research has shown that allowing children to express their views in court cases can lead to better outcomes for the child and can lead to higher rates of satisfaction amongst children of the outcomes[18].

29. The Scottish Government's considers that the majority of children are able to express their view in these situations. There may be cases where a very young child is not able to give their views or where a child has severe learning disabilities. In addition, there may be cases when a young person of any age may not wish to give their views and these wishes should be respected.

30. The Scottish Government believes that a child's views could be sought even if they are no longer living in Scotland as this could be done by them completing a form, by writing a letter or drawing a picture or by speaking to the court by telephone. However, the Scottish Government appreciates that in some cases the location of a child is unknown and therefore obtaining the views of the child may not be possible.

31. The policy is also in line with UNCRC Article 12 which states simply that: "States Parties shall assure to the child who is capable of forming his or

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

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[19].”

32. The policy is for the views of the child to be expressed in a manner suitable to the child. This would require the individual or organisation obtaining the views to consider a range of options on how this is done, including speaking directly to the decision maker, by completing a form, or through submitting a drawing, or letter. In addition in cases under section 11 of the 1995 Act the views of the child can be taken by a CWR. A CWR is appointed by the court to either obtain the views of the child or to produce a report on the best interests of the child.

33. The policy is that whilst 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. Therefore, the presumption in section 11 of the 1995 Act that a child aged 12 or over is of sufficient age and maturity to form a view on whether to be legally represented has been retained.

Alternatives

34. There is the option of not amending the law. This would mean that in practice the views of children under 12 are not fully taken into consideration. In addition, the decision maker might not choose a manner of expressing views that is suitable for the child. The consequence could be that the decision maker does not receive the best information possible about a child’s views. This would also be contrary to the objectives of the Bill on the views of the child and the change is more consistent with the terms of the UNCRC. Therefore, this is not considered a suitable alternative.

35. There is the option of introducing a new lower age limit as suggested by some stakeholders. This could lead to further discussions about what the lower age limit should be. Any age limit would mean children under that age may not have their views heard regardless of whether they are capable of giving them or not. In addition, there are differences in the age that stakeholders feel a child is mature enough to give their views. By removing

[19] https://downloads.unicef.org.uk/wp-content/uploads/2010/05/UNCRC_united_nations_convention_on_the_rights_of_the_child.pdf?_ga=2.134612081.1004052438.1566377392-1950427500.1534844629

the age limit completely the Government is ensuring that the decision is made on a case by case basis.

36. There is an option of laying down in primary legislation the specific methods of obtaining the views of the child. This could mean the decision maker having to consider all of the options laid down. However, a list of this nature could not be exhaustive. Laying down that the decision maker must give the child a suitable opportunity for the child's views to be heard gives flexibility. There may also be cases where the urgency of a case means the decision maker has to limit the methods of obtaining views while still ensuring the method chosen is suitable to the child.

37. In England and Wales, Practice Direction 12B issued by the Family Division[20] specifies at paragraph 4.5 the ways in which a child's views can be given to the court. An exact equivalent would not be an option in Scotland as there is no Family Division and each Sheriff Principal (or Lord President for the Court of Session) is responsible for their own practice directions.

38. There is the option of the decision maker being required to use the method preferred by the young person for obtaining their views. This is not feasible as it could lengthen a case, which is unlikely to be in the child's best interests. In addition, the preferred method may not be practicable. However, the decision maker is required to give the child the opportunity to express their views in a manner suitable to them.

39. The presumption that a child aged 12 or over is of sufficient maturity to express their views is also in other pieces of legislation. There is the option to remove this presumption from all legislation where the court is required to have regard to the views of the child. This would not be appropriate as there are circumstances where a young person requires a certain degree of maturity and understanding to be able to make a decision. For example, the Bill replicates the existing presumption at section 11(10) of the 1995 Act that a child aged 12 or over is mature enough to instruct their own lawyer in new sections 11ZB(3) and (4) .

[20] https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_12b

Restricting personal conduct of case in proceedings involving vulnerable witnesses including victims of offences

Background

40. The Programme for Government for 2017-18 committed the Scottish Government to consulting on prohibiting of personal cross examination of domestic abuse victims in child contact cases[21]. This was included in the consultation on the Review of the 1995 Act.

41. Sections 4 and 5 of the Bill introduce a new special measure into the Vulnerable Witnesses (Scotland) Act 2004 (the 2004 Act) prohibiting a party from personally conducting the remainder of their case. This special measure is available in proceedings where the court is considering making an order under section 11 of the 1995 Act and in Children's Hearings court proceedings. The special measure can be authorised by an order made under section 12 or 13 of the 2004 Act.

42. For proceedings related to section 11 of the 1995 Act, the special measure is available where there is a vulnerable witness. Section 4 of the Bill inserts new section 11B into the 2004 Act which sets out circumstances where a person is to be considered a vulnerable witness. Section 4 of the Bill also inserts section 22D into the 2004 Act. This introduces a rebuttable presumption that the prohibition should apply to a party who has been convicted or accused of a specified criminal offence against the vulnerable witness. The presumption also applies to a person who is the subject of a civil protection order granted to protect the vulnerable witness.

43. For Children's Hearings court proceedings, section 4 of the Bill inserts section 11A into the 2004 Act. This sets out circumstances where a person is to be considered a vulnerable witness for those proceedings. There will be a mandatory, no exception prohibition on personal conduct by a person who, it is alleged in the statement of grounds, has perpetrated specified conduct against a witness. For other parties there will be a presumption that no party should personally conduct their own case where there is a vulnerable

[21] https://www.gov.scot/publications/nation-ambition-governments-programme-scotland-2017-18/

witness to give evidence. This can be dis-applied in respect of specific parties if necessary in the interests of justice.

44. Section 6 of the Bill gives the Scottish Ministers the power to establish a register of solicitors from whom a lawyer is to be appointed if a party fails to appoint one themselves where the prohibition applies in either a case under section 11 of the 1995 Act or a Children's Hearing court proceeding. The Scottish Ministers may by regulations specify the criteria a solicitor must meet to be eligible to be on the register and also the fee rate payable to the solicitor. Provision may also be made about outlays such as fees to be paid to Counsel.

Consultation responses

45. The majority of consultation respondents were in favour of restricting self-representation. All of the five academics who responded to this question were in favour of introducing a ban.

46. The Faculty of Advocates and the Senators of the College of Justice were not in favour of introducing such a restriction on self-representation. The Faculty of Advocates noted that the requirement for protection of victims of domestic abuse must be balanced with the right to a fair trial. The Senators of the College of Justice noted that it would be difficult to define domestic abuse victims unless there had been a criminal conviction. The Law Society of Scotland, law firms and the Central Tayside and Fife Sheriffs' working group were all in favour of introducing a ban.

47. Scottish Women's Aid and the Scottish Women's Rights Centre were in favour of introducing a ban. The Scottish Women's Rights Centre suggested that the ban should cover all cases where domestic abuse has been disclosed. Families Need Fathers Scotland were in favour of introducing a ban. They note that examination and cross-examination by a party litigant of an ex-partner is always difficult whether or not domestic abuse is alleged. They were calling for cases to be conducted on an inquisitorial basis rather than an adversarial one.

48. All the children's organisations were in favour of a ban. NSPCC suggested that any ban should be extended to any child involved in the case whether they are the child of the perpetrator or not.

49. In relation to Children's Hearings, the Family Law Committee of the Scottish Civil Justice Council has considered this matter[22] and is in favour of protections for witnesses in Children's Hearings proceedings.

Policy analysis

50. The policy is to protect victims of offences including victims of domestic abuse and vulnerable witnesses in either Children's Hearings court proceedings or in cases under section 11 of the 1995 Act by ensuring that an individual is not using court proceedings to perpetuate abuse of another person. This will ensure protection in the family courts and children's hearing proceedings is more closely aligned with existing protections in the criminal courts.

51. The policy is to ensure that victims of offences and vulnerable parties feel capable of giving the best evidence possible. This may not be possible if the party is intimidated or scared of the party who is questioning them.

52. The policy is to rely on the existing provisions in the 2004 Act in relation to the application process for special measures. If there is a dispute regarding the existence of a relevant criminal conviction the court can obtain details of relevant convictions and outstanding proceedings from Police Scotland.

53. In relation to Children's Hearings court proceedings there will be a mandatory ban on personal examination where any party intends to examine a witness in relation to specified conduct, narrated in the grounds, where the witness is allegedly the victim of their behaviour. In such a situation, the witness will be a "deemed vulnerable witness".

54. To ensure the right to a fair trial, the policy is that if an individual is prohibited from conducting a case themselves and are unwilling or unable to appoint a lawyer themselves then one would be appointed by the court from the register of lawyers established by the Scottish Ministers.

[22] http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/flc-meeting-files/flc-meeting-papers-12-december-2016/paper-4-1a---sg-and-scra-policy-paper---examination-of-child-and-vulnerable-witnesses-in-children-39-s-hearings.pdf?sfvrsn=2

55. In relation to the register held by the Scottish Ministers, the policy is that a recruitment round would be undertaken to obtain a number of solicitors who would be willing to act for parties. The Scottish Ministers would take the power to set the fee rates for these lawyers in regulations as appropriate.

56. The Scottish Ministers wish to be able to delegate the function of administering and operating the register of lawyers to another public sector body if this is considered appropriate. The Scottish Ministers also wish to be able to contract out the management and operation of the register.

Alternatives

57. There is the option of not amending the law. This will allow persons convicted or accused of serious offences including domestic abuse to be able to personally examine the victims or complainers and their children. This is unpleasant and difficult for the witness, can prolong the domestic abuse and may not be in the best interests of the child. This is not considered a suitable option.

58. Another option would be to limit the prohibition to those who have been convicted of domestic abuse in a criminal court or who are subject to a civil protection order against domestic abuse. However, in 2017/18 there were 59,541 cases of domestic abuse recorded by the police in Scotland[23]. During the same period there were 9,782 convictions with a domestic abuse indicator recorded[24]. There are also instances of domestic abuse which are not reported to the police. It is accordingly important that the court has discretion to apply the prohibition to protect vulnerable witnesses (within the meaning of the 2004 Act) more generally.

59. Another option, suggested by the Faculty of Advocates, is to rely on the 2004 Act as currently drafted. This is already possible and the Scottish Government understands that this is used in practice. However, while this allows evidence to be taken by a commissioner it does not include specific provision to prevent parties from being personally examined by alleged

[23] https://www.gov.scot/publications/domestic-abuse-recorded-police-scotland-2017-18/
[24] https://www.gov.scot/publications/criminal-proceedings-scotland-2017-18/

abusers. Therefore, the Scottish Government does not consider this is the best option to improve the current situation.

60. There is the option of prohibiting personal conduct of a case if a party has a relevant conviction regardless of who was the victim. Whilst this option could be seen as extending protections it is not a preferable option as parties may be prevented from representing themselves due to a conviction which has no connection to, or effect on, the witness.

61. There is also the option of requiring parties to declare any relevant convictions with the initial writ. [This is not considered viable as if a party was required to provide the court with a schedule of previous convictions this would inform the court about all the offences which that person has been convicted of regardless of who is the victim. This could result in more information being disclosed to the court than necessary.] Requiring an individual (without the assistance of a lawyer) to understand what constitutes a relevant conviction for the purposes of the ban, and to then ascertain whether they have any such convictions, would be difficult for individuals to comply with. It may have to carry a criminal sanction if not complied with, which could result in criminalising parties in section 11 proceedings.

62. Consideration was given to whether a party, if prohibited from personal conduct of their case, should receive automatic civil legal aid. This option would require amendments to the Legal Aid (Scotland) Act 1986 to allow for automatic legal aid in certain civil cases. This would mean that a party would need to identify a legal aid lawyer who would be willing to represent them. This option would not require a new register of lawyers to be established. However, there are a number of disadvantages to this option. Firstly, a party may have approached all the lawyers who undertake legal aid work in an area already and the lawyers may be unwilling to undertake this work. There is also a possibility that a party has employed and subsequently sacked all the legal aid lawyers in a particular area. In addition, a party may be resistant to employing a lawyer. Another disadvantage is that a party could use this as a delaying tactic in the court proceedings. It could also lead unintentionally to a delay whilst a party appoints and instructs a lawyer.

Amending the 1995 act to allow the court to authorise special measures to protect vulnerable parties in

proceedings where the court is considering an order under section 11(1) of the 1995 act

Background

63. Concerns were raised by domestic abuse victims during stakeholder events and consultation responses that in Child Welfare Hearings they have to sit at the same table as their abusers. This matter was discussed at the Family Law Committee (FLC) of the Scottish Civil Justice Council's (SCJC) sub-committee on case management in family actions which reported in October 2017[25].

64. As part of the work by the FLC, the SCTS conducted a short survey of 15 courts of various sizes throughout Scotland[26]. A third of the courts surveyed indicated that there was an automatic separation of parties at all Child Welfare Hearings, whilst the remainder said that suitable arrangements could be made if advised by solicitors or parties in advance of the hearing. The courts rely on parties bringing to their attention possible issues in relation to domestic abuse. More than half the courts surveyed did not receive any formal applications by parties for excusal on the basis of a domestic abuse context. Only two of the 15 courts surveyed had received applications from individuals to use a live television link to avoid being in the same room as the other individual.

65. The provision gives the court the power to order a range of special measures if attending or participating in hearings is likely to cause distress which could be alleviated by use of a special measure. The court may order that the proceedings be conducted with the use of video link, with the use of screens or with supporters. The measures in the Bill are similar to existing special measures used in the different context of assisting vulnerable witnesses when giving evidence in other civil and criminal proceedings.

[25] http://www.scottishciviljusticecouncil.gov.uk/committees/family-law-committee/23-october-2017-papers

[26] https://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/flc-meeting-files/05-february-2018/paper-2-1a---scts-report-on-steps-taken-in-child-welfare-hearings-where-there-is-an-allegation-of-domestic-abuse---private.pdf?sfvrsn=2

Consultation

66. The majority of respondents to the consultation were in favour of amending section 11 of the 1995 Act to allow the court to give directions to protect domestic abuse victims and any other vulnerable parties. The Law Society of Scotland was in favour of amending the legislation. All the children's organisations were in favour of amending the legislation.

67. The Faculty of Advocates was against the proposal, stating that: "conduct of litigation is a matter for the sheriff or judge. There are inherent powers of the Court to ensure that all parties and witnesses are treated with proper respect and their participation is facilitated. Vulnerable witnesses are already protected. If further steps are required these should be covered by rules of court, not primary legislation." The Senators of the College of Justice were against the proposal, stating that: "the courts already can and do take a range of practical measures where this is needed… we feel it is important to reiterate the point that the courts can only regard litigants as "victims" where there is a criminal conviction." The majority of the law firms felt that amending rules of court would be a more appropriate means of ensuring that victims of domestic abuse are protected.

Policy analysis

68. The policy is to protect parties during proceedings where the court is considering an order under section 11 of the 1995 Act, in particular at Child Welfare Hearings. Similar options are already available for witnesses in civil proceedings and the Scottish Government consider it important that the court should be provided with a range of tools with which to facilitate parties' attendance at and full participation in proceedings.

69. The policy is for these provisions to apply whether a party is conducting a case themselves or is being legally represented. The Scottish Government are aware that in some cases even if a party is legally represented the court may speak directly to the party.

70. The provision also gives the Scottish Ministers the power to bring forward secondary legislation to add to the special measures that the court may authorise. This is important to allow for flexibility for further options for protecting parties.

71. Where the person who is to act as a supporter is also to give evidence as a witness in the proceedings, they may not act as the supporter at any

time before giving their evidence. An individual who is present during a court proceeding may be privy to information which could impact on the evidence that they would be giving as a witness. This mirrors equivalent provisions in relation to supporters in other civil and criminal cases.

72. An assessment of whether a person is to give evidence in the proceedings, and is therefore barred from acting as a supporter until after they have given their evidence, is to be made at the time the person is to be appointed as a supporter. If the person has not at that point been cited as a witness then it would be at the discretion of the court whether to allow the individual to give evidence as a witness if subsequently cited[27].

Alternatives

73. There is the option of not amending the law. This would mean that the current situation whereby there is no clear provision to authorise special measures to facilitate the attendance and participation of a party would continue. This would not meet the key objectives of the Bill which is furthering protection of victims of domestic abuse.

74. There is the option of making an amendment by rules of court. Rules of court are made by Act of Sederunt and are a matter for the Lord President on behalf of the Court of Session and the Scottish Civil Justice Council. Therefore, the Scottish Government did not include this option in its consultation paper. Rules of court could make further provision in this area, but the Scottish Government's view is that this is an important policy decision so it would be better to make provision in primary legislation to put the matter beyond doubt, as with the existing 2004 Act provisions.

75. Another option could be for proceedings such as Child Welfare Hearings to be conducted separately for each party. This is not considered a viable option as it would fundamentally change the nature of the proceedings.

Register of child welfare reporters

Background

76. The Scottish Government recognise that CWRs can play an important role in ensuring the best interests of the child are reported to the court. CWRs are appointed by the court either to seek the views of the child and

[27] http://www.legislation.gov.uk/ukpga/Vict/3-4/59/section/3

report any views expressed by the child to the court; or to undertake enquiries and report to the court. These functions are currently set out in the Ordinary Cause Rules.

77. The existing CWRs (around 400) are on lists held by the Court of Session and the six Sheriffs Principal. The court can then appoint a CWR on the appropriate regional list to produce a report. For instance, the sheriff court rule 33.21 of the Ordinary Cause Rules prescribes that the interlocutor (ie. court order) appointing a CWR must specify the issues in respect of which the child's views are to be sought or specify the enquiries to be undertaken depending on the reason for the appointment[28].

78. Section 8 of the Bill establishes a register of CWRs held by the Scottish Ministers and provides that a court may only appoint as a CWR a person who is included on the register. Individuals would be eligible to apply to be on the register if they meet the minimum standards in relation to training and qualifications or experience set down in regulations.

79. Appointment to the register would also mean that a CWR term of appointment would not be open ended and that CWRs would have to be reappointed to the register periodically. This would allow for an assessment as to whether a CWR continues to meet the eligibility criteria and also whether there continues to be a need for the number of CWRs appointed by the Scottish Ministers.

80. The Bill also gives the Scottish Ministers the power to set the fee rates for CWR. 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 this may encourage long reports). There could be a rate for reports covering the welfare of the child generally and a different rate for reports just aimed at obtaining the views of the child.

81. CWRs would be funded by the Scottish Ministers rather than by the Scottish Legal Aid Board (SLAB) or privately funded. This would resolve issues around access to justice in this respect as evidence from stakeholder events suggests that parties not in receipt of legal aid may have to incur considerable expenditure in meeting the costs of a CWR if one is appointed. The Scottish Government have heard anecdotally that some privately

[28] https://www.scotcourts.gov.uk/rules-and-practice/rules-of-court/sheriff-court---civil-procedure-rules/ordinary-cause-rules

funded Child Welfare Reports can cost up to £10,000. However, this cost is understood to be an exception to the rule.

Consultation responses

82. There was strong support amongst consultation respondents for amending the existing arrangements. The academic responses were, for the most part in favour of a new set of arrangements or changing the existing arrangements, stating the need for consistency. The children's organisations were all in favour of a new set of arrangements. The Children and Young Person's Commissioner stated that the current funding of CWR by parties produces inequalities of access and can result in the appearance of a lack of independence. The NSPCC were in favour of a joined up system of child welfare reporting based around the rights, needs and best interests of the child.

83. Scottish Women's Aid and the majority of the other organisations who support parents were in favour of a new set of arrangements. They are in favour of mandatory training and Continual Professional Development around the dynamics of domestic abuse and expressed concerns that the majority of CWRs are solicitors.

84. The Law Society of Scotland and the Faculty of Advocates considered that the system works well and therefore there should be no change to the current arrangements. The Senators of the College of Justice were in favour of modifying the existing arrangements as they currently work well but could be improved if appropriate training is provided. Tayside Central and Fife Sheriffs' working party were in favour of amending the existing arrangements but cited that the existing system works well. They suggested that CWRs possess local experience and knowledge which enables them to discuss possible solutions to problems with parties and to make appropriate recommendations to the court.

Policy analysis

85. The Scottish Government's policy is to ensure that the best interests of the child are at the centre of any case under section 11 of the 1995 Act. Establishing a register of CWRs ensures that CWRs appointed by the court are subject to suitable and consistent qualification and training requirements, ensuring for example, that the impact of domestic abuse or a child being turned against a parent has been considered as CWRs will receive training in these areas.

86. In addition, as mentioned above a CWR can also be appointed to obtain the views of the child. The policy in this area is to ensure that a young person feels confident in giving their views and that these are reflected accurately to the court.

87. The policy aim is also to ensure that where a CWR does not meet the required standards they can be removed from the register. This will ensure that CWR continue to produce high quality reports and that they undertake regular appropriate training.

88. The policy is also to ensure consistency across Scotland in relation to the fee that is charged for CWR. Data from SLAB suggests that the costs vary[29]. The policy is also to alleviate the pressure on individuals who are not eligible for Legal Aid and who, as a result, may, at the moment, need to meet some or all of the costs charged by a CWR.

89. The Scottish Government is aware that currently over 90% of CWRs are lawyers and is grateful for the skills that lawyers bring to this role. However, one of the aims of the Bill is to encourage more non-lawyers to apply to become CWRs. The Scottish Government recognises the important skills that child psychologists and social workers could bring to this role.

90. The policy in relation to the register of CWRs is to either run the register in house or to contract it out to a third party. The Financial Memorandum for the Bill refers to both the costs for running the register in house or contracting out the operation and management of the register. If the register is contracted out then Scottish Ministers would still retain the responsibility for the appointment of individuals to the register and the removal of individuals from the register, the setting of eligibility criteria and fee rates.

Alternatives

91. The first option is do nothing and retain the status quo. This would not be a palatable option for the majority of stakeholders as it does not protect

[29] https://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/flc-meeting-files/flc-meeting-papers-23-october-2017/paper-4-2---report-by-slab---child-welfare-reporters.pdf?sfvrsn=2

the best interests of the child. Very few respondents to the consultation have said that there should not be a change to the existing system.

92. Another option is to establish an administrative system for CWR but leave this out of the primary legislation as at present. This could address the concerns raised by a number of individuals about the training received by CWR. One recommendation of the Working Group on CWR between 2013 and 2016 noted above was to introduce a training scheme for CWR. The aim was to lay down requirements for membership of the registers of those persons who may be appointed as CWR. The Lord President expressed concerns that creating a register of CWR administratively could leave SCTS and the Lord President vulnerable to challenge[30]. Therefore, this option is not viable.

93. There is also the option of relying on secondary legislation or guidance. Following the working group on CWRs, the Scottish Government have made some changes which did not require primary legislation. For example by changing the name of CWR from bar reporters and proposing changes to the court rules so the interlocutor appointing a CWR must either specify the issues in respect of which the child's views are to be sought or specify the enquiries to be undertaken and the issues requiring to be addressed in the report. The Scottish Government considers that further amendments, such as requiring CWRs to undergo training would require primary legislation. Therefore, this option is not considered viable.

94. Another option is for the Lord President to regulate CWRs. This would involve either the Scottish Ministers or the Lord President taking powers to regulate matters such as the qualifications, training, and experience required of CWRs, with the registers or those eligible to act as CWRs then being maintained by the Lord President and the Sheriffs Principal.

95. This option would in some ways maintain the status quo as the Lord President and Sheriffs Principal would continue to be responsible for appointing to the register of CWRs. As a result, it could be less time consuming to establish than creating a new structure. However, the Lord President and the Sheriffs Principal would need to take on responsibility for the appointment and reappointment process for CWRs. They would also become responsible for reviewing the people appointed to ensure that they

[30] http://www.gov.scot/Topics/Justice/law/17867/reporters/letters-judiciary-Sep-16

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.

Regulation of child contact centres

Background

96. Child contact centres are safe venues for conflict-free contact between children, parents, and other people in the child's life. Contact centres offer a mixture of supported and supervised contact. Supported contact is where there is no significant risk to the child and therefore contact centres only record that the contact took place and not details of how it went. Supervised contact is where contact takes place in the constant presence of an independent person who observes and ensures the safety of those involved. Contact centres also provide a handover service where one parent drops the child off to be picked up by the other parent. This means that the parents do not have to see each other during the handover.

97. There are currently 41 contact centres across Scotland who are members of Relationships Scotland[31] (RS). In addition the Scottish Government are aware of three independent centres (i.e. not part of the RS network) in Aberdeen[32], Inverclyde[33] and Glasgow[34].

98. The majority of contact centres are reliant on volunteers. However, there is a move towards permanent staff being employed in the larger centres. Contact centres are not currently subject to any regulation in relation to the standard of accommodation or training of staff.

99. The Bill gives the Scottish Ministers the power to set by regulations minimum standards in relation to training of staff and accommodation. The Bill also gives the Scottish Ministers power to appoint a body to oversee the standards and report on the standards on a regular basis. It is envisaged that the body appointed would need to be involved in:

---

[31] https://www.relationships-scotland.org.uk/
[32] https://www.vsa.org.uk/maisies/
[33] http://www.familycontact.org.uk/
[34] http://www.renfieldcontactcentre.co.uk/contact.html

- the process under which the body would oversee the standards, carry out inspections and publish reports (inspections could either be routine or carried out if significant complaints are received about a centre);
- registering contact centres;
- collecting fees from contact centres;
- recruiting staff to carry out the inspections, write reports and carry out other regulatory functions; and
- handling complaints.

Consultation responses

100. Consultation respondents were in favour of regulation of contact centres. Scottish Women's Aid suggested that regulation should involve a process for inspection and a complaints procedure; a programme of training for contact centre staff around the causes, dynamics and impact of domestic abuse, along with standardised questions and training on observing contact where domestic abuse is an issue. Families Need Fathers Scotland suggested that there should be a focus on paid full and part time staff rather than volunteers. All the academics were in favour of regulation but stressed the need for this to be accompanied by sufficient funding.

101. The children's organisations were in favour of regulation. The Children and Young People's Commissioner Scotland believes that the Care Inspectorate is the best organisation to oversee contact centres.

102. The response from the Senators of the College of Justice was against regulation of contact centres, saying that they generally work well. They note that it is appropriate for there to be a degree of flexibility in relation to the places that can be used as a contact centre. They fear that some centres would be required to close. The Law Society of Scotland are in favour of regulation, as contact centres are required to handle challenging situations and work with vulnerable children. The Faculty of Advocates are concerned that introducing regulation may lead to a reduction in the number of contact centres.

Policy analysis

103. The Scottish Government considers that establishing minimum standards in relation to training and accommodation will help ensure that all contact centres are safe locations.

104. The policy intention is that children will be protected in all cases where they are referred to a child contact centre. Therefore, these provisions should apply to all contact centres which are used by individuals who are referred by court. The Scottish Government is aware that local authorities may use other locations to facilitate contact. These are not covered by the proposals in the Bill.

105. The Bill does not extend to referrals by solicitors or self-referrals to contact centres. However, the Scottish Government would expect parties and solicitors to use a regulated centre.

106. The policy intention is that if a party wishes to complain about the service they have received at a contact centre then this should be handled initially by the contact centre but then could be escalated to the body appointed to oversee the regulation of contact centres. This would ensure that the best interests of the child are maintained and any concerns about the safety of the child concerned are dealt with appropriately.

107. The policy intention is that there would be an independent inspection regime to ensure that contact centres meet the required minimum standards. An initial inspection would take place during the period between the body being appointed and the regime coming into force. There would then be re-inspections at regular intervals. The full details of who would undertake the independent inspection would be set out in secondary legislation.

108. The Scottish Government has provided the Care Inspectorate with £56,000 in 2019/20 to undertake a feasibility study. However, other options are being considered including giving this role to another organisation whose role involves protecting children.

109. The policy intention is that three independent centres would not need to become members of RS. The independent centres would be able to submit their complaints procedures and policies in relation to accommodation and training to the body that will be appointed to oversee

the regulation of contact centres. This will ensure that independent centres could continue to operate.

Alternatives

110. One option is to retain the status quo whereby contact centres are not regulated. Stakeholder opinion is, however, strongly in favour of regulation of child contact centres and it is not considered this would be in the best interests of children affected.

111. Another option is to introduce legislation specifying that contact centres must be a member of an association. In New Zealand there is the Aotearoa New Zealand Association of Supervised Contact Services[35]. This organisation establishes a national set of procedures and arrangements between the Family Court and Supervised Contact Providers, and ensures that the needs of any child using such a service for protection and safety is met and that the child's welfare and best interests are promoted.

112. The most similar organisation in Scotland is RS. RS has a national set of procedures and arrangements for their contact centres. The Scottish Government does not consider that RS should have this supervisory role as there are three independent contact centres. In addition, this would not meet the policy aims of establishing an independent complaints procedure and of establishing an independent inspection service.

113. In England and Wales the President of the Family Division has issued a practice direction that court ordered contact must only take place in a centre affiliated with the National Association of Child Contact Centres[36] (NACCC). This would not be an option in Scotland as there is no family division of the civil courts. Each Sheriff Principal would have to issue a similar direction (and the Lord President would have to issue one for the Court of Session). In any event, there is no equivalent to NACCC in Scotland.

[35] https://www.anzascs.org.nz/
[36] https://naccc.org.uk/

Duties in relation to looked after children and their siblings

Background

114. Section 17 of the 1995 Act provides that: "where a child is looked after by a local authority they shall, in such manner as the Secretary of State may prescribe, take such steps to promote, on a regular basis, personal relations and direct contact between the child and any person with parental responsibilities in relation to him as appear to them to be, having regard to their duty to promote the welfare of the child, both practicable and appropriate".

115. There is no equivalent provision for promoting sibling personal relations or direct contact in primary legislation. There is simply a duty set out in regulations to assess contact with family members.[37] The Bill places a duty on local authorities to promote sibling personal relations in the same way as they are required to promote personal relations and direct contact with a child and their parent where this is practicable and appropriate.

116. The Bill clarifies that local authorities must take the views of siblings into consideration when making their assessment of their duties.

Consultation responses

117. There is a growing awareness in the children's sector, and more broadly, around the importance of promoting personal relations and contact between a child in care and their siblings, where it is in the child's best interests.

118. There is a Stand up for Sibling Partnership [38] which is supported by a number of stakeholders including the Centre for Excellence for Children's Care and Protection (CELCIS), the Scottish Children's Reporters Administration (SCRA), Children's Hearings Scotland and Who Cares? Scotland, seeking to share best practice ideas.

119. 148 respondents to the main consultation sought action to better support children to keep in touch with children that they have shared family life with. The child friendly consultation, focus groups of children and young

[37] http://www.legislation.gov.uk/ssi/2009/210/regulation/4/made
[38] https://www.standupforsiblings.co.uk

people, and the infants, children, young people, adults with experience of care and their families who engaged with the Independent Care Review were also clear that contact should be promoted between siblings where it is not against their best interests.

120. Consultation responses received from Barnardo's, Children 1st, Children and Young People's Commissioner Scotland, Clan Childlaw, Dr Chris Jones on behalf of Stand up for Siblings, CELCIS, Who Cares? Scotland, and SCRA advocate primary legislation to include an additional duty on local authorities in relation to a child in care and their siblings in relation to promoting contact and personal relations where this is practical and appropriate.

Policy analysis

121. The policy is to ensure that priority is given to the child sibling relationship at the earliest point when children are being taken into care. The Scottish Government understands that there may be competing interests between sibling children and the welfare of the child concerned and this has to be considered. In a small number of cases the relationship between siblings may be inappropriate or harmful. For example, an abusive family may not have established appropriate sexual boundaries or excessive sibling rivalry may undermine a child's sense of self-esteem or aggravate their challenging behaviour.

122. The Scottish Government considers that a sibling relationship can be wider than a biological brother or sister. The duties are to extend to full, half, step and adopted siblings and include sibling like relationships. This might be influenced by who a child sees as their sibling as well as being an objective assessment of the relationship. For example, if a child is brought up in the same household as their cousin, that could be a sibling like relationship. If a child shared a room with another child in a foster home for one occasion overnight that would not.

123. The policy intention is that all siblings capable of giving a view to a local authority will be able to do so. This furthers compliance with the UNCRC.

Alternatives

124. The Scottish Government could do nothing and maintain the status quo. This would mean that legislation does not reflect the important role that

siblings can play in a child's life when they are not able to live with their parents. This would not meet the needs of the key stakeholders and is therefore not viable.

125. The alternative option is to rely on the existing looked after children guidance. The disadvantage of that is that respondents to the consultation on the Review of the 1995 Act will feel that their views have not been reflected, and the operation of the existing guidance will continue to be ineffective. Therefore, this is not considered to be a viable option.

Clarification of the law regarding parental responsibilities and rights

Background

126. Section 11 of the Bill aims to capture the effect of the Inner House of the Court of Session decision in the case of Knox v S[39], in addressing the question whether the requirement that an order under section 11(2) of the 1995 Act must be "in relation to" PRRs means that the order itself must involve the granting or withdrawing of PRRs. In Knox v S, the Inner House held (paragraph 45) that "residence orders and contact orders, and indeed specific issue orders…. could properly be described as 'orders in relation to' parental responsibilities and rights in so far as they relate to matters encompassed in such responsibilities and rights and are likely to affect the exercise of such responsibilities ad rights by anyone who has, or who might obtain, them.".

127. Section 11 of the Bill makes it clear that an order under section 11(2) of the 1995 Act is to be regarded as related to at least one of the matters mentioned in section 11(1). An order under section 11(2) includes, at (d) a "contact order" which regulates the arrangements for maintaining personal relations between a child under 16 and any person with whom the child is not, or will not be, living.

Consultation responses

128. There were two questions in the consultation on the Review of the 1995 Act which relate to this provision. Firstly, whether there needs to be

[39] Knox v S [2010] CSIH 45

clarification that orders, except for residence orders, made under section 11 of the 1995 Act do not automatically grant PRRs.

129. The academics were divided as to whether the existing law is clear enough. The Law Society, Faculty of Advocates, Tayside Central and Fife Sheriff's working group and two law firms considered that the legislation does not require clarification. The Senators of the College of Justice and one law firm were of the view that it does require clarification.

130. Children's organisations were also divided on the need to clarify the law. The Children and Young People's Commissioner and NSPCC were in favour whilst Clan ChildLaw and Children 1st say that the law is sufficiently clear already.

131. The second question was on whether there needs to be clarification that a person under the age of 16 can be granted a contact order without automatically being given PRRs. Responses from the majority of children's organisations, Scottish Women's Aid and Families Need Fathers Scotland to this question were in favour of clarifying the law. The Senators of the College of Justice, Law Society of Scotland, and Faculty of Advocates, Tayside Central and Fife and two law firms were also all in favour of clarification in the law.

Policy analysis

132. This policy is aimed at ensuring the best interests of the child are at the centre of the case, by clarifying that a court may make an order for contact (for example) in cases where it may not be possible to award PRRs (i.e. the person is under 16 and not a parent) or the court does not consider it is in the child's best interests for the person being granted contact to also be granted PRRs.

Alternatives

133. There is the option of not amending the law. This may lead to continued debate or challenges around whether orders, apart from residence orders, grant individuals PRRs automatically. This may lead to some children not being able to maintain contact with a person which may not be in the best interests of the child.

Factors for the court to consider

Background

134. The Scottish Law Commission Report on Family Law in 1992[40] noted that in England and Wales the Children Act 1989 introduced a checklist of factors covering:

> "(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and under- standing);
>
> (b) his physical, emotional and educational needs;
>
> (c) the likely effect on him of any change in his circumstances;
>
> (d) his age, sex, background and any characteristics of his which the court considers relevant;
>
> (e) any harm which he has suffered or is at risk of suffering;
>
> (f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;
>
> (g) the range of powers available to the court under this Act in the proceedings in question."

135. The Scottish Law Commission (SLC) stated in its report that supporters of a checklist considered that it would help ensure that the same factors are considered by a range of professionals. The SLC also noted that supporters of a checklist considered it might assist parents and children to understand the reasons for a decision.

136. Before finalising its report in 1992, the SLC, in line with usual practice, issued a discussion paper. This did not offer a conclusion on whether or not a statutory checklist of factors should be included in the legislation but invited views. In its 1992 report, the SLC noted, in paragraph 5.23, that "most respondents [to their discussion paper] favoured a statutory checklist but there was significant opposition from legal consultees who feared that it could lengthen proceedings and cause judges to adopt a mechanical approach to going through the list even in, say, as application for a minor

40 https://www.scotlawcom.gov.uk/files/5912/8015/2668/Report%20on%20family%20law%20Report%20135.pdf (see paras 5.20 – 5.23).

variation in an order. We ourselves do not favour a lengthy statutory checklist."

137. Paragraphs 50 and 51 of General Comment 14 of the UNCRC state that a non-exhaustive and non-hierarchical list of elements that should be covered in a best interests assessment by any decision maker could be useful. The General Comment goes on to state that a list could provide guidance for the State or decision makers. General Comment 14 goes on to say that the Committee considers that the following elements be taken into account when assessing and determining the child's best interests:

- The child's views;
- The child's identity;
- Preservation of the family environment and maintaining relations. This includes an assessment and determination of the child's best interests in the context of potential separation of a child from their parents. The Committee suggest that separation should only occur as a last resort when the child is in danger of experiencing imminent harm;
- Care protection and safety of the child. This includes the child's right to protection from all forms of physical or mental violence, injury or abuse;
- Situation of vulnerability; and
- The child's right to health and education.[41]"

138. "The Bill includes factors to be considered before making an order under section 11 of the 1995 Act covering the effect that the order the court is deciding whether or not to make might have on the involvement of the child's parents in bringing the child up and the child's important relationships with other people.

Consultation responses

139. Respondents were divided as to whether the Scottish Government should introduce a list of factors for the court to consider. The majority of the academics were against a list of factors. They noted that this could require

41 https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf

time to be spent on issues that are not relevant in an individual case which would make cases more complex and lengthy. Concern was also raised that this would create a hierarchy. Some stakeholders expressed concern that this could be unnecessary interference with judicial function.

140. Children's organisations were split on whether to introduce a list of factors. One noted that legislating for this risks overlooking matters that may be relevant to an assessment of a particular child's best interests. Instead they were in favour of reference to General Comment 14 of the UNCRC in judicial training (see paragraph 153). Another two children's organisations were in favour of a list of factors that puts a child's views and best interests at the top and were in favour of a checklist as this can protect children.

141. Some stakeholders suggested that instead of introducing a list of factors the existing subsections (7A) to (7E) of section 11 of the 1995 Act which were introduced in the Family Law (Scotland) Act 2006 should be removed. These subsections are seen by some as a partial checklist of factors, and focus on abuse and risk of abuse.

Policy analysis

142. The Scottish Government considers that certain factors should be specified as it would be in the best interests of a child for the court to consider and take account of these matters when considering an order under section 11 of the 1995 Act. The policy is to build on the existing section 11(7A) to (7C) of the 1995 Act which focus on domestic abuse to cover equally important areas. These sections of the 1995 Act have been replicated in the provision inserted by section 1(4) of the Bill.

143. The policy is also to increase consistency amongst courts in what areas they should be considering when making an order. This may be in the best interests of the child as each court would be considering the same issues when making a decision.

144. The Scottish Government believes that both parents should be fully involved in their child's life as long as this is in the child's best interests. Therefore, the court in deciding whether or not to make an order should consider the effect of the order on the involvement of the child's parents in bringing them up.

145. The Scottish Government recognises the important role that siblings and grandparents can play in a child's life. Therefore, it is important for the court to consider the importance of other individuals who are important to the child and how those relationships might be affected.

Alternatives

146. There is the option of not introducing the list of factors and maintaining the status quo. The Scottish Government does not consider this a viable option. Whilst there are drawbacks to introducing a list of factors (principally making the 1995 Act more complex for the courts), it is considered that these are outweighed by the benefits of establishing a list mentioned above.

147. There is also the option of removing subsections (7A) to (7E) of section 11 of the 1995 Act which are seen by some as a semi-checklist of factors for the court to consider. This was in the consultation on the 1995 Act and responses were in favour of retaining the provision. For these reasons this option has been discounted.

148. The Scottish Government considers that a number of areas could be included in the list of factors. The table below lists areas which the Scottish Government does not consider to be viable options:

Proposed area	Reason for not including
Ensuring the views of the child are heard	This is already covered (in section 11 (7)(b) of the 1995 Act) which provides that, taking into account the child's age and maturity, the court shall so far as practicable give the child the opportunity to indicate whether he or she wishes to express their views and if so, give the child an opportunity to express these views and to have regard to them.
Protecting the child from any violence or abuse or risk of violence or abuse	This is already covered by section 11(7A) to (7C) of the 1995 Act which require the court to have regard to the need to protect the child from abuse. This provision has been replicated in the Bill.

The likely effect of any change in circumstances	This could detrimentally affect a non-resident parent who is seeking contact or residence. A new situation, following a change, could quite quickly become the "status quo" and may be in the best interests of the child assessed over the longer term.
The age, sex and background of the child concerned	The Scottish Government considers that the court will already be taking this into account in all cases when considering what is in the best interests of the child.
The need for the child to have a continuing relationship with both their parents	The proposed wording requires the court to consider the effect on the child of the involvement of both parents in bring the child up. This would require the court to consider each case individually. This proposal would go further by suggesting that a child should maintain a relationship with both parents.

Register of curators ad litem in cases under section 11 of the 1995 act

Background

149. A curator ad litem (curator) is appointed by the court to safeguard and promote the interests of a child in so far as those interests are affected by particular litigation. Curators are appointed in a range of cases in Scotland including in adoption, permanence order, divorce and dissolution cases.

150. Use of curators in cases under section 11 of the 1995 Act varies across Scotland. In some areas, curators are appointed instead of a CWR. In some sheriffdoms curators are appointed from the list of CWRs held by the Sheriffs Principal. In other areas curators are appointed from the panel of curators ad litem held by each local authority for permanence and adoption cases. In one sheriffdom the Sheriff Principal maintains a separate

list. The Scottish Government understands that a number of curators are also CWRs.

151. The Bill gives the Scottish Ministers power to establish and maintain a register of curators who may be appointed in cases under section 11 of the 1995 Act and provides that a court in such cases may only appoint as curator a person included on the register. Individuals would be eligible to apply to be on the register if they meet the minimum standards in relation to training and qualifications or experience set down in regulations.

152. Appointment to the list would also mean that a curator's term of appointment would not be open ended and that curators would have to be reappointed to the list periodically. This would allow for an assessment as to whether a curator continues to meet the eligibility criteria and also whether there continues to be a need for the number of curators appointed by the Scottish Ministers.

153. The Bill also gives the Scottish Ministers the power to set the fee rates for curators. Fee rates could be set in a variety of ways such as by using an hourly rate.

154. The Bill requires the court to state on the interlocutor appointing the curator the reason for the appointment and to revisit the reason for the appointment periodically. The Scottish Government is aware that sometimes a curator may be appointed by a court to undertake the role of a CWR.

155. In contrast with the role of CWR which could be undertaken by a social worker or a child psychologist, the Scottish Government expects curators to continue to be lawyers. This is because they have to represent the child's interests in the court proceedings.

Consultation responses

156. The consultation sought views on regulation of CWRs and curators in the same question. The majority of responses focused on regulation of CWRs. One children's organisation was in favour of curators meeting a minimum standard upon appointment in order to ensure that children receive a consistent service across Scotland.

157. The Society of Local Authority Lawyers and Administrators (SOLAR) noted that there is inconsistency in relation to the skills required of officers,

their training, the process for appointment, their accountability, remuneration and quality assurance. SOLAR have noted that some local authorities have sought to introduce consistency, with some councils setting up joint panels of curator and reporting officers for the courts, with agreement on fee charging, required skills, training etc. SOLAR also noted that there has been difficulty with these panels as there is no statutory requirement for sheriffs to appoint from the panel. SOLAR's views were supported by two local authorities who called for a transparent system of appointment and use of curators. The Scottish Women's Rights Centre suggest that curators must be trained in domestic abuse/coercive control issues.

Policy analysis

158. The policy aim is to ensure that the best interests of the child are at the centre of any decision made under section 11 of the 1995 Act. Regulation of curators will ensure that curators appointed by the court are subject to suitable and consistent qualification and training requirements, ensuring for example that they receive sufficient training in representing the views of children, and the effects of domestic abuse, coercive control and turning a child against a parent.

159. A curator would only be required and should only be appointed where the court is satisfied that it is necessary to protect the child's interests. The court already has a duty to consider the best interests of the child and there must be some feature of the case which requires the appointment of a curator over and above this. The Scottish Government is aware that there is currently some ambiguity around when a curator should be appointed and when a CWR should be appointed. The policy is also to ensure consistency across Scotland in relation to the fee that is charged by curators.

Alternatives

160. There is the option of doing nothing. This does not appear to be viable as it would mean that the curators would continue to be unregulated.

161. There is also the option of the only eligibility criteria for curators wishing to act in a case under section 11 of the 1995 Act being on the panel of curators for permanence and adoption cases. This option would ensure that there were eligibility criteria and a regular review of whether members continue to meet these criteria. It would also maintain the status quo in some areas where courts are appointing curators for section 11 cases from the lists maintained by the local authorities.

162. However, this option would not address the issues raised during the consultation about lack of consistency of curators as eligibility criteria could still vary across the country. It would also not give Ministers the power to set a consistent fee rate across Scotland. As local authorities are rarely involved in cases under section 11 of the 1995 Act it would not be appropriate for them to meet the costs of curators in these cases. In addition, it would not be applicable in the areas of Scotland where currently a curator is appointed from either the list of CWRs or another list. For these reasons this is not considered a viable option. However, the Scottish Government considers that being on a panel of curators for permanence and adoption cases could be one of the eligibility criteria listed in secondary legislation for being eligible to be on the register of curators in section 11 cases.

Local authority reporters appointed in section 11 cases

Background

163. In cases under section 11 of the 1995 Act, the court may appoint a local authority to report on a child. This power is set out in section 11 of the Matrimonial Proceedings (Children) Act 1958 (the 1958 Act). Further provisions are set out in rules of court. The Scottish Government understands that in certain areas of Scotland the courts are using these provisions to order a Child Welfare Report from local authorities. In particular, the Comhairle nan Eilean Siar and Dumfries & Galloway councils are appointed to undertake Child Welfare Reports. The 1958 Act does not specify who a local authority may appoint, although the Scottish Government understands that this is generally social workers.

164. Section 14 of the Bill amends section 11 of the 1958 Act as it applies to cases under section 11 of the 1995 Act. This amendment means that if a local authority employee wishes to continue to act as a CWR then they would need to apply to be on the register of CWRs and meet the required eligibility criteria.

165. The Bill does not restrict a court from asking for a report from social work other than a Child Welfare Report, e.g. where they are aware that a family is known to them as this is different to a report on the best interests of the child.

Consultation responses

166. The consultation sought views on the regulation of CWRs and curators ad litem together. The majority of comments from respondents on this question were about the regulation of CWRs. Two organisations made specific comments in relation to local authority reporters. SOLAR stated that courts often order that a local authority appoint a member of their staff employed as a social worker, to investigate and report on all circumstances of the case and what may be in the child's best interests. SOLAR considered that extending the proposals for regulation of CWRs to local authority social workers could present a significant difficulty for the management of the resources and budget of local authority Social Work Departments.

167. Glasgow City Health Care Partnership supported the view expressed by SOLAR that requiring every social worker in the local authority's children and families social work team to be subject to a Scottish Ministerial appointment would be unworkable. They go on to say that each social worker is bound by the law and is deemed to have training and experience and to be able to apply detailed statutory provisions.

Policy analysis

168. The policy aim is to ensure the best interests of the child are at the centre of any decision made under section 11 of the 1995 Act. The Scottish Government accepts, as noted by SOLAR in their consultation response that the majority of local authorities would appoint a social worker to produce a Child Welfare Report. However, section 11 of the 1958 Act does not specify this and therefore could lead to people without adequate relevant training producing reports on the best interests of the child. The Scottish Government considers that the majority of social workers would already meet the criteria to be a CWR.

169. Regulation of local authority employees acting as CWRs will ensure that staff receive sufficient training in representing the views of children, the effects of domestic abuse, coercive control and turning a child against a parent.

170. As noted above, the policy is also to retain section 11 of the 1958 Act for cases other than where a CWR can be appointed, as well as for cases other than under section 11 of the 1995 Act.

Alternatives

171. There is the option of doing nothing. This would mean that there would not be any requirement for a local authority to appoint an individual who is suitably qualified to produce a report. This may not ensure the best interests of the child are protected in all cases.

172. Another option is that section 11 of the 1958 Act could be amended to specify that a local authority must appoint a social worker to produce the report. A social worker is defined in section 77 of the Regulation of Care (Scotland) Act 2001[42]. Social Workers must have a recognised social work qualification and be registered with the Scottish Social Services Council (SSSC). To retain their registration with the SSSC social workers must undertake regular training and learning and development. However, a social worker covers a range of topics and may not be a specialist in obtaining the views of a child. Therefore, this is not considered the best option.

Explanation of decisions to the child

Background

173. There is no specific requirement at present for the court's decision to be explained to the child concerned. As a result, in most cases feedback is provided through a parent or parents. Impartial feedback may not be provided if the child is not a party to the proceedings. In some cases if an adult has been appointed to help the child understand the court process (a child support worker) then they may provide feedback. However, this is rare.

174. Section 15 of the Bill ensures that the outcomes and reasons for decisions are explained to the child concerned in an impartial manner if the court considers it in the best interests of the child. Feedback can be provided by either the court or by appointing a CWR. This reflects current practice within Children's Hearings where children receive notes of decisions and reasons from the Children's Reporter.

Consultation responses

175. Respondents were generally in favour of direct feedback being provided to a child. Scottish Women's Aid said that the feedback will depend on the individual child and what works best for them in terms of communication. They are in favour of the court having a duty to ensure that

[42] http://www.legislation.gov.uk/asp/2001/8/contents

children have the decision explained to them. The Scottish Women's Rights Centre is in favour of child support workers feeding back to the child. Two academics were in favour of using CWRs. One professor and another academic were in favour of using child support workers. Another two professors were in favour of using whatever option is best for the child. Clan Childlaw are in favour of the decision-maker feeding the outcome back. Another academic considered that it may not be appropriate to communicate every decision concerning a child to that child. The court should determine which decisions ought to be communicated to the child.

176. The Senators of the College of Justice believe that primary responsibility should remain with the parents. They highlight concerns that it is not the role of the judiciary to write letters to children. The Faculty of Advocates responded that the court should decide whether any particular decisions should be conveyed to the child concerned and by whom. This view is supported by Tayside Central and Fife Sheriffs' working party on family law. The law firms who have responded to the consultation have all suggested that CWRs should provide feedback to the child. The Law Society of Scotland is in favour of feedback being provided to the child in a manner that is clear and appropriate. This may depend on the approach to taking the child's views.

177. Families Need Fathers Scotland suggest that a qualified family therapist or child psychologist should be involved in the process of feeding back to the child. The children's organisations support the recommendations made in Power Up/Power Down[43] that there should be a duty on the court to provide feedback and that there should be a variety of means to do this.

Policy analysis

178. The policy is that it is in the best interests of the child to receive an impartial explanation of decisions in cases under section 11 of the 1995 Act as these decisions are likely to have a significant impact on their lives. 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.

[43] Power Up/Power Down is referred to in paragraph 12 of this policy memorandum.

179. Not all decisions would need to be explained as there are often a number of Child Welfare Hearings, which may only be procedural. If a decision is simply to postpone a hearing for a short period of time whilst for example legal aid is established, this decision is unlikely to need to be explained. It may however, be necessary to explain a decision that is not a final decision if it is likely to have an impact on a child. For example, the court may decide that it is in the child's best interests for them to start having contact with a parent who they have not seen for a period of time. The Scottish Government expects that this decision should be explained to a child who is capable of understanding. Explaining covers both providing reasons for the decision and also what the decision will mean for the child.

180. The policy is also to give the court flexibility in options available to them as a child may prefer to receive information either directly from the court or through a CWR. A child may have already spoken to the court or written a letter to them or to a CWR. If a CWR has already been appointed then this reporter can be reappointed to provide feedback, unless this would not be in the child's best interests, as the child may have already built up a relationship with the CWR.

181. The Scottish Government considers that even young children are capable of understanding a decision if it is explained to them in language which they understand. However, the Scottish Government appreciates that there may be circumstances, for example if the child is very young or has significant disabilities, where the court may consider that the child would not be capable of understanding a decision. In addition, the Scottish Government accepts that there may be cases where the location of the child is unknown and communication with the child is not possible.

Alternatives

182. There is the option of not doing anything. This would mean that some children and young people would continue not to receive impartial information on the outcome of a decision that affects them directly. This may not be in the child's best interests especially if they have given their views and the court has decided a different outcome is in the child's best interest.

183. There is the option of the court being required to explain all decisions to the child. The Scottish Government considers that this would not be practicable as a case may involve a number of Child Welfare Hearings at which decisions are made. It may not be in a child's best interests for every

decision especially if it is minor, for example a decision to postpone a Child Welfare Hearing.

184. There is the option of making provision so that a decision is explained by another person who is not a court appointment. For example a relative or parent or teacher may wish to feedback to the child and may have a good relationship with the child. However, it is felt that it is important that the child receives impartial information. In addition, there may be concerns regarding data protection if an un-vetted third party was given access to court decisions that would otherwise be unreported.

185. A number of respondents were in favour of feedback being provided by a child support worker. The Scottish Government is aware that in certain areas of Scotland child support workers are already in place but this is not Scotland wide and there are currently no minimum standards that a child support worker must meet in terms of training and skills. There is currently work being undertaken by various areas of the Scottish Government in relation to advocacy workers/child support workers. As stated in the Family Justice Modernisation Strategy, further work is required to ensure that there is a consistent Scottish Government policy in this area. The Bill gives the Scottish Ministers the power to extend the list of people who may provide feedback to a child by secondary legislation which could be used if a system of child support workers is introduced.

Failure to obey order

Background

186. Currently, if someone believes an order under section 11 of the 1995 Act has been breached, the person can go back to court and:

- seek a further order (such as a variation of the order or a switch in residence), and/or
- ask the court to hold the person breaching the contact order in contempt of court.

187. An application to vary a section 11 order is made to the court that originally granted the order. This can be done by a minute which details the changed circumstances and asks the court to vary the order. The other party is allowed to reply to this application. The court can either make an

interim variation based upon written submission by parties or can require a hearing.

188. Concerns have been raised by some stakeholders that resident parents are deliberately not complying with orders whilst other organisations argue that orders have not been complied with due to safety concerns for the child in question.

189. The Bill introduces a requirement on the court to investigate non-compliance with an order. The investigation can either be by the court themselves or in more complex cases by appointment of a CWR.

Consultation responses

190. The consultation sought views on whether there should be changes to the procedure in relation to enforcement of contact orders[44]. Respondents were divided on this subject. Two of the academics believed that there should not be any change in the existing procedure. Three of the academics were in favour of alternative sanctions including parenting classes. Another academic suggested there needs to be an open-minded review of the reason for apparent non-compliance and one suggested that professionals would need to be properly trained to identify the difference between those cases in which there is a blatant disregard for the court's order and those cases in which, due to domestic abuse or genuine fears of safety, etc. contact is justifiably being withheld.

191. The Senators of the College of Justice are in favour of no change to the existing procedure. They have expressed concerns that introducing alternative sanctions or making a breach of a contact order a criminal offence could raise more problems than they solve. The Law Society of Scotland, the Faculty of Advocates and one law firm are in favour of a range of measures but not criminalising a breach of a contact order. The Faculty of Advocates suggest that parents would benefit from attending an awareness course focusing on the impact on children of their actions. The Family Law Association noted that the issue of unduly influencing a child against contact is concerning and usually contrary to the interests of the child. A number of other law firms were in favour of alternative sanctions. The Scottish Courts and Tribunals Service noted that if alternative sanctions were to be taken

[44] This followed an earlier round table on this issue: https://www2.gov.scot/Resource/0052/00525142.pdf

then this would require some form of report prior to any sanction being applied and this could have an impact on courts in terms of court time and staff resource. It would also have significant cost implications.

192. The children's organisations were all in favour of another option to enforce contact orders. Children 1st believed that the courts should work towards understanding what is behind an inability to uphold a contact arrangement. The Children and Young People's Commissioner Scotland noted that it is important to explore the reasons why contact is not occurring. They considered that any decision about sanctions needs to be take account of the best interests of the child. The NSPCC noted that it is rarely in a child's best interest to imprison their safe carer.

193. Families Need Fathers Scotland proposed a range of sanctions far wider than the current options. They believed that penalties could include community service, financial penalties, attendance at parenting classes or other training or short-term or permanent transfer of residence to the other parent. Scottish Women's Aid believed that unpaid work, parenting classes or compensation will not protect children. Similarly, making breaches of these orders a criminal offence would significantly increase the vulnerability of a parent and child and should be avoided at all costs. They are in favour of investigating why children are not being made available and the motive behind a breach of the order.

Policy analysis

194. The Scottish Government is aware from consultation events and responses to the consultation that this is a complex area. The Scottish Government considers it is clearly in the best interests of the children involved for orders under section 11 of the 1995 Act to be complied with.

195. In some cases there may be a simple explanation for why an order has not been complied with, for example the child was unwell. In other cases the situation may be more complex, for example where concerns are raised about the safety of the child in question. The Scottish Government's view is that understanding the reasons behind non-compliance could help the court to ensure the order remains in the child's best interest.

196. If the issue of non-compliance with an order is raised, the policy is for this to be investigated by the court themselves in the first instance. If a more

detailed investigation is required, for example if the child is refusing to have contact with the other party then this may require a CWR to be appointed.

197. The policy is to create consistency to ensure that if a party raises concerns about non-compliance with an order then the court investigates this. These concerns were reflected in the consultation responses. A number of the children's organisations suggested that the courts should work towards understanding what is behind an inability to uphold a contact arrangement.

198. The Scottish Government would expect, as part of the investigation as to why an order has not been complied with, the court would need to obtain the views of the child. These views could assist the court in ensuring that the contact order is in the best interests of the child concerned. However, the Scottish Government is aware that a child may not wish to give their views or may be unable to give them.

199. Contempt of court remains the final sanction for non-compliance with an order as this highlights the serious nature of the issue and the impact that non-compliance can have on a child.

Alternatives

200. There is the option of not amending the law and seeking to highlight in the Family Justice Modernisation Strategy the existing provisions. This is not considered a viable option as it would not ensure investigations would take place consistently and this may not be in a child's best interest.

201. One option is to introduce family contact facilitators. The Justice Committee during its scrutiny of the Family Law (Scotland) Act 2006 expressed concerns about the difficulties associated with enforcement of court imposed contact orders. As a result of this concern the then Scottish Executive announced plans to pilot family court facilitators in two courts (Glasgow and Edinburgh – but with the capacity to take on cases elsewhere in the Lothian and Borders). The pilots were to run for two years initially. It was envisaged that the Family Contact Facilitators would work closely with court staff, particularly sheriff clerks and the sheriffs dealing with family cases. The functions of the post-holders were likely to include the following:-

- facilitate contact between parents, solicitors, sheriffs;
- early intervention in high risk cases as directed by sheriffs;

- liaise with contact centres, health and education officials, children's panel;
- giving support and practical advice to the parents including provision of information about relevant services;
- research/data gathering;
- case tracking; and
- analysis of trends.

202. A procurement exercise was run but only two bids were received. Both organisations' original tenders failed to meet the requirements and they were invited to resubmit their bid. Both failed to improve their bids sufficiently. As a result, the then Scottish Executive decided not to take forward the pilot. Given this experience, the Scottish Government considers that a child contact facilitator role could be too ambitious.

203. The Scottish Government does not consider the option of making a breach of a contact order a criminal offence a useful option as this could mean that more family cases would be dealt with by the criminal court. The criminal court is not the best place for family cases. In addition, and as the consultation itself noted, it may be heavy-handed to introduce criminal offences in this area, as a person would receive a criminal record.

204. Another option is to create a new enforcement route outwith contempt of court which would, for example, allow the court to order an individual to attend a parenting class or mediation or to undertake unpaid work. The court would still have the option of finding that a person is in contempt of court and could order imprisonment. This would offer the court alternative measures which could be more child friendly whilst still maintaining prison as the ultimate sanction. In England and Wales the court has the power to require a person not complying with a contact order to undertake unpaid work. In Germany, the court has the power to fine an individual (as can happen in Scotland with contempt proceedings).

205. This option is less severe than imprisonment and could be seen as a deterrent for non-compliance with a contact order. However, there are concerns that mediation is not a viable option where there has been domestic abuse. There are also 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.

206. Another alternative would be to remove imprisonment as an option when a person is found by the court not to have complied with a contact order. However, this could make it harder to enforce contact orders.

Appeals under the children's hearings (Scotland) act 2011

Background

207. The Children's Hearings System deals with children and young people in Scotland under the age of sixteen (or eighteen in certain circumstances) who are in need of compulsory measures of care. The two main reasons why the Children's Hearings System will be involved with a child or young person are because they are in need of care and protection due to their family circumstances or because they have got into trouble with the police. The Principal Reporter is an independent official within the Children's Hearings System with powers to delegate functions to other officers in particular to Children's Reporters.

208. Under the Children's Hearings (Scotland) Act 2011 (the 2011 Act), a pre-hearing panel or a Children's Hearing can decide whether an individual either is or is not to be 'deemed' as a relevant person. Being a 'deemed relevant person' brings with it a number of rights and responsibilities within the system, including the right to participate in children's hearing proceedings, to receive all relevant confidential information and reports about a child and their family circumstances, and an obligation to attend all hearings unless excused in advance.

209. To be considered as a deemed relevant person, an individual must have (or recently had) a significant involvement in the upbringing of a child. There are also provisions to make sure that a person can either continue to be a deemed relevant person or no longer to be deemed and have relevant person rights removed, where this is appropriate, due to for example a change in circumstances.

210. There are appeal rights in relation to the decisions made by a pre-hearing panel or Children's Hearing in relation to relevant person status. Section 160 of the 2011 Act provides a right to appeal such decisions to a sheriff. Under section 164 of the 2011 Act, there is also a further right of appeal to the Sheriff Principal or the Court of Session (though see paragraph 229 below) against the decision of the sheriff. This appeal right is restricted to the individual requesting deemed relevant person status, the

child, a relevant person in relation to the child, or a combination of those persons acting jointly.

211. Section 163 of the 2011 Act allows the Principal Reporter a right of appeal in certain cases where a sheriff does not confirm a children's hearing decision, but does not currently give the Principal Reporter a right to appeal the decision of a sheriff in an appeal against deemed relevant person status in the same way.

212. Situations can arise where there appear to be grounds to appeal the sheriff's decision, but the child or family does not take this step. This can be for a number of reasons, including that they are not aware that there is a basis for a challenge, or to appeal would add to conflict between family members. Failure to appeal could result in a deemed relevant person being party to all Children's Hearings proceedings when they do not meet the test of having significant involvement in the child's life or alternatively not being involved in the proceedings when they should be.

213. The Bill therefore gives the Principal Reporter the right to appeal the decision of a sheriff in an appeal where deemed relevant person status is the issue.

214. Section 18 of the Bill replaces references to Sheriff Principal with Sheriff Appeal Court and amends the appeal route for appeals against a sheriff's decision to the Sheriff Appeal Court in the first instance, with leave then required to further appeal to the Court of Session

215. The Bill also amends section 164(1) of the 2011 Act to clarify that determinations in respect of appeals under section 160(1)(a)(ii) and 160(1)(b) in relation to a decision to deem, continue to deem or to no longer deem a person as 'relevant' are included.

Consultation responses

216. The majority of responses to the consultation, from children's organisations, Scottish Women's Aid and Families Need Fathers Scotland were in favour of extending the Principal Reporter's right of appeal. The

Faculty of Advocates are supportive but one academic does not consider the Principal Reporter should have an interest in this type of appeal.

217. Whilst there was no consultation on section 164(1) a case in the Court of Session has raised the potential gap in the legislation which the Scottish Government has considered appropriate to clarify[45].

Policy analysis

218. The policy aim is to ensure that the right people are involved in Children's Hearings to safeguard the welfare of vulnerable children. The inappropriate deeming, or a decision no longer to deem a person as relevant, and all the rights/or loss of rights that this status brings can have important legal implications. If there is an error in law, it would be in the interests of the child for this to be reviewed and clarified by an appeal court.

219. The aim of giving the Principal Reporter the right of appeal is to ensure that they have the power to intervene where necessary and therefore protect the best interests of the child. The Principal Reporter already has rights of appeal in relation to other sheriff court appeals and the extension to cover relevant person appeals is likely to lead to such appeals only rarely.

220. The aim of replacing references to Sheriff Principal with references to Sheriff Appeal Court, and the change to the appeal route is to reflect the changes brought in by the Courts Reform (Scotland) Act 2014.

Alternatives

221. The Scottish Government could continue to allow courts to interpret section 164 of the 2011 Act without changing it. Courts might themselves interpret this to include a decision to deem, continue to deem or to no longer deem a person as 'relevant'. However, this would continue to leave the law in an uncertain state. Therefore it is not considered a viable option.

222. The Scottish Government could leave others to appeal decisions in relation to relevant person. There are a number of persons who can

[45] In a recent case CF v MF 2017 SLT 945 Lord Malcolm stated 'it can be noted that there is at least a question as to the competency of the appeal to this court…. on the face of it only decisions of the first kind, namely the initial decision on whether or not to deem a relevant person in relation to a child, can be appealed to a higher court'

challenge the sheriff's decision including the child, the safeguarder (if there is one) and all relevant persons. However, in some cases the Principal Reporter may consider it necessary to challenge a decision when the child and one or all of the relevant persons are content with the decision made, despite there being a possible legal error. The additional stress of a further court decision could, in the short term, cause uncertainty for the child or the adults involved in the case, but in the longer term a further court appeal may ensure the correct people are involved in the child's hearings. Therefore, doing nothing is not considered a viable option.

Conferral of parental responsibilities and parental rights: births registered outwith UK

Background

223. Currently the 1995 Act covers how a father in Scotland may obtain PRRs. This is either by marrying the mother, jointly registering the birth of the child in one of the UK jurisdictions after the Family Law (Scotland) Act 2006 came into force on 4 May 2006, signing a Parental Responsibilities and Rights Agreement[46] with the mother of the child, or seeking a court order.

224. Under section 3(1)(d) of the 1995 Act, in cases of fertility treatment a "second female parent" under the Human Fertilisation and Embryology Act 2008 who isn't married to or in a civil partnership with the mother gets PRRs if she and the mother jointly register their child's birth. The couple must have each consented to the second female parent being treated as such. A second female parent can also obtain PRRs if she and the mother sign and register a Parental Responsibilities and Rights Agreement[47].

225. Section 19 of the Bill gives the Scottish Ministers the power to make regulations. These would relate to the conferral of PRRs on unmarried fathers and second female parents where the child's birth is registered overseas and the parent has obtained overseas parental duties, rights or responsibilities in a similar way to obtaining PRRs in Scotland, where the mother of the child has consented. The regulations will list processes for obtaining parental duties, rights or responsibilities in overseas jurisdictions

[46] https://www2.gov.scot/Publications/2008/06/16155526/1
[47] http://www.legislation.gov.uk/ssi/2009/191/contents/made.`

which the Scottish Ministers consider should result in the conferral of PRRs in Scotland.

Consultation

226. There was strong support amongst consultation respondents for this proposal. All the academics were in favour of amending the law, as are the Law Society of Scotland and the Faculty of Advocates. The children's organisations who responded to the consultation and Families Need Fathers Scotland are in favour of making the amendments. Scottish Women's Aid did not give a yes/no answer but said that recognition depends on whether or not the PRRs are comparable with PRRs in Scotland.

Policy analysis

227. The policy is that it is in the best interests of children for unmarried fathers and second female parents who have obtained overseas parental duties, rights or responsibilities through a process comparable to how unmarried fathers and second female parents can obtain PRRs in Scotland to have PRRs in Scotland. This will ensure that the unmarried father/second female parent maintains their responsibilities and rights. Article 7 of the UNCRC also provides that a child shall have "as far as possible, the right to know and be cared for by his or her parents".

228. The policy is that it is important that the overseas process involved the consent of the mother as this reflects the position in Scotland under the 1995 Act. This will protect mothers who did not consent to the unmarried father or second female parent obtaining overseas parental duties, rights or responsibilities.

Alternatives

229. There is the option of not amending the law and encouraging unmarried fathers and second female parents to complete a Parental Responsibilities and Rights Agreement with the mother of the child or seek a court order. This would leave the situation as currently and certain fathers and second female parents may not enjoy PRRs if they move to Scotland. This could have an unnecessary detrimental effect on the welfare of the child as some individuals may not be able to afford the cost of registration of the agreement or may simply not get round to registering an agreement.

230. Another option is to limit the recognition to only those fathers/second female parents who jointly register the birth in a country that gives them

rights equivalent to PRRs. This would give a number of fathers PRRs but may inadvertently exclude fathers who have obtained PRRs through slightly different processes. For example, in the Netherlands a father can obtain PRRs if both parents register this in the parental responsibility register[48].

231. There is the option of giving all fathers PRRs automatically. This would remove the need for this provision. This could promote and encourage father's responsibilities and involvement in the upbringing of the child.

232. However, this option has not been adopted in the Bill given concerns raised about the unmarried father of a child conceived as a result of rape or incest being given automatic PRRs. In addition, the introduction of a father who has not previously been involved in a child's upbringing may not necessarily be in the best interests of the child and may affect the welfare of the mother. In addition, further consideration would be need to be given to the birth registration process. There could be difficult practical issues for registration if a mother does not say who the father of the child is. This could lead to additional court cases regarding parentage.

Extension to sheriff court of enforcement powers under family law act 1986

Background

233. Under the current law, certain kinds of court order ("Part I orders" – a reference to Part 1 of the Family Law Act 1986) on family matters from England and Wales or Northern Ireland, are registered in the Court of Session and must also be enforced in that court. Data from SCTS suggest that in 2017 24 orders were registered in the Court of Session.

234. The provisions allows the option for orders from elsewhere in the UK that are registered in the Court of Session to be enforced in the sheriff court. For orders enforced in the sheriff court the provisions in Chapter III of Part I of the Family Law Act 1986 regarding jurisdiction will apply. If a person wishes to enforce a Part 1 Order in a sheriff court, the court will have jurisdiction if the child is habitually resident in the sheriffdom or the child is physically present in Scotland and is not habitually resident elsewhere in the

[48] https://www.government.nl/topics/family-law/question-and-answer/father-responsibility-for-child-if-not-married-or-registered-partnership

UK and either the pursuer or the defender is habitually resident in the sheriffdom.

235. The rules on emergency jurisdiction in the 1986 Act will also apply.

Consultation

236. The consultation sought views on whether to allow both enforcement and registration of orders from other parts of the UK in the sheriff court as well as the Court of Session. The majority of respondents to the consultation were in favour of allowing cases to be registered in the sheriff court as well as the Court of Session. The majority of academics are in favour of the amendment. Children's organisations did not express a view in this area. Scottish Women's Aid were against amending the law as they feel that de-prioritising considerations to a lower court runs the risk of facilitating perpetrators. Families Need Fathers Scotland were in favour of amending the legislation as this would make action speedier and less costly in many cases. They were in favour of retaining the Court of Session for complex cases.

237. The Faculty of Advocates were against extending the 1986 Act to include the sheriff court. The Faculty stressed that the current practice operates effectively and in line with other international enforcement measures. The law firms were in favour of the amendment stating that this would open up access to justice and could be more convenient and cost effective. The majority of local authorities and Community and Healthcare Partnerships were in favour of amending the law.

Policy analysis

238. The policy is to improve access to justice by allowing a person who wishes to be able to enforce any Part 1 order made elsewhere to be able to do so in the sheriff court as well as in the Court of Session. This also reflects the fact that 99% of contact and residence cases are now heard in the sheriff court rather than the Court of Session.

239. The policy is to retain registration of a Part 1 order in the Court of Session as the Court of Session holds a list of orders that have been registered. Due to the low number of orders registered it would not be practicable for each sheriff court to maintain a list. The Scottish Government are aware that most orders are registered for the purpose of enforcement and therefore people may continue to seek to enforce an order in the Court

of Session as it is one process rather than undertaking a separate enforcement action in a sheriff court. However, it is considered important to offer the option of enforcement in the sheriff court.

Alternatives

240. There is the option of not amending the law. This would mean that the status quo would remain. This is not desirable as individuals would not have the opportunity to choose the most appropriate way for them to enforce an order.

Requirement to have regard to any risk of prejudice to the welfare of the child that delay in proceedings would pose

Background

241. Unpublished data from the Scottish Legal Aid Board (SLAB) shows that currently the contact and residence cases can vary in length. Where parties received legal aid, cases last on average the following length of time:

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

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

243. In meetings with stakeholders and in ministerial correspondence the Scottish Government has heard complaints from court users that court cases are taking too long, and this is not in the best interests of the child concerned. The UK Supreme Court has also commented on delays[49].

244. The SCJC have consulted on improving case management in family actions[50]. One of the recommendations was that there should be an early hearing in a section 11 case to decide how cases should be handled.

245. The Scottish Government welcomes this work, which follows both a policy paper by the Scottish Government and research by the Family Law Committee of the SCJC. The Scottish Government considers that an express provision in primary legislation on the effect of delay on the child complements these wider reforms.

246. The Bill requires the court to have regard to any risk of prejudice to the child's welfare that delay in proceedings would pose. This provision would apply in proceedings where the court is required to treat the child's welfare as the paramount consideration, and would include in particular cases under section 11 of the 1995 Act and Children's Hearings court proceedings.

Consultation

247. Responses from the consultation were in favour of introducing a provision on delay. A number of the academics expressed concern stating that it would be unenforceable and that delays are not necessarily due to the court and can be due to the parties themselves. They also raised concerns that such a provision could mean that the courts focus more on the timings of the case rather than what is in the best interests of the child.

[49] https://www.supremecourt.uk/cases/docs/uksc-2011-0173-judgment.pdf (see paragraphs 21 and 22 in particular)
[50] https://www.scottishciviljusticecouncil.gov.uk/consultations/scjc-consultations

248. Two of the children's organisations were in favour of a provision similar to the provision in England and Wales. Another children's organisation suggested that a more appropriate way of addressing this would be through effective case management. Families need Fathers and Scottish Women's Aid were both in favour of introducing provision on delay.

249. The Faculty of Advocates and two of the law firms were in favour of introducing a provision in relation to delay. The Law Society of Scotland is against the provision as they do not believe that it would effectively achieve expeditious case management. It considers that streamlining of rules would be more appropriate.

Policy analysis

250. The Scottish Government considers that delay in court proceedings, under section 11 of the 1995 Act, Children's Hearings proceedings or adoption cases will usually not be in the best interests of the child. Lengthy court proceedings can lead to a significant period of uncertainty for a child which may not be in the child's best interests.

251. The Scottish Government appreciates that complex cases may not be resolved quickly in court and that the courts will have to continue to consider all factors when making a decision. 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.

Alternatives

252. There is the option of not amending the law and not making provision in primary legislation about avoiding undue delay in cases involving children. This would not advance the best interests of the child. The Scottish Government thinks it important to address the issue that delay will often be prejudicial to the welfare of the child.

253. A further option would be for provision of this nature to be laid down by court rules, as originally envisaged by the Scottish Law Commission report of 1992. However, the Family Law Committee of the SCJC agreed in February 2017 that no changes to the rules were required:

> "Members held a detailed discussion about the issue of delay in family actions. … a distinction should be drawn between the passage of time

> and delay, as the passage of time is often necessary to achieve resolution. Members agreed, and thought the problem was one of undue delay. … suggested that it may be more appropriate to include a provision about avoiding delay in primary legislation, as is the case in England and Wales, rather than in rules. … said that such a provision could be considered in the Scottish Government's upcoming review of Part 1 of the Children (Scotland) Act 1995. The consensus amongst members was that no change to the rules was required. The Committee agreed that the rules should not be amended to include a provision about avoiding delay."[51]

254. Taking account of these views, the option of amending court rules to include provision on undue delay is not deemed the best approach, given the approach taken by the Family Law Committee of the SCJC.

Effects on equal opportunities, human rights, island communities, local government, sustainable development etc

Equal opportunities

255. A full Equality Impact Assessment has been published alongside the Bill.[52] The Equality Impact Assessment identified the following positive impacts on protected characteristics.

Age

256. The Bill is likely to have a positive impact on people because of their age as one of the key provisions removes the presumption that a child aged 12 or over is considered mature enough to give their views. This will have a positive impact in advancing equality of opportunity as younger children will be encouraged to give their views.

257. In addition, the Bill is likely to promote good relations among and between different age groups. One of the items on the list of factors the court is to consider when making an order under section 11 of the 1995 Act

[51] http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/flc-meeting-files/flc-13-february-2017/approved-minutes-13-february-2017.pdf?sfvrsn=2

[52] http://www.gov.scot/ISBN/9781839601170

is the likely effect of the order on the child's relationship with other people. This could include grandparents or other older family members.

258. The Bill also includes provisions regulating child contact centres to ensure that they are safe locations for children and adults to have contact. This would have a positive impact in relation on children and also younger adults as figures from the contact centres suggest that younger adults as parents are more likely to use contact centres.

Disability

259. The Bill is likely to have a positive impact in relation to the protected characteristic of disability as the provisions in the Bill allowing the courts to authorise the use of special measures to protect vulnerable parties. This could reduce stress levels when attending court. There is evidence that attending the family court can be a very stressful experience[53].

Sex

260. Statistics from SLAB suggest that 82% of defenders in cases under section 11 of the 1995 Act are female compared to 18% of men. By comparison 32% of pursuers are female compared to 68% of men. Therefore, in general, improvements to the family courts are more likely to have a positive effect on women acting as defenders and men acting as pursuers.

261. Scottish Government statistics on domestic abuse incidents recorded by the Police suggest that 81% of domestic abuse involved a female victim and a male perpetrator compared to 16% of incidents where the victim is male and the perpetrator is female. Provisions in the Bill are likely to have a positive impact in ensuring that victims of domestic abuse have a greater opportunity to participate in court proceedings without fear of continued abuse.

262. The Bill includes provisions giving the Scottish Ministers the power to make regulations on the conferral of parental responsibilities and rights on unmarried fathers and second female parents where a child's birth is registered outwith the UK and the parent has obtained parental duties, rights

53 https://www.webarchive.org.uk/wayback/archive/20180514221659/http://www.gov.scot/Publications/2010/12/08145916/0

or responsibilities in a similar way to how unmarried fathers and second female parents can obtain PRRs in Scotland. This could advance equality of opportunity for unmarried fathers and second female parents.

Sexual orientation

263. The Bill includes provisions giving the Scottish Ministers the power to make regulations on the conferral of parental responsibilities and rights on a second female parent where a child's birth is registered outwith the UK and the parent has obtained parental duties, rights or responsibilities in a similar way to how second female parents can obtain PRRs in Scotland. This could advance equality of opportunity for second female parents.

Race

264. The Bill includes provisions giving the Scottish Ministers the power to make regulations om the conferral of parental responsibilities and rights by regulations on a second female parent or unmarried father where a child's birth is registered outwith the UK and the parent has obtained parental duties, rights or responsibilities in a similar way to how second female parents/unmarried fathers can obtain PRRs in Scotland. This could advance equality of opportunity for overseas nationals.

Human rights

265. The Scottish Government is satisfied that the provisions of the Bill are compatible with the European Convention on Human Rights (ECHR). In a number of areas the Bill is also relevant to right and obligations under the UNCRC, with the aim throughout to further compliance with the UNCRC.

Family life

266. A number of areas covered by the Bill raise ECHR implications, balancing respective Article 8 ECHR rights to family life of those affected. The Bill will generally further the rights of children, which may have an effect on other family members' Article 8 rights, in particular situations which the courts will take account of.

Restricting self-representation - vulnerable persons or victims of offences etc.

267. Article 6 ECHR the right to a fair trial is also raised by some provisions, including restricting the personal conduct of a case in proceedings involving vulnerable persons or victims of offences, where the party will be provided

with a lawyer to represent them. This is considered compatible with Article 6.

268. Article 6(3) does not generally apply in the civil context, but the minimum rights in Article 6(3) are specific aspects of the right to fair trial in Article 6(1), which applies in proceedings which determine parental responsibilities and rights[54]. In a criminal context, Article 6(1) and (3) confer no right on an accused to defend themselves in person – rather the right "to defend himself…through legal assistance of his own choosing"[55] which is not absolute[56]. Legislation which requires an accused in criminal proceedings to be represented by a lawyer can be compatible with Article 6[57]; in a civil context the minimum Article 6(3) rights do not expressly apply, but the provision in the Bill is considered to meet those standards.

269. Correira de Matos v Portugal confirmed the court must have regard to the defendant's wishes on choice of legal representation, but may override those wishes when there are relevant and sufficient grounds for holding this is necessary in the interests of justice. This entails an examination of the relevant and sufficient grounds provided by the legislature and when applying the relevant law by the courts. The Strasbourg court drew on UN Human Rights Committee General Comment No. 32 on Article 14 § 3 (d) of the International Covenant on Civil and Political Rights (ICCPR) - restrictions of the accused's wish to defend themselves in person had to have an objective and sufficiently serious purpose necessary to uphold the interests of justice, which could require mandatory representation including where necessary to protect vulnerable witnesses[58].

---

[54] W. v. the UK (Appl. 9749/82), para 78; R.P & others v. the UK (Appl. 38245/08).
[55] Article 6(3)(c)
[56] See e.g. Correira de Matos v Portugal, ECtHR (GC), 4 April 2018, para 121.
[57] X v Norway (1975) 3 DR 43; Philis v Greece (1990) 66 DR 260 similar criminal restrictions on self-representation have been passed in the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 and the Domestic Abuse (Scotland) Act 2018. Such measures have been upheld, McCarthy v HM Advocate [2008] HCJAC 56; 2008 SLT 1038, relying on Croissant v Germany (1993) 16 EHRR 135.
[58] para 133

270. The ban in the Bill applies in limited circumstances, if the court is satisfied the party in question must either have been convicted of or be facing outstanding criminal charges for a specified offence[59] of which the witness was the complainer[60], subject of a civil protection order obtained by the witness, or in existing vulnerable witness cases at the court's discretion. Further, in civil cases, the ban is subject to two exceptions: (1) the witness has not agreed to give evidence without the ban applying and it is appropriate for the witness so to do so; (2) the ban would give rise to a significant risk of prejudice to the fairness of the proceedings or otherwise to the interests of justice, and that risk significantly outweighs any risk of prejudice to the interests of the witness if the order is made.

271. In Children's Hearings proceedings, whether the prohibition on self-representation will apply will be determined by the subject matter of proceedings, and the vulnerability of the witness. Where the witness is a victim of specified conduct, such as sexual or violent offences, the alleged perpetrator will be prohibited from personally questioning the witness, without exceptions. Where other parties wish to question a victim of certain conduct or the witness is a child or vulnerable witness, there will be a presumption that the ban will apply to any party who wishes to question the witness, except if the ban would give rise to a significant risk of prejudice to the fairness of the proceedings or otherwise to the interests of justice, and that risk significantly outweighs any risk of prejudice to the interests of the witness. Where the ban applies, there will be an opportunity to question the witness, protecting Article 6 rights.

272. In contact and residence proceedings, unlike in criminal proceedings, whether the prohibition should apply must be determined by the prior conduct of the parties towards the witness and the relevance to the proceedings so the court has discretion to consider the risk of prejudice to the fairness of the proceedings or otherwise to the interests of justice.

273. Children's Hearings proceedings routinely concern the conduct of a party to the proceedings towards children or other vulnerable witnesses, often by a member or members of the child's family. Measures to protect

---

[59] Specified offences will be defined in part by secondary legislation but will capture violent and sexual offences, including offences involving domestic abuse.

[60] Or children's hearings grounds alleging the commission of such an offence will have been established or remain outstanding.

children and other vulnerable witnesses are therefore more direct than in contact and residence cases. The restriction of any party's wish to represent themselves has an objective and sufficiently serious purpose, and does not go beyond what is necessary to uphold the interests of justice. The mandatory ban is restricted to where the alleged perpetrator of certain conduct (including violent or sexual offences, or domestic abuse) seeks to personally question the alleged victim of such conduct. The presumptive ban as regards other parties is always subject to the exception outlined above. The legitimate aim of these proposals is the protection of vulnerable witnesses, and the means to achieve this, in the children's hearings context, is proportionate to that aim whilst still ensuring effective participation of all parties in the proceedings.

274. In both sets of proceedings, the party banned from self-representation is afforded the opportunity to appoint their own lawyer, failing which the court will appoint one, so they have the opportunity to take advantage of their Article 6 rights.

275. Assuming for the *civil* restrictions Article 6(1) ECHR is engaged, the restriction on self-representation may be sufficient for the Article 14 ECHR right not to be discriminated against to be engaged on the basis of previous criminal convictions for specified offences, outstanding criminal proceedings or status as a person subject to a civil protection order, which might constitute an "other status" in Article 14[61]. There is a doubt whether a distinction based on these factors falls within "other status", but this analysis proceeds as if it does. Whether a characteristic is innate, immutable or important to the development of an individual's personality will be relevant to whether it qualifies as a 'personal characteristic' protected under Article 14 - the legislature will enjoy a wider discretion in justifying a difference of treatment based on a ground which is none of these things, eg. defined by what someone has done or what has happened to them.[62]

276. A difference in treatment will be discriminatory without objective and reasonable justification. It must pursue a legitimate aim, with a reasonable relationship of proportionality between the means employed and the aim

[61] Kjeldsen, Busk Madsen and Pedersen v Denmark (1976) 1 EHRR 711, ECtHR.
[62] R (RJM (FC) v Secretary of State for Work and Pensions [2008] UKHL 63, [2008] 3 WLR 1023, paras 5, 41.

sought to be realised.[63] The policy objective is to protect vulnerable witnesses in contact and residence proceedings, in particular victims of domestic abuse.

277. The proposals seek to achieve this aim by ensuring proceedings provide a forum in which a victim of domestic abuse is not required to confront and personally engage with the person who has carried out that abuse, and in which the abuse can be perpetuated. This can be an intimidating and humiliating experience, having regard to the emotionally charged subject matter of the proceedings.

278. The aim of the proposals is similar to the existing ban on self-representation for persons accused of certain criminal offences. In the civil context the criminal conduct of which the witness is a victim or complainer does necessarily form the subject-matter on which the witness is to give evidence.

279. In general, measures can be taken to protect witnesses[64]. As noted, an objective and sufficiently serious purpose to justify provisions restricting the right to self-representation is the protection of vulnerable witnesses, and the means by which the protection is achieved are focused as narrowly as possible while achieving that aim. Not every criminal conviction will result in a ban - an offence must be specified in the Bill or subordinate legislation (and will include violent offences, sexual offences, and domestic abuse offences). The witness must be the victim or complainer. This restricts the scope of the proposal and establishes a clear link between the offence and the purpose of protecting the vulnerable witness. So not every person who possesses the "other status" of being convicted (or accused) of a specified offence will be banned, and not on the basis of the status as convicted or accused, but by regard to the effect of that status on the witness to give evidence in the proceedings. The ban may also apply because the party is subject to a civil protection order obtained by the witness. In each instance

[63] Darby v Sweden (1990) 13 EHRR 774, ECtHR, para 31; Petrovic v Austria (1998) 33 EHRR 14, ECtHR, para 30

[64] Kostovski v Netherlands (1990) 12 EHRR 434, Baegen v Netherlands (Application No.16696), Doorson v Netherlands (1996) 22 EHRR 330 and Van Mechelen v Netherlands (1998) 25 EHRR 647). The general applicability of the principles identified in these cases was confirmed by the High Court in H.M.A. v Smith 2000 SCCR. 910.

there is a sufficient factual basis for personal representation to be prohibited for the reason of protection of the vulnerable witness.

280. The aim of protecting vulnerable witnesses is sufficiently important to justify the means employed, designed to have as limited an impact as possible while achieving the aim of protecting vulnerable witnesses, and ensuring effective participation of all parties in the proceedings. Having regard to the discretion allowed the legislature, the means adopted are proportionate.

UN Convention on the Rights of the Child

281. In connection with the UNCRC, the Bill contains a range of provisions that will affect children's rights. The full list of UNCRC articles which may be relevant to the provisions in the Bill are in the Child Rights and Wellbeing Impact Assessment which has been published on the Scottish Government website[65]. The Bill is compatible with the UNCRC.

282. Article 3 is key to the policy intention of the Bill that the child's best interests are at the centre of any contact and residence case under section 11 of the 1995 Act and in Children's Hearings under the Children's Hearings (Scotland) Act 2011.

283. Article 5 is relevant in relation to:

- the provision giving the Scottish Ministers the power to confer PRRs on unmarried fathers and second female parents where the birth of the child is registered outwith the UK and the father or second female parent obtained parental duties, responsibilities or rights in relation to the child through a specified process similar to the process for obtaining PRRs in Scotland;
- introducing a list of factors for the court to consider when considering making an order under section 11(1) of the 1995 Act including whether there has been a deliberate attempt to undermine the relationships between the child and a parent of the child, or any person who has PRRs in relation to the child; and
- clarification that orders under section 11(1) of the 1995 Act apart from residence orders do not automatically grant PRRs.

[65] http://www.gov.scot/ISBN/9781839601118

284. Article 6 is relevant in relation to further protecting children from domestic abuse, in particular establishing a register of CWR, which will require them to have training on domestic abuse and coercive control.

285. Article 7(1) is relevant in relation to the provisions:

- introducing a list of factors for the court to consider when considering making an order under section 11(1) of the 1995 Act, including the effect the order may have on the involvement of the child's parents in bringing the child up;
- allowing Scottish Ministers to make regulations conferring PRRs on unmarried fathers and second female parents where the birth of the child is registered outwith the UK and the father or second female parent obtained parental duties, responsibilities or rights in relation to the child through a specified process similar to the process for obtaining PRRs in Scotland; and
- placing a duty on the court to investigate failure to comply with an order under section 11 of the 1995 Act.

286. The Bill also imposes a duty to keep looked after child siblings together and promote personal relations between a child who has been taken into care and their siblings. This is broadly in line with Article 8 of the UNCRC which is relevant to provisions placing a duty on local authorities in relation to looked after children up to promote contact with their siblings; and introducing a welfare checklist of factors for the court to consider in cases under section 11 of the 1995 Act.

287. Article 9 of the UNCRC is key as the Bill covers contact and residence cases relating to children, PRRs, and ensuring that the views of the child when decisions are being made that affect them.

288. Article 12 of the UNCRC is key to the policy intention that the views of the child is considered in proceedings that affect them.

289. Article 14 has relevance in relation to provisions giving Scottish Ministers the power by regulations to confer PRRs on unmarried fathers and second female parents where the birth of the child is registered outwith the UK and the father or second female parent obtained parental duties, responsibilities or rights in relation to the child through a specified process similar to the process for obtaining PRRs in Scotland.

290. Article 15(1) is relevant to protecting children from domestic abuse where they may be coercively controlled, in particular in relation to establishing a register of CWR, including training on domestic abuse and coercive control.

291. Article 16 is relevant in relation to provisions:

- placing a duty on local authorities in relation to looked after children up to promote contact with their siblings; and
- establishing a register of Child Welfare Reporters, including training on domestic abuse and coercive control.

292. Article 18 is relevant in relation to provisions:

- introducing a list of factors for the court to consider when considering making an order under section 11(1) of the 1995 Act, including the effect the order may have on the involvement of the child's parents in bringing the child up;
- giving Scottish Ministers the power to make regulations conferring PRRs on unmarried fathers and second female parents where the birth of the child is registered outwith the UK and the father obtained parental duties, rights or responsibilities in relation to the child through a specified process similar to the process for obtaining PRRs in Scotland; and
- regulating child contact centres to ensure they comply with standards of accommodation, staff training and service, and appointing a body to undertake inspections.

293. Article 19 is relevant in relation to provisions:

- giving courts the power to authorise special measures to protect vulnerable parties in proceedings where the court is considering an order under section 11(1) of the 1995 Act;
- introducing a prohibition of personal conduct of a case involving vulnerable parties or victims of certain offences in cases under section 11 of the 1995 Act and Children's Hearings court proceedings;
- providing that where a court becomes aware that an order under section 11(1) of the 1995 Act has not been complied with then the court has a duty to seek the reasons behind this;

- regulating child contact centres to ensure they comply with standards of accommodation, staff training and service, and appointing a body to undertake inspections;
- establishing a register of CWRs, including training on domestic abuse and coercive control; and
- establishing a register of curators in cases under section 11 of the 1995 Act.

294. Article 20 is relevant to provisions:

- placing a duty on local authorities in relation to looked after children up to promote contact with their siblings; and
- providing that the Principal Reporter should be given the right to challenge a Sheriff's decision in relation to deemed relevant person status

295. Article 21 is relevant in relation to provisions introducing a presumption that when considering the welfare of the child in a Children's Hearing or an adoption or permanence court case, the court or Children's Hearing is to have regard to any risk of prejudice to the child's welfare that delay in proceedings would pose.

296. Article 23 is key to the policy intention of the Bill that the welfare of the child is paramount in consideration.

297. Article 23 is relevant in relation to provisions:

- ensuring that the outcome and reasons for certain decisions are explained to the child in an impartial manner if the court considers it in the best interests of the child;
- removing the presumption that a child aged 12 or over is mature enough to give their views in cases under sections 6, 11 and 16 of the 1995 Act, sections 14 and 84 of the 2007 Act and section 27 of the 2011 Act and ensuring that any views are taken in a suitable manner;
- establishing a register of CWRs, including training on domestic abuse and coercive control;
- establishing a register of curators in cases under section 11 of the 1995 Act; and

- regulating child contact centres to ensure they comply with standards of accommodation, staff training and service, and appointing a body to undertake inspections.

298. Article 30 is relevant in relation to provisions establishing a register of Child Welfare Reporters, including training on domestic abuse and coercive control.

299. Article 31 is relevant in relation to provisions establishing a register of Child Welfare Reporters, including training on domestic abuse and coercive control as this could help ensure the best interests of the child are reflected to the court.

300. Article 39 is relevant in relation to provisions:

- establishing a register of CWRs; and
- providing that where a court becomes aware that an order under section 11(1) of the 1995 Act has not been complied with the court has a duty to seek the reasons behind this.

Island communities

301. An islands impact assessment has been published on the Scottish Government website.[66]

302. Amending section 11 of the 1958 Act could result in a reduction in the number of local authority employees eligible to provide a Child Welfare Report. However, the Scottish Government considers that this should not have a negative impact on island communities as a CWR appointed to produce a report on a child living in an island community could live elsewhere and there would be no cost implications to the parties as Scottish Government will fund all CWR costs including travel expenses. In addition, eligibility criteria for CWRs would not be limited to lawyers and the Scottish Government would plan to encourage more social workers and other professionals to apply to be on the list of CWRs. Therefore, if a social worker wished to continue to produce CWRs they would be eligible to apply and demonstrate that they meet the required standards.

[66] http://www.gov.scot/ISBN/9781839601125

303. Regulation of child contact centres may have an impact on island communities where there are currently no child contact services. For example, there is currently no child contact centre service in the Western Isles or Shetland. However, court ordered contact in the Western Isles and certain other islands where there is no child contact centre service currently takes place on mainland Scotland, and the Bill will not change this. Therefore, the Scottish Ministers do not consider that these provisions will cause any further impact on island communities in this regard.

304. The Scottish Ministers are aware that they may be an impact on island communities in relation to ensuring there are a sufficient number of lawyers appointed to the list to cover those areas. When the Scottish Ministers undertake a recruitment round they will ensure that there are a sufficient number of lawyers on the list who would be able to act for parties who are based on Scottish Islands.

305. The Scottish Government is aware that the provisions in relation to banning an individual from self-representing themselves may have an impact on islands if there are not enough lawyers who are willing to be on the register of lawyers. The Scottish Government consider that this provision will not affect significantly affect island communities as the number of cases across Scotland in which the prohibition will apply will be very low. Firstly, the provisions only apply to evidential hearings and very few section 11 cases proceed to proof[67]. Secondly, in the majority of cases parties will be eligible for legal aid and will already have legal representation[68]. The Scottish Government consider that the position will be reflected in island communities with a similarly low proportion of applicable cases.

306. The provisions placing a duty on local authorities to promote contact between looked after children and siblings may have an impact on island communities as a local authority may have to fund travel for a sibling who is living on an island to visit another sibling. The costs of this may be more significant than if both siblings lived in mainland Scotland. However,

---

[67] Based on figures from Scottish Courts and Tribunals Service in 2018/19 there were 239 cases for parental responsibilities and rights for which proof proceeded.

[68] The Scottish Government does not have hard figures on the number of party litigants but from speaking to stakeholders it is estimated that around 10% - 15% of litigants in family cases represent themselves.

promotion of contact can take various forms and need not always be in person, depending on the welfare needs of the child.

Local government

307. The Scottish Government is satisfied that the Bill has minimal direct impact on local authorities. Any impact on the business of local authorities has been captured in the Financial Memorandum and also the Business and Regulatory Impact Assessment which has been published on the Scottish Government website.[69]

Sustainable development

308. The Scottish Government undertook a Strategic Environment Assessment pre-screening report. This identified that provisions in the Bill will have very limited environmental consequences based on the criteria set out in schedule 2 of the Environmental Assessment (Scotland) Act 2005. However, allowing a vulnerable party to participate in proceedings via live video link might have a positive impact on the environment but this is likely to be a minimal impact overall.

309. The pre-screening Strategic Environment Assessment report was issued to key organisations and no concerns were raised.

310. There is no impact – positive or negative – on environmental protection as the Bill does not cover that type of area.

311. On social equity, the Scottish Government carried out a Fairer Scotland Duty Assessment. This shows the provisions of the Bill on CWRs have a positive impact in relation to access to justice. Where a party to a case under section 11 of the 1995 Act is not in receipt of legal aid, they may need to meet the costs (or some of the costs) of any Child Welfare Report ordered by the court.

312. The evidence shows that although the proportion of cases in which a party privately funds a Child Welfare Report may be relatively low, the potential costs to those affected individuals could put them under significant financial pressure. Requiring a person who is privately funding their case to pay a considerable sum (perhaps up to £10,000) for a Child Welfare Report

[69] http://www.gov.scot/ISBN/9781839601132

could pose access to justice issues, particularly since the decision to request a Child Welfare Report is made by the court.

313. This supports the approach taken in the Bill to introduce a new scheme of regulation for CWRs and curators ad litem, which extends beyond the standardisation of fees, and provides that the Scottish Ministers will fund the costs of all Child Welfare Reports. Therefore, the Bill has a positive impact on social equity.

314. The Bill has no direct impact – positive or negative – on economic viability as the Bill is concerned with social policy rather than with economic policy.

315. However, the Bill could have some impact on legal firms, although not to the extent of having an impact on their economic viability. The Bill bans parties form personally conducting their cases in certain circumstances. This may provide an opportunity for solicitors to represent persons who would otherwise be unrepresented. However, numbers are expected to be low.

316. The Bill also establishes registers for CWRs and for curators ad litem. CWRs are largely solicitors and curators are litem are solicitors. However, work in these areas will continue and these provisions in the Bill are not expected to impact on economic viability.

317. The Bill also introduces the regulation of child contact centres, to ensure children and other users of contact centres are protected. Regulation will impact on centres. However, the Scottish Government will work closely with centres as regulation is introduced and will ensure that regulation is proportionate. As a result, the Scottish Government does not expect regulation of child contact centres to have a negative impact on economic viability.

This document relates to the Children (Scotland) Bill (SP Bill 52) as introduced in the Scottish Parliament on 2 September 2019

Children (Scotland) Bill

Policy Memorandum

© Parliamentary copyright. Scottish Parliamentary Corporate Body

Information on the Scottish Parliament's copyright policy can be found on the website -
www.scottish.parliament.scot

Produced and published in Scotland by the Scottish Parliamentary Corporate Body.

All documents are available on the Scottish Parliament website at:
www.scottish.parliament.scot/documents