Children (Scotland) Bill
Proposed amendments and other changes

Shared Parenting Scotland has been fully engaged through the last three years of consultations and submissions of evidence in the development of what is now the Children (Scotland) Bill.

Our view, based on experience of the thousands of fathers, mothers and other family members who have contacted us over the past 10 years, is that the present system has deep seated flaws.

Parents who cannot reach agreement for sharing the parenting of their children after divorce or separation find that looking to law and to the courts is stressful for all involved, expensive, tortuously slow and unpredictable in outcomes. Above all the system is adversarial and can introduce entirely new areas of hostility between mothers and fathers even in the exchange of correspondence between solicitors before a case gets near to court.

There is something seriously flawed with a system in which solicitors talk freely about 'playing the sheriff'; in which safe, competent and loving parents run up legal bills in the tens of thousands to win time with their children; and in which the time lost between a parent and his/her children in dispute or court proceedings can never be replaced.

While we support many of the changes included in the Children (Scotland) Bill we feel its assumptions are rooted in expectations of parents and parenting that are seriously out of date and do not reflect realities of family life in modern Scotland. Children's experience and expectations of their parents have changed radically in the last 25 years. We feel the culture of sharing parenting that has become normal in 'intact' households has been set aside in the Bill without justification. The Bill is essentially conservative at a moment when radical change is needed.

Only a minority of parenting arrangements after separation or divorce involve the courts but the law - the prospective Children (Scotland) Act 2020 - influences the language and the conduct of the wider public narrative. At a time of hurt and stress after separation there are too many incentives for parents to dig heels in and too few to put the children first.

In that context of bringing the Bill into line with the 2020 realities of parenting we urge MSPs to consider supporting the amendments and other changes we list below.

After each section heading the relevant recommendations from the Justice Committee's Stage 1 Report are in a box. Our proposed amendments are then noted alongside in bold italics, followed by a brief account of our arguments. These arguments are developed more fully in our report "*Family law: the way forward for Scotland*".

Removing the terms "Contact" and "Residence" from court orders

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

Justice Committee Recommendation: The Scottish Government should consider bringing forward amendments at Stage 2 to simplify the drafting of the Bill. It is an important principle that, insofar as it is possible, legislation passed by the Parliament should be clear and understandable. (Para 78)

Words are important. Shared Parenting Scotland suggests that the current 'residence' and 'contact' labelling of the court orders in Section 11 cases is not only inaccurate but also works against equality of status of parents. It encourages a perception in the public narrative that 'non-resident' parents are a complication rather than an emotional and social resource for their children. The discriminatory terminology leaks out into the perceptions and practice of other agencies that are important to children such as schools, health providers and social work. It leaves one of the two separated parents battling for recognition.
Our suggested amendment would remove this labelling altogether, referring instead to "Section 11 Orders" throughout the legislation. Although this change would require substantial amendment throughout the Bill, that does not seem a sufficient justification for holding on to unhelpful, discriminatory terms that do not help children.

Naming of court orders was changed in the 1995 Children (Scotland) Act from "custody and access" to "residence and contact". Custody is about prisoners not children. Many people, including some professionals who should know better, still use the old terminology 25 years on.
The current 'residence' and 'contact' names for court orders are not much better. They tend to reinforce the perception of one separated parent being more important and having more 'control' over the children than the other.
We often hear comments such as "*I make the decisions because I am the resident parent*" made by parents even on issues that the existing legislation specifies should be matters of discussion between parents such as choice of school or even moving to another part of the country. Not only do some resident parents feel entitled to use their perceived status to control their children but also to control what the other parent does in his/her time with the children.
A parent who has a "contact" order often has the children staying overnight in his or her home up to half their time, even though the terminology implies to others that he or she is as peripheral to his or her children's life as a parent who lives on the other side of the world and visits every other year.
The naming of court orders was changed in England and Wales in 2014 from Residence and Contact Orders to Child Arrangements Orders in order to embed more neutral terminology in the law.
Given the complexity of the proposed legislation, it is worth taking any opportunity to make the language of the Children (Scotland) Act simpler.

Creating a proper checklist in the law

Justice Committee Recommendations:

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

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

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

SPS PROPOSED AMENDMENTS

add a new section: "(7F) In the absence of an agreement on the pattern of residence of a child, the court shall consider at the request of at least one of the parents the possibility of ordering the child's residence on an equal basis between the two parents"

Amend 11ZA (2A) to: "When considering the child's welfare, the court must resolve disputes about contact in weeks or at most months."

Amend 11ZA (3) (e) (ii) to: "the child's important relationships with grandparents, other family members and other people"

Add to 11ZB (1): "(c) have regard to whether these views have been unduly influenced by an adult."

The 1995 Children (Scotland) Act provided a simple framework of key principles for court decisions which should:

regard the welfare of the child concerned as its paramount consideration and shall not make any such order unless it considers that it would be better for the child that the order be made than that none should be made at all; and taking account of the child's age and maturity, shall so far as practicable — (i) give him an opportunity to indicate whether he wishes to express his views;(ii)if he does so wish, give him an opportunity to express them; and (iii)have regard to such views as he may express.

When this Act was amended in 2006 various factors were added that a sheriff or judge must consider relating to the impact of domestic abuse on children and how it should be treated in court.

Domestic abuse is a serious matter but it is not the only serious matter that a sheriff needs to consider in order to grasp the full dynamics that may be at work within a case.

If there is to be a check list we feel it should be more complete. Our amendments are derived from our casework over the last 10 years and replicate changes that have already been incorporated into family law in many other countries.

The factors we suggest are:

STARTING POSITION - establishing equally shared care of children as the starting position for a sheriff or judge when making decisions about where children should live is a way of allocating meaningful parenting time to both mother and father.

The general benefits for children of shared parenting are known from international research in terms of children's social and psychological wellbeing, their educational attainment and avoidance of adverse experiences. There are benefits not only in the short term but also into adulthood. **Our amendment does not make shared parenting mandatory or is prescriptive of any arithmetical share of time.** It tells the court to start with that option when one of the parents requests it, and then consider any reasons why a different pattern is better for the children.

The present adversarial system effectively puts the onus of arguing for meaningful parenting time with his or her children on one parent and is inherently discriminatory given that most of the pursuers in family actions are fathers. Fathers repeatedly tell us they feel they are ''on trial'' and forced to prove their worth as a parent no matter how involved they were before separation. Changes of this type have worked well in a wide range of jurisdictions across the world.

SPEEDIER DECISIONS - our courts can be slow and cumbersome and proceedings can be drawn out over months into years. All the while the children in whose interests the eventual decision will be made may not have seen one of their parents. Sometimes the relationships are seriously damaged by delays in the system. This is widely acknowledged by the many lawyers and sheriffs we speak to who ask, ''what can I do?''.

Our suggested amendment is based on Lord Glennie's Inner House judgement, replacing the far weaker "have regard to" statement on avoiding delay in proceeding with a time limit.

GRANDPARENTS - the Government seems reluctant to add the word "grandparent" to the legislation. The most recent SNP election manifesto included this statement *"We will review the legislation to ensure the interests of children and their need to form and maintain relationships with key adults in their lives - parents, step-parents, grandparents and other family members - are at the heart of any new statutory measures."* This Bill sidesteps that commitment in preference to a non-binding Grandparents' Charter.

UNDUE INFLUENCE - hearing the voice of children is very important and we support the changes which establish the right of children to have their views taken. This measure brings with it the need to ensure that the child's views have not been unduly influenced by one parent or any other individual, especially if that view is that the child does not wish to see one of the parents at all.

Complete rejection of a parent is not normal behaviour. Effectively making a child the decision maker at a time of family stress places an intolerable burden on that child. This amendment removes that burden. While we would prefer to use the term "parental

alienation", we accept that parental alienation isn't the only factor in such cases, and the phrase "undue Influence" will cover a broader range of facts and circumstances.

We repeat that the sheriff or judge is overall required to reach a decision within the key principles noted above. None of the items on a more complete checklist will be definitive in themselves. However, it will help sheriffs if they can indicate to the parties how they took into consideration the items on the checklist. This is more transparent which is important in itself but will also make decisions more intelligible to parties.

Without a comprehensive checklist of the factors that are important to the wellbeing of children, we believe the Scottish legislation will not be compliant with the UN Convention on the Rights of the Child. The Children (Scotland) Bill should not leave these matters unresolved, given that the Scottish Government is also committed to incorporate the Convention into Scottish Law in the current session.

Parental Rights and Responsibilities for Unmarried Fathers

Justice Committee Recommendation:	***SPS PROPOSED CHANGES***
The Scottish Government should before Stage 2 respond to the conclusions in Dr Barnes Macfarlane's report on PRRs for unmarried fathers and, in particular, provide further details as to whether it considers that the current law complies with its human rights obligations under the ECHR and UNCRC. (para 607) Justice Committee Recommendation: The Scottish Government should also consider whether a discretionary power for the courts to order DNA testing would provide a useful mechanism to address some of the issues identified in Dr Barnes Macfarlane's report, including ensuring that a child's right to know his or her identity is respected. (para 608)	***If the committee is not willing to extend PRR eligibility to all fathers or seek changes in birth registration procedures, we suggest it would be of significant benefit to children if a simpler and quicker process to assess worthiness and add the father's name to the birth certificate is developed.*** ***We also support extension of powers to order DNA testing, given the increasing importance of children knowing about their genetic heritage and any associated medical factors.***

This is another area where the current law doesn't seem to comply with either the European Convention on Human Rights (ECHR) or the UN Convention on the Rights of the Child (UNCRC). The main problem is the difference in treatment of unmarried fathers and mothers.

All mothers get Parental Rights and Responsibilities (PRRs) automatically on birth but can have them taken away by the court if they are considered to pose a significant risk to the child. This only happens in fairly serious public law cases and after the court has done a

balancing exercise between the risks and benefits posed by the mother. All married fathers get PRRs automatically and can also have them taken away in similar serious cases.

Fathers who are not married have been able to obtain PRRs for children born since 4th May 2006 if their name is included on the child's birth certificate. This was in recognition that Scottish law at the time was discriminatory and not ECHR compliant. The change in the 2006 Family Law (Scotland) Act seemed to be the minimum the Scottish Parliament could do by way of recognising the importance in their children's life of unmarried fathers.

Shared Parenting Scotland still receives enquiries from parents who have PRRs for their children born after 2006 but not for those born before. Others have PRRs for children born in England where the law changed in 2003 but not for children born after a pre-2006 move to Scotland. Although that anomaly will disappear in 2022, the remaining anomaly in parental rights will persist for the 2000 or more children born in Scotland every year to unmarried parents who only have their mother's name on their birth certificate.

The Government resisted making a law change in 2006 extending PRRs to those fathers, citing concern that this would give rights to fathers of children conceived through rape or incest. While excluding such fathers is totally justified, this concern neatly sidesteps the question about how many of these 2000 children are being prevented from receiving the support of safe, worthy and competent fathers who could play a positive part in their lives.

The current legislation and court processes put very significant hurdles in the way of such fathers who want to play a more constructive role in their children's lives. If the mother refuses to sign an agreement letting them have PRRs, the unmarried father has to embark on a long and expensive court process. The first 1000 days of a child's life is the time when constructive involvement of both parents can have maximum impact, but in such cases that crucial period is taken up with legal battles that cause untold stress to both parents.

To address concerns that universal granting of parental rights would cause severe problems to women who have conceived following rape or incest, we would suggest instead that two things could be done to ensure that children are not deprived of worthwhile fathers and compliance with ECHR and UNCRC is achieved.

- The remaining obstacles to DNA testing should be removed.

- Within the Family Justice Modernisation Strategy, the current procedures for obtaining PRRs and also for amending birth certificates in cases where a father has been omitted should be streamlined.

Making this process faster and easier will benefit children and parents by reducing stress, and helping them focus on the benefits for a child of relationships with both parents and both extended families. It can also be used to ensure that PRRs are not provided in circumstances where the child does not benefit. Courts already do this balancing exercise in public law cases where the links between children and their natural parents are severed through adoption.

Enforcement of Court Orders

Justice Committee Recommendations:

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

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

SPS PROPOSED AMENDMENT

Amend 11F (3) to: "The court may appoint a child welfare reporter or parenting coordinator to investigate and report to the court on the person's failure (or alleged failure) to obey the order (see section 101A)"

The Children (Scotland) Bill currently includes a provision for the court to appoint a Child Welfare Reporter to investigate and report on the reasons why a section 11 court order has not been complied with. (11F(1) to (4).

That amendment provides a useful first step to dealing with the enforcement of child contact orders, but it falls seriously short of resolving the problem.

An amendment to extend this provision to other suitably qualified people such as parenting coordinators and any other person specified in secondary legislation would give legal backing to the appointment of professionals better suited to carry out this task.

Once primary legislation has been amended to widen the scope for professional appointments, the Family Justice Modernisation Strategy can address the actual question of how parents can be provided with appropriate support to overcome or avoid situations in which one of them has decided not to follow a court order. This public health, problem-solving approach has already been introduced into some Scottish Courts in areas such as persistent drug and alcohol abuse.

While the court is still making the key decisions about what is in the interests of children, the ongoing management and support of parents who find it hard to follow the court's orders is delegated to professionals who can intervene swiftly when problems emerge and without referring back to court. Sheriffs frequently tell parents it is not their job to micromanage their parenting but at present there is no-one else to do it.

The resultant savings in court time are likely to be adequate to pay for these professional interventions. There is already evidence from many other countries that this change can be

effective. It would be desirable to test this in Scotland through a pilot programme in one sheriffdom, and this would also help provide the time to develop and train a suitable range of professionals to carry out this work.

Child contact cases only reach court because there is a significant disagreement between parents, but not always because there are serious issues about the parenting capacity of either. A problem-solving approach won't solve every case of non-compliance with a court order. The ultimate penalties for contempt of court may have to remain for those wilful cases. However, adopting a supportive problem-solving approach should improve the situation for many of the cases which currently clog up the family courts and cause needless public and private expense.

Explanation of court decisions to the child

Justice Committee Recommendations:

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

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

SPS PROPOSED AMENDMENT

11E (4) (b) add: "or a parenting coordinator appointed by the court"

after "arranging for it to be given by a child welfare reporter"

This would extend the scope of the court to appoint persons, particularly those who have already worked with the child. As noted above the deployment of these professionals in support of the court has the potential to address the problems faced by parents in complying with Section 11 court orders far more quickly than it is currently possible through returning a matter to court. Primary legislation is required in order to make these appointments possible – more detail can be determined through secondary legislation or court rules.

Parenting Coordination is a child focussed alternative dispute resolution process in which a mental health or legal professional with mediation training and experience assists high-conflict parents to implement their parenting plan by facilitating the resolution of their disputes in a timely manner, educating parents about children's needs, and, with prior approval of the parents and/or the court, making decisions within the scope of the court order or appointment contract