Response ID ANON-VPUF-TE1Y-4

Submitted to **Review of Part 1 of the Children (Scotland) Act 1995 and creation of a family justice modernisation strategy**
Submitted on **2018-09-28 16:15:15**

Obtaining the views of a child

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

Yes – remove the presumption and replace with a new presumption based on a different age.

Why did you select your answer above? :
Don't remove the presumption entirely, but extend to prescribe alternative ways that views of children aged 0-5, 5-12 and 12+ should be obtained and considered. For children aged 0-5 there should only be a very limited consideration of views in general terms. Older children are likely to have greater capacity and understanding , but are also likely to be subject to influence from their parents, particularly the parent with whom they spend most time.
Whatever the age it should also be stated clearly in any consultation that the views of children are not necessarily determinant of what should happen in their best interest. It is an intolerable burden on children to allow them to believe that they will be the 'decision-makers'. Explanatory material for children should emphasise this pointand set out that if the judge does not agree completely with their view as expressed they have the right to an explanation. We have seen several exemplary examples of such explanations by judges in Scotland and judges in Engand and Wales. According to CAFCASS only 5% of children actually want to see the judge in such cases [anecdotal reference in CAFCASS link below]
Forms seeking the views of children should explicitly give an opportunity for the child to record positive aspects of contact with their parent as well as concerns or problems – as with Scottish Child Law Centre "Helping Hands" forms. Guidance should be given on how the child should fill out the form - ideally in the presence of a trusted adult who is not aligned with either parent and not in the presence of either parent. Any/all adults present should sign the form. As well as forms the use of apps and other online processes should be considered for obtaining the views of children and young people, as noted by CAFCASS who are working on various other ways for children to express views such as apps
[http://www.transparencyproject.org.uk/cafcass-tool-up-for-childrens-voices/]

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

Another way (please specify)

If another way, please specify. :
several other ways noted within the following box

Why did you select your answer above?:
OTHER WAYS
We have rejected the other options in the above list because they all have serious shortcomings in their current practice. Our list below indicates what needs to be done to mitigate the effect of these shortcomings. We therefore support these options if they are modified as described.

F9 Form
The form F9 as revised by the Scottish Civil Justice Council should be put into use as soon as possible. Research should be commissioned in order to monitor how it is being used and whether the various parties involved (children, parents, lawyers, judges) are finding the new form useful.
Sheriffs and judges should be given guidance through practice notes and training to ensure that they understand how the forms should be used.

Child Welfare Reporters
While some child welfare reports provide useful information to the court and thereby assist in the speedy resolution of child contact disputes, the standard still varies considerably across Scotland.
It is unacceptable that there should be no transparency in the recruitment and appintment of child welfare reporters, that there is no quality control of their work and no structure for their work, especially where allegations of domestic abuse may have been made by either parent. Where an allegation of a criminal nature has been involving a child there is now a robust Joint Investigative Interview protocol, based on NIHD guidance, in place in which interviewers are trained how to interview a child, how to avoid leading or tainting the child's testimony, how to ensure the child is neither pressured nor exhausted. Above all, all such interviews are videorecorded. While we do not recommend going to that length it is unacceptable that the reporter's handwritten notes are beyond scrutiny for accuracy given that his/her recommendations generally guide the sheriff's decision. There should be no resistance to either parent or even the child welfare reporter audio recording interviews.
As noted by the recent Working Group (on which we were represented), there should be standards for the appointment of Child Welfare Reporters, requirements for training to be undertaken on topics such as parental alienation and domestic violence, and oversight of the actual reports by the Sheriff Principals and the Lord President. In pursuit of concensus within the group we accepted a minimal recommendation for training. Our view is that a considerably higher requirement should be expected for such key figures, the only independent evidence takers, in the court process.
The changes that resulted from the Working Group findings have resulted in improvements, but more needs to be done to ensure that this process is optimised. The Working Group concluded that it was not necessary to establish a new CAFCASS-type structure in Scotland, but until all its recommendations have been fully carried out the Scottish processes are at significant risk of falling below acceptable standards.
If family lawyers are being entrusted with a reporting task that goes significantly beyond their normal training and experience, adequate oversight and training must be provided. Expecting lawyers to be automatically good at child welfare reporting without these supports is like expecting professional footballers to excel at ice hockey just because both sports require goals to be scored.
Child welfare reporters should only speak to children after they have received training in specific issues including parental alienation and domestic violence, and

they would also benefit from more general training on wider aspects of obtaining children's views.

Speaking directly to the judge or sheriff

Speaking to children about their views in child contact cases is recognised in many counties as a task that requires both judicial training and the assistance of other professionals.

At present there is a wide range of practice across Scotland. Some family judges do not want to speak to children, preferring to obtain reports from child and family professionals. Other judges are content to speak with children in chambers or have them give evidence in court. The Judicial Institute has arranged various training sessions on this topic in recent years bringing in a range of specialists from Scotland and further afield. This provision of training is excellent, but attendance is voluntary and has not reached anywhere near all of the sheriffs and judges who conduct family cases.

In Germany all judges who speak to children have to undertake specific training. A study of this process [Karle, Michael, Gathmann, Sandra, The State of the Art of Child Hearings in Germany. Results of a Nationwide Representative Study in German Courts, Family Court Review 54(2) 167-185 (2016)] was conducted by the German Federal Ministry of Justice which obtained views from 1027 judges (45% return). Nine out of ten family law judges regard the hearings with children as 'very' or 'fairly' meaningful,

The advantages reported most often were: (1) discovering how the child is coping (90.4%) and (2) getting to know the child (77.7%). Further positive aspects reported were: a better evaluation of the criteria for ‘best interests of the child' and also the achievement of a consensual settlement of the issues between the parents. Disadvantages were also noted. The most frequent concerns were that children were not able to express themselves freely (56.5%) and that the strain on them was too great (50.6%).

In Denmark judges will speak to children but only if supported by a child psychologist.

Child Support Worker

The term "child support worker" needs more specification to ensure that the person undertaking this work has appropriate skills and experience and a full picture of the circumstances of the family. Receiving information from only one self-referring source is inherently unreliable. While it may be appropriate for "child support workers" to operate within a domestic abuse support service, there must be safeguards to ensure that such services do not become involved without some testing of alleged abuse. We give some detail below but strongly believe that where there is an allegation of domestic abuse there should be a fact finding process as soon as possible.

We are aware of many examples over our years of casework where unfounded allegations have been allowed to become part of the discourse for months and even when found to be contrived or otherwise unfounded it is too late to undo the damge wrought on the relationship with the children involved.

Where a child support worker supplies a letter or other report to a court s/he must include their qualifications in the correspondence.

Our note below and also our response to question 5 gives details of the judgement in a recent family proof in which the involvement of a domestic abuse service based on false information supplied to it was misplaced and ultimately damaging to the children involved. This illustrates the potential risk of a unilateral diagnosis of domestic abuse without any wider consideration and the long term damage it can cause to children who are led to believe that they have been abused.

In that case and in various other ones that we have knowledge of, the service has "supported" children to write letters to court which have led to decisions to reduce or remove contact with a parent. As reported by Dr Kirk Weir in his research study, the expressed views of children involved in high conflict family disputes need to be considered with great care. Dr Weir described his work in 60 English court cases. His involvement came after a Finding of Fact had dismissed any allegations of child abuse or domestic violence. In preparing his report to court, he interviewed both parents separately, and then met children on their own and with each parent.

In the sessions with the alienated parent and children together, apparently stout resistance dissolved into normal loving contact, sometimes within minutes, sometimes after a hour or so.

This enforced contact was successful in all cases involving children under 5, in 80% of cases with children aged 5-7, and in 40% of older children. [High Conflict Contact Disputes: The Extreme Unreliability of Children's Expressed Wishes and Feelings, Family Court Review, 49 (4) p 788-800 (2011) https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1744-1617.2011.01414.x]

Our concern about "child support workers" relates to various cases in which this support has been solely directed towards supporting the child to overcome the effects of alleged domestic violence. While support by suitably qualified professionals is entirely justified in cases where a child has suffered or experienced or witnessed domestic violence, it is wholly inappropriate and extremely damaging if the alleged abuse has not actually taken place.

Lady Hale, now president of the Supreme Court expressed this in Principal Reporter v K [UKSC 56 (2010) para 44] "No child should be brought up to believe that she has been abused if in fact she has not, any more than any child should be persuaded by the adult world that she has not been abused when in fact she has."

Ruling in a cross-border contact case Justice MacDonald quoted the conclusion of the children's guardian surveying the conduct of professionals in this case that "'It is as if a sort of hysteria took over and prevented people from asking certain questions'. I cannot help but agree." In that case all of the serious abuse allegations made by the mother were found to be false. [EWHC 532 (Fam) 2016]

The recent report by Women's Aid and CAFCASS "Allegations of Domestic Abuse in Child Contact Cases" indicates that domestic abuse was alleged in almost two-thirds of cases (62%), with fathers more likely to be the subject of allegations than mothers. That study did not seek to make findings on the veracity of these allegations. But in a study of Scottish family court cases, Professor Tommy MacKay reports: "Of 107 children who were the subject of psychological reports for the courts in this study, allegations of physical or sexual abuse had been made in 37 cases, and 26 of these were deemed to be false, with nine of the remainder unsubstantiated and two upheld."

[Educational & Child Psychology Volume 31 Number 3 (2014) p85, "False allegations of child abuse in contested family law cases:The implications for psychological practice]

In a recent unreported sheriff court judgement it was found that various inappropriate and damaging measures were taken by domestic abuse services in response to allegations of domestic abuse. These included the installation of panic alarms in the children's house, and the children being trained in "safety" procedures such as hiding in a safe place in their house. The sheriff found that "... These plans and practices of what was in these plans would suggest to the children that their father posed a threat of physical harm. There was no such threat. The plans were unjustified."

In that case one of the children was assisted by a "child support worker" to write a letter to the court saying that he didn't want to see his father. At the end of the subsequent proof hearing another sheriff wrote back to the children to tell them that "... There is no reason why you should not see your father and his family again. No-one should try to persuade you not to see them if you want to..."

We suggest that the above examples show the dangers of accepting untested allegations in child contact cases.

This is not to deny that abuse does take place on some occasions, and that children and parents need protection when it does occur. But, as noted by Lady Hale, it is just as important to determine whether an allegation is justified in order to prevent children being excluded from one of their parents for no reason.

Other ways

Avenue in Aberdeen and other family mediation services are undertaking work with children, both to obtain their views and provide additional support during the mediation. They insist on seeing children several times to help sort out what children really think from any influences.

The neutrality of such services makes them an attractive option for obtaining children's views, although the staff undertaking this work require significant amounts of training and experience in issues such as attachment, child development, domestic abuse and parental alienation. We are advised Avenue's own protocol limits them to interaction with children over the age of 7. Funding should be provided for these services to be evaluated and rolled out more widely across Scotland.

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

Another option (please specify)

If other, please specify::
A qualified family therapist or child psychologist should be involved in preparing and delivering the explanation

Why did you select your answer above?:
As noted above, child support workers and child welfare reporters may not be suitably qualified or experienced to undertake this task.
In the recently reported case of Patrick v Patrick, a clinical child psychologist assisted the sheriff in composing the letter explaining the judgement and also supported the children to understand it.
In that case the psychologist had already been involved in the case and the parents agreed this course of action.
We suggest that it would be very desirable for this type of specialist support to be routinely available to parents and children at all stages of family separation and will return to this point in subsequent answers.
The Scottish Legal Aid Board have already accepted that 'family therapy' is a useful option for the courts to use in certain situations and should be encouraged for appropriate cases.
In cases where the views of children have been obtained by properly trained and experienced practitioners (as opposed to the current system in very few child welfare reporters attain such standards) the court should consider ways in which the services of these practitioners could be retained. If the court then proceeds to make orders which significantly differ from those views, the sheriff or judge can consider whether it is in the children's best interests to have some form of explanation and/or ongoing support.
When crucial aspects of children's life such as living arrangements, contact with a parent, school choices, religious observance or other factors are being decided in court, those children have the rights under Article 12 of the UNCRC to express their views and to have these views considered and taken seriously.
Explanation of such court decisions is a crucial component of taking these views seriously.
The cost of providing this specialist advice to the court in composing any feedback and of providing support to the children could be borne either by legal aid or by privately funded parties to the action. Although there may be cases in which all costs are awarded against one party, costs should normally be shared equally between parties.
We recognise that this proposal significantly extends the role of the court in family actions, but is already happening in some cases, and simlar procedures have already been adopted in various other legislatures such as Australia.
In the United States there is now routine use of Parenting Co-ordinators.
Parenting co-ordination is defined by the Association of Family and Conciliation Courts (AFCC) as "a child focussed alternative dispute resolution process in which a mental health or legal professional with mediation training and experience assists high-conflict parents to implement their parenting plan by facilitating the resolution of their disputes in a timely manner, educating parents about children's needs, and, with prior approval of the parents and/or the court, making decisions within the scope of the court order or appointment contract." The following link shows what qualifications and experience are required from parenting co-ordinators.
[http://parentingcoordinationcentral.com/Qualifications_of_a_PC.html]

4 What are the best arrangement for child welfare reporters and curators ad litem:

Another option

If another option, please specify. :
Scotland should develop an entirely new system based on international best practice

Why did you select your answer above?:
Because of the drawbacks as noted above to the existing arrangements, we propose that a new set of professionals (parenting co-ordinators) is created. This would encompass many of the existing professionals(family lawyers, mediators, family therapists, child psychologists etc) but would require them to undertake additional training to supplement their existing experience. Although this would require initial investment and some continuing management and oversight, the scale of expenditure required is far less than would be necessary to create a new CAFCASS style organisation.
The current system with Child Welfare Reporters, Curators and Safeguarders has evolved over a long period of time and is not well integrated.
Scotland already has the kudos of having developed the Children's Hearing system, and it is now time for us to make another bold move to enhance the wellbeing of children and families, as indicated in the National Performance Framework.
By developing this new category of professional to operate using existing people working alongside and under the direction of the family courts, it should be possible to increase the chance of appropriate help becoming available to separating parents and their children far quicker than in the current system.
Scotland has been widely praised internationally for the work of its Violence Reduction Unit for taking a 'welfare' or 'public health' approach to addressing violence in the community. Similarly, several drug and alcohol courts are adopting the 'problem solving' approach to regular offenders. The common thread that links the children's hearings, the VRU and the problem solving courts is the commitment to deal with problem behaviour rather than write of the individuals involved. We believe the adversarial approach to contact and residence disagreements too often encourtages the parties to take a black and white approach to every issue between them from the most trivial to the more serious. Parenting Co-ordinators would recognise the parents and their children as indviduals who should be supported rather than contestants in a damaging game.

Commission and diligence

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

No

Why did you select your answer above?:
There is a need for improvement in this process, but not in the terms as noted above. We agree that disclosure of confidential material should be be made in the best interests of the child, but do not agree that the views of the child should necessarily be taken into account.
This is because there are occasions where abusive behaviour is alleged and the children concerned have been subject to undue influence from a parent and/or a domestic abuse service they may believe that they have been abused even when no abuse has actually taken place..
As noted by Lady Hale the president of the Supreme Court in Principal Reporter (Respondent) v K (Appellant) and others (Scotland) (para 44) "No child should be brought up to believe that she has been abused if in fact she has not, any more than any child should be persuaded by the adult world that she has not been abused when in fact she has."
In a recent Sheriff Court proof (Sheriff Coutts, Jedburgh, F84/15, 14/2/18 unpublished) the damaging impact on children of an unnecessary domestic violence intervention was demonstrated.
The children in this case were referred to a domestic abuse service following the mother's allegation that their father was threatening them. She said she had been referred by police but it was established she had referred herself. The support that they received included creation of a safety plan with the children, an alarm was installed in the mother's house, and arrangements were made for Police Rapid Response to any call from the mother or her children.
In her Finding in Fact following a description of these precautions, the sheriff notes:
"In fact the pursuer {father} had never kept the children against their will and returned the children from contact when they wished to be with their mother even late at night. The pursuer had never taken them other than at contact times. There were no threats that he would do so. There were no reasonable grounds for installing a panic alarm. There was no reasonable fear of abduction. The alarm would suggest to the children that their father posed a threat of physical harm. That was unjustified."
We are referring to these details because at an earlier stage in this case the father has attempted to obtain details from that domestic abuse service of what work had been done with his children. Although information was obtained when the court granted unrestricted diligence for recovery of relevant records from that service, these documents were heavily redacted and the sheriff hearing the case at that time stated that the only way to recover this information was through commission and diligence.
These moves in 2015 to recover records from a local domestic abuse service were what prompted Scottish Government to hold the round-table discussion referred to in 3.08 above.
It took a further three years of court action before the case was heard at proof and the above findings of fact were made. The children in this case have spent more than four years with an unjustified belief that they were at risk from their father. Following a successful appeal by the father to the Sheriff Appeal Court and further Sheriff Court hearings the children have now been offered family therapy to try and undo this damage. This example shows how unjustified and untested allegations of domestic abuse can cause massive damage to children's views of one of their parents.
Families Need Fathers Scotland knows of many other examples of this sort of damage, which is why we consider that it is so important for any agency dealing with domestic violence should look more closely before starting work with a potentially abused child. Wher a child support worker writes either to a court or to the soliciotr of one party his/her qualifications should always be stated.
We fully accept that there are many cases in which children are abused by one parent and rightfully deserve support and protection, in which interventions are necessary and justified, but the above case shows that there are occasions in which confidential documents should be disclosed despite the views of the children. Such disclosure can be made to a Commissioner to preserve confidentiality, but the cost of this process should be eligible for legal aid.

Contact

6 Should Child Contact Centres be regulated?

Yes

Why did you select your answer above?:
Scottish contact centres are already overseen when in membership or association with Relationships Scotland. While it is desirable that such an important service should be subject to nationally uniform regulation, this should be proportionate and accompanied by adequate and long-term funding support. It is also important that the volunteers who currently provide a key component within contact centres are fully supported and that training requirements are not made so onerous that volunteers are deterred from taking part. In terms of gender balance their are very few male volunteers. An active recruitment effort should be undertaken.
While a minimum level training is necessary for all the people involved in contact centre operation, the more requirement for more detailed training should be focused on paid full- and part-time staff.
Child contact centres provide an important role within the family court system, particularly as a way of ensuring that interim contact orders can be made as early as possible in court cases while the court awaits independent information from a child welfare report. This importance should be recognised by provision of a long-term funding stream, either direct from Scottish Government or from the Scottish Courts and Tribunal Service or the Scottish Legal Aid Board. This would remove the current uncertainty and effort from having to find core funding from lotteries, trusts and other charitable sources.
As noted above, the Inner House has already ruled that child contact decisions should be made in weeks, or at most months - and without adequate child contact centre provision this will be be very difficult for Scottish courts..
Without such funding guarantees it will be very difficult to impose anything more than very minimal regulation without risking damage to the overall provision of child contact.
Our experience is that courts that make orders for supervised or supported contact are unaware of the waiting list for time at many contact centres or of the quite substantial costs that the non-resident parent may incur in the process.
As part of this process, we also suggest that national guidelines for child contact centres should be prepared and publicised to contact centre users. Families Need Fathers Scotland is currently working on a Child Contact Centre User Guide, which we hope will assist in this process.

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

What steps should be taken to help ensure children continue to have relationships with family members, other than their parents, who are important to them?:
Yes. Grandparents from one side of a child's family are often excluded when contact with the parent is stopped. Although legal action can be conducted to try and restore this contact, this is more difficult than action taken by the parent, and such action can simply widen the gap between two sides of the family, due to the adversarial process.
The charter for grandparents produced by Scottish Government in 2006 says the right thing: "Grandparents can and do play a vital role in helping children to maintain some stability in their lives." but this provides no actual help to grandparents in this position.
4% of enquiries to Families Need Fathers Scotland are from grandparents, manly about contact with their grandchildren.

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

Yes

Why did you select your answer above?:
There needs to be a process in place in terms of the UNCRC (which sets out a child's right of contact with grandparents and extended family) that renders the right meangful when one parent may be exerting influence against it. This will be an important change in perspective on the issue.

In the meantiome, the Charter for Grandparents has not been effective in resolving this issue in many cases we are aware of, and we suggest that it needs to be strengthened by a legal presumption.
Any such presumption will be rebuttable, and we have given counterarguments against such a presumption below.

' It might cut across the provisions of the legislation that the welfare of the child is paramount; on no order being made unless the court considers it better for the child that an order be made than that none should be made at all; and on the child expressing views'
Experience in many other countries does not suggest that rebuttable presumptions about contact with parents or grandparents need cut across these fundamental principles. Such a presumption doesn't cut across the powers of sheriffs and judges to make orders, but they do provide additional guidance based on sound evidence..

' In some cases, it is possible that contact with a grandparent can lead to contact with an unsuitable parent'
Sheriffs and judges can take this into account when making orders, as they do already in some cases.

'A presumption could lead to more people having rights over a child which may go against the key principle that the welfare of the child is paramount'
As noted above, grandparents and other family members are usually supportive parts of a child's family and can make positive contributions to child welfare.

'A child's close relationship may be with someone other than a grandparent'
This can be taken into account when necessary

'A grandparent can already seek contact with their grandchild by applying to the court'
Taking court action to obtain contact with a grandchild is costly and may not attract legal aid support for grandparents who would otherwise qualify for such assistance. More fundamentally, taking court action is usually interpreted by the other parent as a hostile action and thereby reduces the possibility for an agreed or mediated solution.

'No case is the same and each case should be considered on its own merits'
Cases will still be considered on their own merits if a presumption is introduced.

The current system does not make it easy for grandparents to obtain contact with grandchildren when contact with their own son or daughter has already been stopped or restricted. Adding this provision to family law will not resolve all of these problems, but it will give a clearer and more positive steer to families facing such issues.

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

Yes

Why did you select your answer above?:
This clarification would be useful, but we would not support the idea that sibling contact should be routinely obtained or enforced through adversarial court action. Such action is very damaging to ongoing family relations, and services such as child centred mediation and family therapy are far more likely to resolve such issues in a quick and less confrontational manner.
The introduction of Parenting Co-ordinators within Scotland could provide a more responsive, skilled and supportive approach to restoring these relationships. As noted more fully below and in FNF Scotland's Way Forward report, these professionals would be expected to have skills and experience in family law, mediation, family therapy, attachment and psychology. They could work within a court regulated framework, where families are supported in the implementation of overall court decisions.

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

What do you think would strengthen the existing guidance to help a looked after child to keep in touch with other children they have shared family life with?:
As noted above and elsewhere, Parenting Co-ordinators could also assist children to keep in touch with other children with whom they have shared family life.

11 How should contact orders be enforced?

Another option.

If another option, please specify. :
Criminal penalties to remain as the ultmate sanction, but alongside a menu of less draconian options including community service to be undertaken at the time contact is due to take place, parenting apart courses, transfer of residence and suspension of penalties in order for contact to take place.

Why did you select your answer above?:
We propose a range of sanctions far wider than the current options, reflecting the particular nature of child contact orders which are somewhat different from other circumstances in which contempt of court comes into play.
There should a core procedure to follow to deal not only with complete failure to obtemper but also intermittent or disruptive compliance. There should be discretion for sheriffs/judges to depart from the core procedure if required. This should set out what is considered as contempt in such cases, a timescale for each stage, and a scale of penalties.
The stages could include:

1. All contact orders must include mention of the penalty if the order is not upheld (as in English family court orders).
2. Contempt hearings should be separate from child welfare hearing to allow the parent to take specific legal advice. The sheriff who is conducting the child welfare hearings should also conduct the contempt hearing. This continuity is desirable at all stages of family cases, putting the emphasis on finding solutions that will promote resolution of the child contact issue rather than simply punishment for the contempt. If contempt is established, the sheriff must impose a penalty but has the option to suspend this penalty to allow parent to re-establish contact.
3. There should be a limited time period after the contempt is established to allow parent to purge contempt by ensuring contact takes place (3 months maximum). A Child Welfare Hearing should be held at the end of this period and agents/party litigants also asked to provide monthly reports on whether contact has taken place.
4. The timescale for suspension of penalty can be extended by sheriff if reasons are accepted at the contempt hearing or 3-month hearing. Sheriffs can re-impose the contempt penalty if monthly reports are not provided.
Penalties for contempt in child contact cases could include community service (to be held at the time of contact), financial penalties (not for parents on low income), attendance at Parenting Apart or other training or short-term or permanent transfer of residence to the other parent.
Imprisonment should only be a last resort measure. If professional intervention is required to assist transfer of residence, the offending parent could be required to pay some/all costs if resources available.
The timescale for carrying out this action is crucial – many of the current problem cases have dragged on for a long period before any attempt was made to enforce the court order.

Cross border cases within the UK: jurisdictional issues

12 Should the definition of "appropriate court" in the Family Law Act 1986 be changed to include the Sheriff Court as well as the Court of Session?

Yes

Why did you select your answer above?:
This change would make action speedier and less costly in many cases, although the option of Court of Session action should remain for complex cases.
It should be accompanied by guidance for sheriffs, judges and court officials on how such cases should be conducted.

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

Yes

Why did you select your answer above?:
1. Clarify how the different dates for recognition of unmarried fathers registering parental rights in different parts of the UK. At present a parent who has obtained parental rights in England can then lose them when he moves to Scotland because the child was born before the Scottish law change of 4/5/06. This could be remedied by backdating PRRs for all fathers whose name is on the child's birth certificate.

2. The combination of section 11 and section 42 of the 1986 Family Law Act can prevent a father raising an contact action in Scotland if a divorce, nullity or judicial separation has previously been obtained in England or Wales.
Section 11 of the 1986 Act says:
11.— Provisions supplementary to sections 9 and 10.
(1) Subject to subsection (2) below, the jurisdiction of the court to entertain an application for a Part I order with respect to a child by virtue of section 9, 10 or 15(2) of this Act is excluded if, on the date of the application, matrimonial… proceedings are continuing in a court in any part of the United Kingdom in respect of the marriage … of the parents of the child.
(2) Subsection (1) above shall not apply in relation to an application for a Part I order if the court in which the matrimonial … proceedings are continuing has made one
of the following orders, that is to say—
(a) an order under section 2A(4), 13(6) or 19A(4) of this Act (not being an order made by virtue of section 13(6)(a)(ii)); or
(b) an order under section 5(2), 14(2) or 22(2) of this Act which is recorded as made for

the purpose of enabling Part I proceedings with respect to the child concerned to be
taken in Scotland or, as the case may be, in another court in Scotland, and that order is in force.
Section 42(2) says:
(2) For the purposes of this Part proceedings in England and Wales or in Northern Ireland for divorce, nullity or judicial separation in respect of the marriage of the parents of a child shall, unless they have been dismissed, be treated as continuing until the child concerned attains the age of eighteen (whether or not a decree has been granted and whether or not, in the case of a decree of divorce or nullity of marriage, that decree has been made absolute).

Adding that together, the sheriff court has no jurisdiction unless the English court has renounced jurisdiction. Parents can go to the English court and ask for an order under section 2A(4) which says:
(4) Where a court—
(a) has jurisdiction to make a section 1(1)(a) order by virtue of section 2(1)(b)(i) of this
Act, but
(b) considers that it would be more appropriate for Part I matters relating to the child to be determined outside England and Wales, the court may by order direct that, while the order under this subsection is in force, no section 1(1)(a) order shall be made by any court by virtue of section 2(1)(b)(i) of this Act.

Or they can start the contact action back in England and seek to have in enforced in Scotland.
Neither process is easy or quick, and there is a major lack of understanding of cross-border issues by solicitors in either country, with a few exceptions. The recent information published jointly by the Scottish Lord President and the President of the English and Wales Family Division addresses on some of the cross-border complexities but doesn't include mention of the situation in Northern Ireland.

The court there could still decide that the issue would be better dealt with in Scotland, but that would be a matter for the court there.

If he does go ahead in Scotland an Initial Writ is the correct format, but it will be necessary to aver that the divorce was in England and that the relevant English court has made an order under section 2A(4) of the Family Law Act 1986, and to produce the order.
The Scottish Government should seek to extend this work to cover the issues raised in this consultation and publish extended guidance in collaboration with counterparts in these countries.

Parentage

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

No

Why did you select your answer above?:
Now that DNA testing is simple, inexpensive and fairly conclusive and more than 50% of Scottish children are born to unmarried parents, it is worth considering whether this presumption is still necessary.

15 Should DNA testing be compulsory in parentage disputes?

Yes

Why did you select your answer above?:
The increased importance to a child of knowing his or her genetic background already provides adequate reason for DNA testing to be compulsory. In coming years there will be even more knowledge in this area, making it even more necessary for children to know what genetic conditions exist within their family.

At present sheriffs seem unclear whether or when a court can order a DNA test. A presumption in favour of test would have shortened several of the cases we are aware of, reduced the number and cost of child welfare hearings and allowed a relationship to between non-resident parent and child to develop at a much earlier age.

Parental Responsibilities and Rights

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

No

Why did you select your answer above?:
The current system by which step parents can obtain PRRs through application to the court seems to provide the necessary safeguards and provide an independent assessment of the situation and the interests of the child/ren.
For those reconstituted families where there is agreement, it should be possible for the biological parents to enter into a registered minute of agreement with each other which can convey the appropriate powers and responsibilities to the step parent, without having a legal change to create a step parent PRR.
For the purposes of education, one of the main areas where PRRs are relevant, is already operating under definition of a parent in section 135(1) of the Education (Scotland) Act 1981 as: “includes guardian and any person who is liable to maintain or has parental responsibilities (within the meaning of section 1(3) of the Children (Scotland) Act 1995) in relation to, or has care of] a child or young person" . This means that step parents and partners in same sex couples already can be brought under the "parent" definition, although they might not have capacity to authorise medical treatment or agree to school trips.

17 Should the term “parental rights” be removed from the 1995 Act?

No

Why did you select your answer above?:
As noted in the further information, this change would not have any substance without further adjustments. We note below the areas we feel should be changed. If these changes are made so that all fathers have PRRs unless they have been removed or modified by a court, the current imbalance between all mothers who have automatic PRRs and those fathers who don't have PRRs would largely disappear.
However, if these changes are not made, it becomes more imperative that the word "rights" should remain in the legislation.

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

Yes

Why did you select your answer above? If you answered yes what terms should be used? :
Many people, including some lawyers and other professionals, still use the pre-1995 terms of "custody" and "access". While this is a disappointing indication that changing terminology doesn't necessarily have the desired impact, Families Need Fathers Scotland would still support the removal of this differential labelling in favour of a more neutral term such as "parenting order" that can be applied equally to both parents.
The term "child's order" does not work as a substitute. It isn't the child's order. It is an order that regulates the parents' time with the child. We would suggest therefore 'parenting order' or 'child arrangement order’. It is important that the terminology does not suggest that one parent has more standing than the other in the eyes of the state in connection with parenting children, whatever the allocation of parenting time.
The current terminology perpetuates the concept that one parent has more status and the other is a visitor in their lives whereas the interests of children after parental separation are almost always served by having full involvement of both parents operating on equal standing.
Families Need Fathers Scotland often hears about cases in which a mother states that she is in charge and therefore the only decision maker. Changing the legal terminology will only go some way towards altering these popular views, but if we leave the terminology alone it will perpetuate the presumption.
As noted in our charity name, Families Need Fathers Scotland does not consider either parent to have priority - we believe that "Both Parents Matter" and are seeking equality on that basis.

19 Should all fathers be granted PRRs?

Yes

Why did you select your answer above?:
All biological fathers and mothers should be granted PRRs. Removal of PRRs in certain cases (incest, rape etc.) should be made easier to cater for the (likely) small number of such cases where it is immediately obvious that the child will not benefit from having paternal or maternal involvement.
The current court process for obtaining PRRs is cumbersome and practice varies across courts. This change would save court costs and also be compatible with human and child rights and be an equal opportunities measure, as noted in resolution 209 of the Council of Europe .
(http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22220&lang=en).
This resolution stresses the benefits for children of the involvement of both parents in their upbringing, and calls on member states to ensure that family law foresees, in case of separation or divorce, the possibility of joint custody of children, in their best interests, based on mutual agreement between the parents. States should remove from their laws any difference based on marital status between parents who have acknowledged their child.

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

Yes

Why did you select your answer above?:
Although backdating is usually avoided in legislation and the anomalies created by the 2006 Act will finally disappear when children born before 4th May 2006 reach the age of 16 in 2022, there is justification for this change to be made during the curent Parliamentary session.
Families Need Fathers Scotland often hears from unmarried fathers who have children born both before and after 5th May 2006. These children are currently being considered differently in law because of the lack of backdating, which is contrary to their Article 8 rights to family life under the European Convention of Human Rights , and also contravenes article 7 of the UN Convention of the Rights of the Child.
Backdating could also deal with the difference of dates that PRRs were introduced for unmarried fathers in England and Scotland, unless automatic and backdated PRRs are introduced. At present an unmarried father can have PRRs granted in England because his child was born after the English law changed on 1/12/2003 and was jointly registered with the mother. If he crosses the border to live in Scotland these rights disappear unless the child was also born after 4/5/2006.

21 Should joint birth registration be compulsory?

Yes

Why did you select your answer above?:
If all fathers are given PRRs then joint registration is less necessary.
If birth registration remains a condition for PRRs then joint registration should be compulsory. Rape or incest victims should not be required to register jointly though care will have to be given in the drafting to avoid another 'rape clause' controversy.
We have asked the Scottish Ministers several times to disagregate the numbers of single registrations several times. It currently includes children born of incest or rape along with casual relationships. It does not seem in keeping with current concepts of equalities law that the rights of men who become fathers after a casual relationship should be lost by being included in the same category.
It should be noted that compulsory birth registration in England and Wales was included in the Welfare Reform Act 2009, but this has not been enacted. The accompanying note to this legislation describes the intention: “In the majority of cases, unmarried parents will continue to register jointly in co-operation with each other. In most of the remaining cases, the mother will be required to provide the father’s details to the registrar, in order to enable the registrar to contact the

father and ascertain and include his details on the birth register. Similarly, an unmarried father will have a corresponding right to provide his details to the registrar independently of the mother, and to have his name entered on the register subject to acknowledgement by the mother that he is the child's father. Whilst in practice such approaches should be the exception, the provisions allow in this way for joint registration by couples who are not co-operating with each other. There will, however, be some cases where a mother will be exempt from the duty to provide the father's details, in which case sole registration will take place. These will include, for example, cases where the mother does not know the identity of the father (or his whereabouts), or where she fears that her safety – or that of her child – might be put at risk were the father to be contacted."

The Civil Registration (Amendment) Bill 2014 in the Republic of Ireland places a duty on unmarried parents to register the father's name on the birth certificate of their child. This move supports the right of a child to have the identity of both parents acknowledged.

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

Yes

Why did you select your answer above?:
At a time when various international arrangements are being revisited because of Brexit there is additional justification for this change to be made, even if it only affects a small number of families.

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

Yes

Why did you select your answer above?:
The current model adopted in family cases seems rooted in the 1970s and pays little attention to the changes that have taken place in family life in the last 40 years with more female participation in the workforce, more day to day hands on parenting by fathers and vastly different expectation among both parents and children of what involved parenting is in reality. Scotland likes to claim it is world leading in many areas of social policy but in family law it is lagging the field. There is now substantial research evidence from across the world to support the proposition that shared parenting is in the best interests of children, and would therefore not undermine the principle of paramountcy of the welfare of the child.
Key references include:
Fransson, Emma & Låftman, Sara & Ostberg, Viveca & Hjern, Anders & Bergström, Malin. (2017). The Living Conditions of Children with Shared Residence – the Swedish Example. Child Indicators Research. 11. 10.1007/s12187-017-9443-1.
This study assessed how parenting arrangements can influence a child's wellbeing & life experiences. These were measured in several categories including economic, social, health, working conditions & safety at school and leisure time activities.
Researchers found that in several areas, particularly in economic outcomes, children were slightly worse off living with one parent as opposed to children living with shared parenting or children living with both parents in the same household.
Children living with one parent as opposed to shared parenting or two parent families were also:
- More likely to report not getting on well with their parents
- Less likely to report their parents had time for them
- Reported worse peer relations including being less likely to claim having at least one close friend in class
- More likely to report less than good on a self-rated health scale and report smoking weekly far more frequently
- Assessed their school performance as being lower in relation to their peers
- Less likely to participate in organised sport activities on a weekly basis
https://www.researchgate.net/publication/312505961_The_Living_Conditions_of_Children_with_Shared_Residence_-_the_Swedish_Example

A roundup of 60 research studies published by Professor Linda Nielsen shows that joint physical custody (shared parenting) is linked to better outcomes for children on all the measures of behavioural, emotional, physical and academic wellbeing, compare with sole physical custody.
Joint versus sole physical custody: Outcomes for children independent of family income or parental conflict, Journal of Child Custody, Vol 15 p35-54 (2018) https://doi.org/10.1080/15379418.2017.1422414

Young children spending overnights with both separated parents has sometimes been criticised, but research included the following established evidence of the benefits.to both parent-child relationships associated with overnights (a) up to and including equal numbers of overnights at both parents' homes, (b) for both the long-term mother-child and father-child relationships, and (c) both when children were 2 years old,as well as when they were under 1 year of age. These benefits held after controlling for subsequent parenting time with fathers in childhood and adolescence, parent education and conflict up to 5 years after the separation, and children's sex and age at separation.
Fabricius, W. V., & Suh, G. W. (2016, November 28). Should Infants and Toddlers Have Frequent Overnight Parenting Time With Fathers? The Policy Debate and New Data. Psychology, Public Policy, and Law. Advance online publication. http://dx.doi.org/10.1037/law0000108
Given the current concern about adverse childhood experiences (ACEs|) in early years, we would suggest that full involvement of both parents in the life of young children mitigates ACEs linked to parental separation.

The legislation should be amended to include a rebuttable presumption of equal care after separation, as has been enacted in Australia, Belgium, France, New Zealand, Sweden and several states in the USA. The Arizona legislation led the way in the United States and similar legislation is now under active consideration in more than 20 states. Scotland can draw on the experience in these countries, both the advantages of such a presumption as well as any problems.
At present Scottish sheriffs/judges have very little guidance on what shared parenting should be ordered, if any. We know of several sheriffs who have stated from the bench their opposition to shared parenting in principle. We believe such evidence-free assertions that should recuse them from involvement in cases where there is a crave for shared parenting.
A rebuttable presumption of equal care gives a clear starting point for sheriffs/judges but it also provides them with just as much scope as at present to make orders that reflect the circumstances of each case.

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

No

Why did you select your answer above?:
Although it is sometimes better to avoid presumptions in legislation that may cause conflict with the underlying principles, as noted above there is ample justification for shared parenting to be mentioned in legislation. Making this change to Scottish Family Law can play an important part in wider efforts to promote the involvement of fathers in the lives of their children, as part of an overall gender equality strategy.

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

Yes – other (please specify).

If other, please specify.:
Both guidance and a statutory basis for collecting information should be considred, plus other measures relating to the the exemption in the Pupils' Educational Records (Scotland) Regulations 2003

Why did you select your answer above?:
We have been heavily involved with both schools and parents for several years. The Scottish Schools (Parental Involvement) Act 2006 and the guidance that accompanied it appreared to set a benchmark by urging schools to "work hard" to include fathers in general and non-reseident parents in particular.
Our experience is that the picture is very patchy. There are numerous examples of extremely good practice within indivdual schols and individual authorities but most of those can be traced to passionate individuals who have driven a change on attitude, practice and achievement.
We have published a user guide, Equal Parents, with a guide to the legal issues and help to both school and parent in how to go about establishing a constructive relationship with each other. It has been widely praised. However we still hear of schools that show little interest or which assume non-resident parents are a risk rather than a resource.
Even the the 2006 Act was a step forward and the recent National Plan will move matters on again we feel that the assumption that schools will principally communicate with only one parent is unhelpful, retrogressive and, we believe, unlawful in terms of the 2010 Equality Act. We believe that even the improvements that the National Plan urges on schools will remain fatally undermined by the failure of the pupil enrolment forms (and annual data updates) to include the details of all parents with PRRs on an equal basis and to rely on one parent to include the contact details of the other.

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

Yes – other (please specify).

If other, please specify.:
Both legislation and guidance may be needed

Why did you select your answer above?:
Families Need fathers Scotland is often contacted by fathers who are prevented from obtaining health information or who are not informed about treatments that is being carried out.
This can be exploited by the parent the child lives with most of the time who fails to inform the other of treatment or medication or appointments beyond those for minor childhood ailments. We have also had cases where the non-resident parent has taken the child for medical attention (as a parent with PRR) but has had this used against him in the next child welfare hearing.

There is no 'base law' for health providers in the same way as the 1980 Education Act defines parent for the purpose of schools though there is explicit GMC guidance to health providers that they should recognise both parents.
We have seen evidence of confusion and error in the approach taken by GP Practice Managers and are devising our user guide to help both them and parents.

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

No

Why did you select your answer above?:
If other changes are made that extend PRRs or whatever replaces them more widely then this will no longer be an issue. Any remaining confusion can be dealt with through Practice Notes.

28 Should the Scottish Government take action to try and stop children being put under pressure by one parent to reject the other parent?

Yes

Why did you select your answer above? If you selected yes, what should be done?:
If the 2006 amendments are removed on grounds that there is no need to elaborate the paramount presumptions of the 1995 Act, then there would be no clear reason for adding a requirement to take account of parental alienation.
If the 2006 amendments to section 11 remain then there should also be a mention of parental alienation in this part of the Act.
It would be worthwhile to include some consideration of parental alienation in accompanying guidance, and to make consideration of both domestic violence and parental alienation a required part of training of child welfare reporters, safeguarders and curators ad litem.
Unfortunately training of judges remains a voluntary process but the Judicial Instutite should be encouraged to continue offering training on this topic and it the

Lord President and Sheriffs Principal should encourage judges and sheriffs who hear family cases to undertake such training .
If Parenting Co-ordinators are established in Scotland they should be required to understand parental alienation and how it can be countered.
There is increasing international understanding of parental alienation. The term is sometimes used in connection with any rejection of a parent or contact refusal, but it is more accurate to consider it as relating to a severe and unjustified rejection of a parent by a child with whom that child had a previous loving relationship.
Parental alienation has already been recognised by Scottish Government as a factor in connection with training of child welfare reporters though the training has not yet begun. There is a need for more information and training for other professionals in the child welfare field and for some consideration of the risks caused by parental alienation to the psychological health of the child in the long term as well as in the conflicted circumstances surrounding separation.
It is simply incorrect to suggest that Parental Alienation has been dismissed or disproved.
The concept of wellbeing is already in statute and underpins GIRFEC but the effects of parental alienation are rarely considered within the SHANARRI indicators. It is important that health and social work professionals who are working with children have an understanding of these risks and know what intervention is available.
A diagnostic model for the pathology Attachment-Based Parental Alienation is founded on existing internationally recognised definitions within the Diagnostic Symptom Manual. It is described as “pathogenic parenting by a narcissistic/borderline personality parent forming a cross-generational coalition with the child against the other parent following divorce can result in an emotional cut off in the child's relationship with the targeted parent”. (definition from the work of Dr Craig Childress).
In 2019, the World Health Organisation (WHO) is for the first time indexing Parental Alienation as a disease. This means that if you look up "parental alienation" within the new international classification of Diseases (ICD-11), you will be taken to "QE52.0 Caregiver-child relationship problem" with the description "Substantial and sustained dissatisfaction within a caregiver-child relationship associated with a significant disturbance in functioning." ICD-11 will be presented for adoption by the Member States at the World Health Assembly in May 2019, to come into effect as early as January 1, 2022.
Parental alienation has been acknowledged as a factor in family cases in England and Wales by both the President of the Family Division and by the Chief Executive of CAFCASS.
The CAFCASS High Conflict Practice Pathway is a practice framework being developed to help their practitioners systematically assess cases which feature adult behaviours associated with high conflict. This includes but is not limited to parental alienation, which is best seen as a broad spectrum of behaviours with varying impact. A finalised version will be made available on the CAFCASS website from Autumn 2018, and will be rolled out between then and March as their staff are trained in its use.
Although CAFCASS works within a different legislative system, it would be desirable for Scottish organisations to pay attention to this work as it develops in order to consider what elements could be adopted for use in Scotland, given that there is no national organisation in Scotland overseeing the equivalent work undertaken by Child Welfare Reporters.

While raising awareness and development of treatment for such parental alienation is important, it is also crucial that any such work also covers other forms of rejection and refusal which may not fall within this diagnosis of the pathological condition.

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

No – leave as a matter for the civil courts.

If other way, please explain.:

Why did you select your answer above?:
No. As noted in the 2017 Farmer Review “The Ministry of Justice’s own research shows that for a prisoner who receives visits from a family member the odds of reoffending are 39% lower than for those who do not. Yet the clearest finding from my work – and the conclusion of Her Majesty’s Inspectorates of Prison and Probation and others – is that there is an unacceptable inconsistency of respect for the role families can play in boosting rehabilitation and assisting in resettlement across the prison estate.”
Removal of PRRs is a step that requires very careful consideration and it should only be undertaken by a family court which undertakes the same balancing exercise that is necessary in permanence cases.

Child Abduction by parents

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

Yes

Why did you select your answer above?:
Because this should make the legislation more effective.

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

Yes

Why did you select your answer above?:
Despite the other issues which would need to be resolved, and also the possibility of increased complexity concerned with Brexit, Families Need Fathers Scotland supports the change in law to reflect the position in England and Wales.

Domestic Abuse

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

Yes

Why did you select your answer above?:
We agree that personal cross examination by an alleged abuser is likely to further harm a victim and should not happen, but also suggest that this problem is wider and affects all family law cases with unrepresented parties.
Examination and cross examination by a party litigant of an ex-partner is always difficult, whether or not domestic abuse is alleged. The recent rule changes, allowing lay representatives to undertake all the aspects of a court case that a lawyer can, provided a degree of relief of this problem for parties who are not legally represented, but there are very few people in a position to act as lay representatives in such cases.
If the current adversarial family court process continues, we would support either automatic legal aid or the submission of questions to be assessed and asked by the judge.
Although the Istanbul Convention calls for such cases to be conducted on a non-adversarial basis, it has not been ratified by the UK. Our contention is that family court cases would benefit from being conducted on an inquisitorial basis in their entirety. Child Welfare Hearings are already tending towards inquisitorial, and the emphasis on judicial case management contained within the recent Family Law Committee proposals also follows that line.
Unlike criminal or commercial cases, the hearings in a family court are not conclusive. Children and parents are likely to continue interacting for many years to come after the court hearing is concluded. Adversarial processes tend to amplify grievances and differences between parties unless their representatives are very careful.

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

No

Why did you select your answer above?:
As noted in the further information, the SCTS has not found a significant number of applications not to appear at child welfare hearings and the triage proposals by the Family Law Committee will also reduce the number of Child Welfare Hearings in some cases.
It is normally very important that a sheriff sees the parents present in court in such cases, in order to convey the seriousness of child welfare to both parties. Sheriffs are very aware of the conduct of parties in court and are likely to be quick to address any issues of intimidation or threatening behaviour at child welfare hearings.

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

No remove these sections.

If yes - but amend, please give details.:

Why did you select your answer above?:
As noted elsewhere in this consultation response, Families Need Fathers Scotland considers that the original version of the Children (Scotland) Act was clear enough in its description of the key principles. Subsequent judgements can be used to present lists, but keeping the legislation clear and straightforward is to be preferred, and we agree with the conclusions that came from the Justice Committee's post-legislative scrutiny.

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

No

Why did you select your answer above?:
We do not support this proposal. We agree that repeated litigation can be harmful to all parties concerned, particularly the children but see very little evidence of what in other areas would be considered vexatious litigation. We also see cases where circumstances in a child's life require evolution of arrangements. Arrangements that worked at preschool may need to change after school or on transition to secondary school. Ideally the parents would agree these changes but where they can't the requirement to seek leave will represent a new process, cost and likely disruption of relationships.
Our proposal for a trial of Parenting Co-ordinators described in our answer to question 42 below could prevent repeated litigation, particularly that which currently occurs in connection with ongoing arrangements such as pick-up times and holidays.
Parties may need to return to court when major changes need to be decided, but the No Order principle is already used to prevent needless litigation and the Scottish legal Aid Board often refuse to approve funding when it is considered that further litigation is not necessary or chand=ces of success are low.

36 Should action be taken to ensure the civil courts have information on domestic abuse when considering a case under section 11 of the 1995 Act?

No

If other, please give details.:

If another option, please explain.:
In our experience, parties entering defences in section 11 cases do not hold back from including allegations and details of criminal cases that are proceeding or which have already been prosecuted. Child welfare reporters are very aware of these issues. Now that the new computer systems are almost fully operational in sheriff courts it should possible for a sheriff to obtain details of convictions during a hearing.
It is very important for courts to be in a position to distinguish between allegations and evidence. As noted elsewhere in our submission, section 11 court cases have a high incidence of false allegations.

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

Yes

Why did you select your answer above?:
Domestic Abuse Risk Assessments as described could be a useful way of providing the court with useful information. However, we would support a specific pilot exercise so that the process could be thoroughly evaluated before being 'promoted' in Scotland.

If yes what should be done?:
Conduct a proper trial of these assessments.

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

No

Why did you select your answer above?:
Because of the reasons mentioned above. We would give priority to setting up specialist family courts operating on a inquisitorial basis, and would instead support speedier handling of criminal cases alongside the separate family proceedings, so that important issues affecting children are dealt with as quickly as possible. Early fact finding will assist both parents and children and save time and cost later.

Court Procedure

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

Yes

Why did you select your answer above?:
Families Need Fathers is aware of a significant number of contact cases which have taken far too long in both the Sheriff Court and the Court of Session.
One case which now only concerns contact has been in front of the Court of Session since 2009 and although a judgement ordering contact was handed down in 2016 (AH against CH, CSOH 152) the contact has not taken place and a further proof has been ordered.
A case which was heard in the Sheriff Court but resulted in an appeal to the Court of Session (SM v CM [2017] CSIH 1) was similarly sluggish.
Lord Glennie wrote in that judgement:
“This case raises issues of practice and procedure of more general application. It also gives rise once again to real concern about the time taken in the Sheriff Court to determine issues of contact and other matters concerning young children.” [Para.2]
Lord Glennie went on to write,
“The contact action… forms an essential part of the background to this [contempt of court] appeal both in establishing the interim contact orders of which the defender was alleged to be in contempt and in contributing to the procedural problems which have led to this appeal.” [Para.6]
Towards the end of the judgment of 5th January 2017 Lord Glennie wrote,
“We cannot leave this case without commenting specifically upon three matters of concern in these proceedings.” [Para. 64]
“The first relates to the length of time taken up by the proceedings in the Sheriff Court. This is not a matter that arises directly in this appeal. But it is important that we should express our concern as to the time taken for these proceedings to be resolved. For a contact action which commenced in January 2010 only to come to a conclusion in October 2013 is unacceptable. The child was only one year old when the action began. By the time the judgment was delivered in the contact action he was only three months short of his fifth birthday.” [Para. 65]
Lord Glennie recognised the harm done by delay when he wrote,
“The problems arising from delay are obvious. The longer a dispute about contact goes on, the more difficult it is likely to become, and the more the life of the child will be overshadowed by the continued and protracted nature of the proceedings. The passage of time can have irremediable consequences for relations between the child and its parents, particularly the non-cohabiting parent seeking contact or greater contact. Delay in resolving the proceedings may result in a de facto determination of the issue before the court.” [Para 65]
“The time taken to resolve disputes about contact should be measured not in years but in weeks or, at most, months.” [Para 66].
When Lord Glennie's statement was mentioned in a recent Sheriff Court case the response from that sheriff was "We don't believe in that judgement" - a strange statement in relation to an Inner House decision.
The Lord President and the Sheriffs Principal should monitor family cases to try and ensure that such long-running examples are firmly dealt with in future. The changes in case management in the Sheriff Court that are currently being considered by the Family Law Committee of the Scottish Civil Justice Committee may assist in this process, but a far more proactive system of case monitoring and a shift towards alternative dispute resolution should also be considered..
A statement in primary legislation will emphasise this message, although we feel that a more fundamental change is necessary, as noted in our Way Forward report.

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

No

Why did you select your answer above?:
Our preferred option would be to have specialist family sheriffs available throughout Scotland, as suggested in the Civil Justice Review.
Until specialist family sheriffs are appointed in all Sheriff courts, or available in all courts on a roving basis, litigants should be able to chose between having a case heard in the Sheriff Court or the Court of Session.
The Court of Session now has two specialist family judges, which means that family cases are being heard by judges with a particular knowledge of this topic as well as experience of conducting a wide variety of such cases.
Three sheriffdoms now have designated family sheriffs in their largest court (Glasgow, Edinburgh and Dundee). Although there are also sheriffs in the other

Scottish courts with extensive knowledge and experience in this area, they are not hearing nearly as many Section 11 cases and they also do not benefit from the peer support that can be achieved within a court that has a number of specialist family judges.
The problems arising from this lack of support and expertise can be seen in some recent Sheriff Appeal Court judgements, such as the APPEAL IN THE CAUSE K AGAINST K AND W (CURATRIX AD LITEM (SAC Civ 24, 2018).
This appeal is from a decision by the sheriff at Selkirk to grant a minute to vary a divorce decree by reducing to nil the appellant's contact to two of his children. The case is an unusual one due to the final decision of the sheriff to determine the application
notwithstanding that a proof had commenced and had not been completed. The short point which arises is whether he was entitled to do so.
The appeal was successful and the case was sent to a specialist family sheriff in another court to re-run the proof. In the Opinion Sheriff Principal Pyle commented "Thus there was no doubt, in our view, that the sheriff did have the power, and the necessary tools, effectively to case manage these proceedings and that he ought to have considered, at the very least, whether or not to exercise those powers and if so which ones. Had he done so then the problems which later arose might never have arisen. (para 43).

41 Should a check list of factors for courts to consider when dealing with a case be added to section 11 of the 1995 Act?

No

Why did you select your answer above? If you answered yes please give details about what should be in such a check list.:
Our preferred option would be to restore the Children (Scotland) Act to its original clarity by removing subsections 7A to 7E. The three main principles in section 7 (welfare of the child, no order and children's views) would remain.
Inserting a check list into primary legislation puts undue emphasis on particular aspects. Although the changes introduced in the Family Law Act in 2006 relating to domestic abuse were intended to highlight this issue at a time when parental rights and responsibilities for unmarried fathers were introduced, an unfortunate side effect may have been to increase the number of false allegations of domestic abuse raised in court actions. This was noted in research by Professor MacKay, which found "Of the 37 cases where allegations of abuse had been made, 26 (70 per cent) were found in Court or were judged on the best available evidence to be false. Of the remainder, the allegations were unsubstantiated in nine cases (24 per cent), while the remaining two (5 per cent) were upheld." (results, p88)
[False allegations of child abuse in contested family law cases: The implications for psychological practice, Tommy MacKay, Educational and Child Psychology, vol. 31, No 3, p 85, British Psychological Society(2014)]
As noted elsewhere in our submission, Families Need Fathers Scotland fully accepts that domestic abuse committed by fathers or mothers is a significant issue in child contact cases, but we consider that false allegations of domestic abuse are also a problem and can cause damage to children. That is why we are suggesting that checklists within primary legislation sometimes have unintended consequences.
If it is decided that subsections 7A to &E should remain, then we would propose that points about parental alienation or undue influence should also be added.

Alternatives to Court

42 Should the Scottish Government do more to encourage Alternative Dispute Resolution in family cases? Please select as many options as you want.

Yes – introduce Mediation Information and Assessment Meetings in Scotland., Yes – better signposting and guidance., Yes – other.

If other, please give details.:
Provide secure, long term funding for family mediation in Scotland; make family mediation compulsory in cases without domestic violence; introduce a Parenting Co-ordinator pilot scheme

Why did you select your answer(s) above?:
Compulsory mediation has been successful in other jurisdictions. If people are reluctant to be in the same room for mediation, shuttle mediation can be attempted.
In Massachusetts a mandatory mediation pilot achieved a 72% settlement rate between November 2014 and April 2017 from 154 scheduled cases. This mediation was conducted free of charge by supervised students within the University School of Law.
[http://www1.wne.edu/news/2017/10/family-mediation-pilot.cfm]
If it is considered that the actual mediation cannot be compulsory, attendance at mediation information sessions should be made compulsory. Whatever is decided, enough funding should be provided on a long-term but outcome based structure that ensures that ADR/mediation is available quickly to separating parents and is is linked in to other support services.
This has the potential for reducing expenditure on legal aid and court costs. Evidence is available from the Tribunals Service on the time and cost-saving resulting from judicial arbitration, and this should be tested in family contact cases in Scotland to see if similar gains are possible.
The Civil Justice Council in England/Wales has been conducting an extensive review of ADR, and published an interim report in 2017 [https://tinyurl.com/yc6wk27s] This review noted that "Family mediation is more closely regulated than mediation in civil disputes. And the use of family mediation has been more strongly encouraged by the family courts, the legal aid system and the rule makers than civil mediation in the civil justice system. We do not think it is a matter of coincidence that regulation and strong court encouragement go together." (6.1)
It mentions that a new initiative for early resolution and the integration of ADR into formal court systems, the Family Solutions Court, was launched in London on 16 July 2015. (6.6)
In connection with MIAMs, it notes "How successful are MIAMs? It has recently been reported by one family mediator analysing her organisation's casework that only one in 20 court applications has been preceded by a MIAM. This suggests either that very many cases are falling within the exceptions or that court staff are being flexible about compliance. After compulsion the number of MIAMs moving on to full mediation has shown a slight decline from 69% to 66% but the position remains that if the parties do receive an explanation of the alternatives to court the majority will take them." (6.16)
MIAMs were introduced in England and Wales at the same time as severe cuts in legal aid, thus making it far more difficult to promote them effectively.
Rules Rewrite Workstream 5 of the Scottish Civil Justice Council is currently considering alternative dispute resolution, and the conclusions reached by that group will feed into the Rules Rewrite.
FUNDING AND OVERSIGHT OF FAMILY MEDITION
We have added this option because of our concern that family mediation is not available as quickly and affordably in Scotland as it should be. The existing

services do a most valuable job in providing family mediation, but Families Need fathers Scotland considers that there is scope for providing a service which is available very quickly and throughout Scotland. Although some direct funding is provided by the Scottish Government through the Children and Young People Early Intervention Fund, this grant is of limited duration, with no guarantee that it will be available after the end of the funding period. Government money is also available through legal aid funding of some mediation, and some families can afford to pay for family or solicitor mediation, but it is not treated as a core service. As noted in the Legal Aid Review, the Scottish Governent should consider shifting the emphasis from funding family cases to proceed through the courts to providing solid long-term core funding for family mediation, possibly through the Scottish Legal Aid Board as already happens in the Republic of Ireland and other countries.

This shift in emphasis could result in substantial savings of public money if it can divert significant number of families from long-term court action. Family mediation facilities could be located in or near family courts, so that even if many cases have to have initial hearings and fact-finding to investigate domestic violence allegations, they can then be continued in mediation.

PARENTING CO-ORDINATORS

We also suggest that Scotland undertakes trials of the use of Parenting Co-ordinators to support famili es once an initial determination has been made in court or through mediation. These should be professionals coming from family law, mediation, family therapy or social work backgrounds, trained and experienced in all these areas so they can provide a more comprehensive and longer term service than Chikld Welfare Reporters, Curators or Safeguarders. This type of work is now used extensively in the USA and other countries in order to assist, support and guide separating parents to work effectively after separation. Rather than the family courts having to make all minor decisions such as on pick-up details and holiday dates, the parenting co-ordinators are tasked by the court to do this work. Parenting coordination is a hybrid ADR process used with high■conflict parents, and the PC wears many hats. The Association for Family and Conciliation Courts (AFCC) Task Force on Parenting Coordination (2006) defines parenting coordination as

a child focused 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 parties and/or the court, making decisions within the scope of the court order or appointment contract (p. 165).

Alongside the changes proposed in this consultation, Families Need fathers Scotland suggests that a pilot family co-ordinator scheme is instituted in one of the areas covered by a famly court. Using experience provide through the AFCC, existing professionals can be trained in the additional skills they require and then work with court referred families. Although the American experience is very positive, we would suggest a fully evaluated pilot scheme is the best way to fully explore whether this approach will benefit children and parents and provide significant cost savings.

Families Need Fathers Scotland is publishing a separate report "The Way Forward" with more details of this proposal.

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

Yes

Why did you select your answer above?:
This gap in legislation should be dealt with.

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

Yes

Why did you select your answer above?:
Further official guidance would be welcomed, particularly as it should have sufficient authority to convince people on some of the fundamental principles such as the disadvantages of family court action and the benefits of alternative dispute resolution.

However this type of official information will be limited in its scope. It would be equally important to provide links to authoritative independent sources of information, including information published by this organisation and other family support bodies. There are already some standards such as the Help and Support for Separated Families (HSSF) accreditation administered by the Department of Work and Pensions, and any referrals would also contain suitable disclaimers.

The Scottish Legal Aid Board and other official bodies might also consider extending the existing Scottish standards for information and advice organisations to include family law and parenting issues, as they only cover issues such as debt and housing at present.

The Scottish Courts and Tribunal Service should also have a far greater role in providing accessible information for family court users through courts and its web site. The Rules Rewrite process currently being undertaken by the Scottish Civil Justice Council should also help by producing clearer and simpler court rules.

Birth Registrations

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

No

Why did you select your answer above?:
This change is unlikely to avoid disputes between parents, and if one parent is encouraging the young person it is likely to generate further conflict. There would need to be some form of due process than a checkbox process.

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

Yes

Why did you select your answer above?:
Provided the child is old enough, this could be a useful step, but it also risks putting the child in the centre of a parental dispute. Any guidance should also encourage parents to be very careful in this consultation.

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

Yes

Why did you select your answer above?:
The current use of the Register of Corrections may be against the Equalities Act and it also risks contravening Article 8 of the EHRC. Children should have both parents noted clearly on their birth certificate whenever possible .

Children's Hearings

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

Yes

Why did you select your answer above?:
Because in some cases it may be necessary.

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

Yes

Why did you select your answer above?:
In line with other changes within the court system, the Children's Hearing System should be able to incorporate suitable technological items/processes as they become available.

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

Yes

Why did you select your answer above?:
For reasons of transparency and efficient administration of hearings.

51 Should personal cross examination of vulnerable witnesses, including children, be banned in certain 2011 Act proceedings.

No

Why did you select your answer above?:
Personal cross examination should not be benned unless automatic provision of legal aid or other such mesure is also introduced to protect the rights of the person banned from cross examination.
Adopting an inquisatorial approach in such cases would put the responsibility for examination on the judge.

Domicile of persons under 16

52 Should section 22 of the 2006 Act which prescribes where a child is deemed to be domiciled be amended?

No

Why did you select your answer above?:
For clarification.

Conclusion

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

The partial Business And Regulatory Impact Assessment, The partial Child Rights and Wellbeing Impact Assessment

If yes, please provide your comments below. :
The partial BRIA includes the following as major cost items:
■ Children's support workers – approx. £3.2m per year based on two per local authority;
■ Regulation of child welfare reporters and curators ad litem – approx. £1m per year;

We suggest that a third alternative - Parenting Co-ordinators should be considered, initially on a pilot basis. This option could replace some or all or the work undertaken by children's support workers and child welfare reporters. If the pilot proved successful, national implementation involving a mixture of reskilling of

existing staff and training of new staff would have star-up and ongoing costs, but it could also result in ongoing cost savings due to the reduction in court actions. Given the substantial costs currently incurred both by SLAB and the SCTS in family court hearings, there is potential for a change to be cost neutral or to produce savings.
The other issue we raise in our submission - the introduction of family sheriffs who will conduct all hearings on an inquisitorial basis, alongside existing case management proposals, also has potential for significant cost savings. Proof hearings in family cases normally take up at least 2-15 days of court time, sometimes more. Inquisitorial hearings conducted by suitably experienced judges and sheriffs are likely to bring about substantial reductions in the length of time in court.
. Australia and various US jurisdictions have undertaken trials of such processes, offering litigants a choice between the traditional adversarial procedure and an alternative.
Following previous experiments in conduct of family courts cases, Parenting Management hearings have just been introduced offering an alternative to traditional court hearings as a means of resolving family law disputes between self-represented litigants. The scheme is proposed to be a 'fast, informal, non-adversarial dispute resolution mechanism'. The scheme will involve the appointment of a panel of family lawyers, psychologists, social workers and child development experts to assist parents in resolving disputes relating to the care of their children.
Informal Domestic Relations Trials (IDRT) are held in Oregon as an alternative to the traditional family court hearing. Only the judge asks questions of each party, and the use of other witnesses is limited. The traditional rules of evidence do not apply in an IDRT and lawyers are only involved to state what the issues are, and make short arguments about the law at the end of a hearing. Hearings are short and decisions are normally made on the same day as the hearing.
In an assessment it was found that the IDRT process reduced conflict at trial because of the non-adversarial nature of proceedings, while allowing both parties tell their side of the story. [https://onlinelibrary.wiley.com/doi/abs/10.1111/fcre.12263] The IDRT process is far quicker than traditional trials, and although it is particularly suitable for self-represented parties, there is still an important role for lawyers to advise their clients and help them to focus on the key issues, albeit different from their traditional part in the court process.
Iowa is currently considering the adoption of IDRT procedures, and other state jurisdictions are also considering the use of IDRT.

The Partial Child Rights and Wellbeing assessment is a useful roundup of information and statistics, although it also shows that there is a distinct lack of data concerning family court cases. We have given references to several other international studies which provide a contrasting result to those listed, particularly in relation to the benefits of shared parenting. We recognise that this is a disputed area, but would consider that whole population studies from Sweden where a lot of data is routinely collected on various aspects of the wellbeing of children and young people in a country where there are far greater amounts of shared parenting are likely to carry more authority than small scale sample studies from other countries.

54 Do you have any further comments?

Yes

If you have answered yes please provide your comments below. :
Having only one question on alternative dispute resolution is unfortunate. We have included our ideas on this are within the consultation responses and will also publish a separate report on The Way Forward. Although the court is sometimes the only way to make key decision in section 11 cases, we suggest that the provision of alternative services such as mediation and parenting co-ordination should have priority.

About you

What is your name?

Name:
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What is your email address?

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Are you responding as an individual or an organisation?

Organisation

What is your organisation?

Organisation:
Families Need Fathers Scotland: Both Parents Matter

If you are responding as an organisation and want to tell us more about your organisation's purpose and its aims and objectives, you can do so here.:
Families Need Fathers Scotland: Both Parents Matter (FNF Scotland) supports fathers, mothers, grandparents and other family members to secure and maintain meaningful relationships with their children following parental separation or divorce. There are in the region of 25,000 separations and divorces involving children in Scotland every year. While only a minority end up as court 'custody battles' many more separations are difficult and, in our opinion, unnecessarily adversarial at the expense of the wellbeing not only of the parents but also of the children affected.

Fathers often tell us that they feel that the system is against them. While politicians enthuse about the diversity of families in modern Scotland, old presumptions crash back into place after separation, assuming that the mother (with automatic parental rights) is the primary carer and viewing fathers (with parental rights effectively contingent on the relationship with the mother) as a risk rather than a resource whatever the reality of their parenting before separation. This causes distress, pain, bewilderment and frustration for all those fathers who had built their life around their children and now feel that they must prove themselves as worthy of contact with them. Although it is mainly fathers who come to us for support we equally support mothers who approach us. Our conviction is, as stated in

our branding, that Both Parents Matter. All of our group meetings have women attending and the majority of the pro bono solicitors who assist us are women.

We offer Scotland-wide support through our helpline, email and in-person advice services, local support groups in Aberdeen, Dundee, Edinburgh, Glasgow, Paisley and Stirling and over Skype, voluntary lay support offering comfort and guidance in court, and new publications and research on common issues facing separated families.

Where are you resident?

Scotland

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

Publish response with name

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Yes

Evaluation

Please help us improve our consultations by answering the questions below. (Responses to the evaluation will not be published.)

Matrix 1 - How satisfied were you with this consultation?:
Slightly satisfied

Please enter comments here.:
Our concern is that this consultation has largely focussed on the laws and court process, whereas we consider that alternative dispute resolution methods are far more suited to child contact and other related family disputes. Our Way Forward report will present an outline of how this change of focus could be accomplished,.

Matrix 1 - How would you rate your satisfaction with using this platform (Citizen Space) to respond to this consultation?:
Very satisfied

Please enter comments here.:
It would be useful to have better ways to share the editing of responses.
Spellchecking should not be American.
A method for prnting out interim versions of the full response would be useful