

Review of Part 1 of the Children (Scotland) Act 1995 and creation of a Family Justice Modernisation Strategy

**Analysis of Consultation Responses
Final Report**

May 2019

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1 Introduction

1.1 The Consultation Exercise

1.1.1 The Scottish Government is committed to improving family law and how the child's voice is heard within cases, and to ensure that the child's best interests are at the centre of the system. To assist the Scottish Government to target any necessary changes, a public consultation ran between May and September 2018 seeking views on potential changes to Part 1 of the Children (Scotland) Act 1995 (the 1995 Act).

1.1.2 The 1995 Act focuses on the needs of children and their families. This defines parental responsibilities and rights in relation to children, as well as setting out the duties and powers available to public authorities. Part 1 of the 1995 Act specifically covers parental responsibilities and rights. The consultation also sought views to assist with the development of a Family Justice Modernisation Strategy and other matters related to family law. Specifically, views were sought in relation to wide ranging topics, including:

- Obtaining the views of a child;
- Commission and diligence;
- Contact;
- Cross border cases within the UK: jurisdictional issues;
- Parentage;
- Parental Responsibilities and Rights;
- Child abduction by parents;
- Domestic abuse;
- Court procedure;
- Alternatives to court;
- Birth registration;
- Children's Hearings;
- Domicile of persons under the age of 16; and
- Various Impact Assessments.

1.1.3 Two versions of the consultation document were available - a main document containing 54 questions, and a child friendly version (henceforth referred to as the young persons' survey, with survey questions identified by the prefix YP)¹ containing 16 questions. Both documents contained a mix of closed and open questions.

1.1.4 The Scottish Government designed the questions for the consultation documents, and sought views from a range of stakeholders on areas that should be covered. A draft of the consultation was shared with the Scottish Courts and Tribunals Service and the Scottish Legal Aid Board in advance.

¹ The young persons' survey was aimed at young people up to the age of 26 as this is the maximum age for Members of the Scottish Youth Parliament.

- 1.1.5 Similarly, questions drafted for the young persons' survey were piloted with young people via several partners/forums, including Young Scot, the Scottish Youth Parliament and Scottish Women's Aid before being finalised.
- 1.1.6 The consultation launched on 15 May 2018 and closed on 28 September 2018.
- 1.1.7 In addition to the written consultation, the Scottish Government held a series of 28 separate events across the country to seek views and feedback on the main consultation themes. Results from these events are not included within this report.

1.2 Methodology

- 1.2.1 A total of 549 substantive responses were received - 254 responses to the main consultation and 295 responses to the young persons' survey.
- 1.2.2 A total of 171 individuals responded to the main consultation document, along with 83 organisations. For analysis purposes, these organisations were further categorised based on the organisation type, with the numbers of respondents in each category detailed in the table below.

	Number	Percentage
Children's Organisations	12	14%
Domestic Abuse Support Services	5	6%
Family Support Organisations	15	18%
The Legal Profession	11	13%
LGBT Organisations	3	4%
Local Authorities	19	23%
Public Bodies	8	10%
Other Organisations	10	12%
Total	83	100%

- 1.2.3 Respondents to the main consultation were also asked to identify their geographic residence, with most coming from Scotland (n=238, 94%). A further 10 (4%) respondents came from the 'Rest of the UK', and only 2 (1%) respondents came from the 'Rest of the World', while 4 (1%) respondents did not provide an answer.
- 1.2.4 The young persons' survey asked respondents to identify which age category they belonged to. Nearly half (46%) were aged 16 or under, 12% were aged 17-18, and 17% were aged 19-25. The table below provides a detailed breakdown of the age of respondents who answered the young

persons' survey. It should be noted that some of the respondents who preferred not to say their age may have been over the age of 25.

	Number	Percentage
Under 8 years old	7	2%
8 - 12 years old	45	15%
13 - 16 years old	85	29%
17 - 18 years old	35	12%
19 - 25 years old	50	17%
Prefer not to say	68	23%
No Response	5	2%
Total	295	100%

- 1.2.5 Across both consultation modes, all questions were answered by at least one respondent. Responses were read and logged into a database, and all were screened to ensure that they were appropriate/valid. None were removed for analysis purposes. Although some responses to individual questions did not directly address what was being asked, all feedback was analysed and is presented under the appropriate sections below.
- 1.2.6 Closed question responses were quantified and the number of respondents who agreed/disagreed with each proposal is reported below. Comments given at each open question were examined and, where questions elicited a positive or negative response, they were categorised as such. For most of the questions, respondents were also asked to state the reasons for their views, or to explain their answers. The main reasons presented by respondents both for and against the proposals set out across the consultation were reviewed, alongside specific examples or explanations, alternative suggestions, caveats to support, and other related comments.
- 1.2.7 Verbatim quotes were extracted in some cases to highlight the main themes that emerged. Respondents to the main consultation document completed a Respondent Information Form (RIF) which allowed them to specify their publishing preferences. Only extracts where the respondent indicated that they were content for their response to be published were quoted. Respondents to the young persons' survey were not asked about publishing preferences, although completion was anonymous. As such, suitably anonymised quotes have also been presented from this respondent group.
- 1.2.8 All consultation responses were analysed, across both the main consultation document and the young persons' survey, to identify the main themes and issues arising. Given the large volume of responses, however, this report focuses primarily on the dominant issues raised rather than providing a summary of all comments and concerns. Full consultation responses are

published separately by the Scottish Government meaning that no data is lost.

1.3 Report Presentation and Research Caveats

- 1.3.1 Findings are presented as they relate to each question contained under the core sections of the consultation document.
- 1.3.2 The tables below show the difference in views expressed by the respondent group as a whole, however, where responses have been heavily influenced by one respondent type (i.e. by individuals or organisations) this has been highlighted in the descriptive text. Given the differing sizes of some of the organisation groupings and the relatively small number of organisations present within some categories, it was decided that disaggregated analysis by organisation typology would be unreliable. However, in any cases where organisation type correlated clearly with the views expressed, this is picked up narratively in the report. Similarly, any differences in opinions between individuals and organisations, or between consultation mediums is highlighted in the discursive narrative.
- 1.3.3 As a guide, where reference is made in the report to 'a few' respondents, this relates to five or less respondents. The term 'several' refers to more than five, and typically less than ten.
- 1.3.4 It should also be noted that, while some adults may have completed the young persons' survey, it was not possible to reliably identify such participants and remove them from the analysis. There is also a risk that some respondents may have contributed via both consultation formats (i.e. the main consultation and the young persons' survey). Again, however, due to the anonymous nature of the child friendly instrument, it was not possible to identify such individuals and remove them from the analysis, so some double counting may exist.
- 1.3.5 Finally, the views presented here should not be taken as representative of the wide range of stakeholders invited to respond to this consultation, nor should they be generalised too broadly. Rather, they reflect the views of those individuals and organisations who responded.

2 Discussion of Key Results

- 2.1.1 Both consultation exercises were successful in engaging a wide range of stakeholders in discussion of all the topics included. Many responses came from individuals, including children and young people, and adults with direct experience of family disputes as well as professionals speaking in their own right. Organisations that responded included members from the legal profession and courts responsible for managing family disputes, as well as public sector organisations who act as corporate parents and provide social work services to families in dispute. Third sector organisations responsible for supporting individuals and families impacted by family disputes also took part.
- 2.1.2 Detailed comments were provided throughout the consultation, however, it appears that later questions may have suffered from an element of respondent fatigue, with fewer responses provided overall (indeed, in five out of the final six questions dealing with topical issues, 40% or more failed to provide a response). Qualitative comments were often much reduced in length compared to those provided at earlier questions. The length of the consultation most likely contributed to this.

2.2 Main Findings

- 2.2.1 A number of questions from the main consultation document attracted overall support. Each question in the table below elicited supportive ratings from at least half of all respondents.

	Percentage of Respondents Who Said 'Yes'
Q6. Should Child Contact Centres be regulated?	66%
Q9. 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?	67%
Q22. 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?	55%
Q23. Should there be a presumption in law that a child benefits from both parents being involved in their life?	50%
Q28. Should the Scottish Government take action to try and stop children being put under pressure by one parent to reject the other parent?	56%
Q33. 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?	51%
Q36. 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?	50%

Q38. Should the Scottish Government explore ways to improve interaction between criminal and civil courts where there has been an allegation of domestic abuse?	50%
Q39. 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?	54%
Q44. Should the Scottish Government produce guidance for litigants and children in relation to contact and residence?	60%
Q46. 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?	59%
Q47. 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?	51%
Q49. Should changes be made which will allow further modernisation of the Children's Hearings System through enhanced use of available technology?	57%
Q50. Should safeguarder reports and other independent reports be provided to local authorities in advance of Children's Hearings in line with other participants?	50%

2.2.2 Only two questions resulted in at least half of the respondents providing a negative response:

- Q17. Should the term "parental rights" be removed from the 1995 Act? - 50% said no; and
- Q24. Should legislation be made laying down that courts should not presume that a child benefits from both parents being involved in their life? - 52% said no.

2.2.3 The young persons' survey elicited supportive ratings from over half of the respondents at three questions, as follows:

- YP4. Should a child have contact with both parents? - 54% said only when it was good for the child;
- YP5. Should a child have contact with their grandparents? - 51% said only when it was good for the child; and
- YP11. Should we give information to children on what it is like to go to court about who they live with or have contact with? - 54% said yes.

2.2.4 Young people were also supportive of being allowed to keep in contact with their brothers and sisters, however, responses were more split between always being allowed (31%) and only when it was good for the child (44%).

2.2.5 One key recurring message was a need for the child's best interests, their welfare and their voice to be of paramount importance in any changes to the legislation. There were concerns that some of the questions focused too much on the

concerns or interests of the parents and risked losing focus on the child. While it was felt important to allow children to keep in contact with a range family members (including both parents, siblings and grandparents), and issues around domestic abuse and the difficulties faced by non-resident parents being excluded from their child's life were often discussed, it was stressed by many that all legislation and processes should remain focused on the child and their welfare/best interests.

- 2.2.6 It was often considered difficult to legislate for the wide range of possible circumstances of a child's life. Similarly, if a family case had reached court there was clearly some level of dispute involved, again making it difficult for broad assumptions to be made. Rather, respondents expressed that it would be more appropriate for each case to be assessed and investigated on its own merits.
- 2.2.7 Responses suggest there are perceptions of inherent bias prevalent within some cases, however, there was no consistency as to whether this bias was perceived to be towards either the resident parent or the party seeking contact. Similarly, respondents felt that taking children's views into account may not be happening consistently or as often as it should. In several instances throughout the consultation it was felt that greater training and/or guidance may be required to ensure current legislation is being implemented effectively and consistently across the country. Additional/amended legislation or the introduction of assumptions as a starting point for cases may not be the solution.
- 2.2.8 Greater training for all those involved in the family court system was also considered to be needed, and was discussed at several points throughout the consultation. In particular, it was felt that in-depth training on eliciting and interpreting the views of children and young people was required in order to ensure this happens more consistently and more often. It was also suggested that training and a more nuanced understanding of domestic abuse, coercion, and alienation was needed for professionals.
- 2.2.9 Child support workers also appear to be a largely welcomed role for some. It was felt they would be more impartial than a court appointed child welfare reporter, could support a child throughout the process, explain the outcome of the case to the child, and would have greater training and experience of working with children to support them to provide their views. However, others felt that the role of the child welfare reporter could be expanded more easily and cost effectively, although it was again stressed that more extensive training would be required.
- 2.2.10 Several areas were considered (by some at least) to be not relevant to the 1995 Act and it was felt that they required much wider consultation to ensure that the views of all key stakeholders were considered. This included any changes to legislation or processes that would impact on looked after children, or on education or health providers in relation to information sharing.

3 Obtaining the Views of a Child

3.1.1 Both the main consultation document and the young persons’ survey sought views in relation to how the court obtains the views of a child (and from what age this should be done). It also sought views on how the court should provide feedback to a child in cases made under section 11 of the 1995 Act.

3.2 Age Child Capable of Giving their Views

3.2.1 The young persons’ survey asked respondents to consider at what age a child should be able to give their views to a judge, while the main consultation document sought views on whether the presumption that a child aged 12 or over is of sufficient age and maturity to form a view should be removed from sections 11(10) and 6(1)(b) of the 1995 Act and section 27 of the 2011 Act.

YP6. At what age should a child be able to give their views to a judge?

	Number	Percentage
At any age - all children should be able to give their views	73	25%
Only when a child can understand what is happening	111	38%
12 or over	20	7%
Don't know	7	2%
No response	84	28%
Total	295	100%

3.2.2 Young people were generally split between those who felt that a child should only be able to give their views when they can understand what is happening (38%) and those who felt that a child of any age should give their views (25%). Only 7% felt that only those aged 12 or over should be able to give their views, while 2% did not know and 28% gave no response.

3.2.3 Those who indicated that a child should be able to give their views only when they understand what is happening suggested that if they did *not* understand, then they may not grasp the implications of their decisions. They may also not understand the questions being asked, and may be more easily influenced/susceptible to coercion:

“Young children lack the capacity to understand the full and long-term implications of a decision. A child is also often easily influenced.” (Young Person, Age 19-25)

3.2.4 Several respondents also suggested that assigning an arbitrary age would not be suitable for all children. Some children younger than 12 would be capable of

understanding what was happening while others may not. Rather, it should be determined by each situation and the specific child involved:

*“Age limits are arbitrary, and level of comprehension is not age-dependent.”
(Young Person, Age 19-25)*

- 3.2.5 Those who suggested that a child of any age should be able to give their views typically felt that all children have views and opinions and that it was important for them to be able to express these. It was suggested that, where a child is very young, the situation may need to be explained in a way they will understand and they may need to be supported in expressing their views (including to the court). It was, nonetheless, still important to provide them with the opportunity to be heard:

“All children have right to say what they want and can say if the situation is explained properly.” (Young Person, Age Undisclosed)

*“At any age, but really young children should have help to say their view.”
(Young Person, Age 8-12)*

- 3.2.6 Several also suggested that children often pick up on and understand issues before adults think they can:

“It should always be taken into account what a child has to say about their life. Adults often underestimate how much children pick up, they will know what's going on.” (Young Person, Age 13-16)

- 3.2.7 While the young persons’ survey asked respondents to simply consider the age at which a child should be able to share their views with a judge, respondents to the main consultation were asked, more specifically, to consider whether the presumption that a child aged 12 or over is of sufficient age and maturity to form a view should be removed from sections 11(10) and 6(1)(b) of the 1995 Act and section 27 of the 2011 Act.

Q1. 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?

	Number	Percentage
Yes - remove the presumption and replace with a new presumption based on a different age	37	15%
Yes - remove the presumption and do not replace it with a different presumption	105	41%
No - leave the presumption as it is	50	20%
No response	62	24%
Total	254	100%

- 3.2.8 Two in five (41%) respondents supported the removal of the current presumption and felt it should not be replaced with a different presumption. A further 20% thought the presumption should remain unchanged, and 15% supported replacing it with a new presumption based on a different age.

Views of Younger Children are Important

- 3.2.9 Many individuals and organisations across all response categories suggested that children younger than 12 can often have the maturity and understanding required to form a view regarding their situation, and that their views should be taken into account:

*“Children are capable of expressing views at much younger age than 12.”
(Individual)*

- 3.2.10 Several individuals felt that it was important that the views of younger children were heard, both where non-resident parents considered that contact was being limited unfairly, and where young children wanted reduced/no contact with non-resident parents. It was suggested (by both individuals and organisations) that, in situations where the child’s voice was not heard this could be damaging to their emotional wellbeing, mental health, relationships, or their safety.

- 3.2.11 While many appeared to support a lower age limit being implemented, few offered a specific age which they considered to be appropriate to be included. One suggested nursery age, another age 6, another age 9, two suggested age 8, and two suggested age 10.

Decided on a Case-by-Case Basis

- 3.2.12 Some felt that the decision around whether a child has the maturity to form a view should be flexible, and made on an individual basis in each case as maturity and ability in this respect would be different for different children. This view was held by both individuals and organisations alike:

*“It should be based on the individual child. Some younger children can express their views and understand a court process, while some 12-year olds may not.”
(Individual)*

“It is crucial that children who are capable of forming their own views are able to express them in proceedings relating to them, and that their views are given due weight in accordance with their age and maturity. This should be assessed on a case-by-case basis in an appropriate manner.” (Domestic Abuse Support Service)

All Children Should Have the Opportunity to Express Their Views

- 3.2.13 All organisations and many individuals who suggested the presumption should be replaced with a new one, felt that children of all ages should have a voice in such proceedings (regardless of maturity levels). Many organisations (and a few

individuals) cited a need for greater consistency with Article 12 and General Comments of the UNCRC:

“[Article 12, General Comment 12 of the UNCRC] States parties cannot begin with the assumption that a child is incapable of expressing her or his own views... States parties should presume that a child has the capacity to form her or his own views and recognise that she or he has the right to express them; it is not up to the child to first prove her or his capacity.” (Children's Organisation)

3.2.14 For the same reason, it was also suggested by some that there should be no ‘tests’ of a child’s capacity, or that these should not be overly restrictive.

3.2.15 Some suggested that including any age limit within the presumption could lead to assumptions that any child below that age is not capable of giving their view. This may become a practical barrier:

“It is important to ensure that children of all ages may have their views taken into account. Putting an age limit may mean that children under that age are not consulted.” (Individual)

“...we agree that the existing presumption has the practical effect of stopping children under 12 with capacity from expressing their views when they are capable of doing so. The existence of the presumption creates an unnecessary barrier for younger children who wish to express a view. It also may discourage courts from accepting views from children under 12 or from seeking them out.” (Legal Profession)

3.2.16 Some felt that a more child friendly system was required to facilitate and support children to give their views, including very young children who do not yet talk. It was suggested that more creative methods may be required along with training for Sheriffs, solicitors and others involved, as well as input from support/advocacy services to elicit and interpret a child’s views. Those tasked with representing children’s views would be expected to be able to work with very young children, and be experienced in issues related to external influences/manipulation, abuse, child distress, mental and physical disabilities, etc. It was also felt that it was not sufficient to simply allow a child to provide their views, but that due weight and consideration had to be given to such views. However, the welfare/best interests of the child must always be paramount, and where it is considered this does not match the child’s views, a clear and understandable explanation should be provided.

3.2.17 Some also highlighted the importance of not conflating the rights of all children to express a view with their legal capacity, for instance, to instruct a solicitor. It was considered important that these remain separate concepts, potentially with separate age limits. However, it was felt that the similarity in the language used could risk changes to one impacting on perceptions of the other.

Creating a New Presumption

- 3.2.18 It was suggested (by both organisations and individuals) that simply removing the age presumption may be inappropriate as it risked no children's views being heard. Rather respondents felt that either a new presumption was needed to clarify that all children possess the ability to form and express rational and informed views about their family situation, or that a firmer requirement was included to seek all children's views:

"Failing to replace the presumption if removed will cause confusion about the intention behind the removal. It might give the impression that children over the age of 12 can no longer be presumed to have the maturity to express a view, and must be treated the same as children below the age of 12. The new presumption should acknowledge that even very young children are capable of forming and expressing a rational and informed view about their family situation." (Individual)

"...the presumption should be that all children will have a view about their situation and circumstances, regardless of their age/maturity/ability to explain what their view is... It is the effective communication of the child's view which is critical - not the age at which the child is deemed able to have a view." (Public Body)

- 3.2.19 Only a few respondents felt that the age limit should be increased, with one suggesting that those aged 12 may not be mature enough, while another suggested the age limit should be increased to 18.

Maintaining the Current Presumption

- 3.2.20 Reasons given for supporting the current presumption included that age 12 was a suitable age and that the removal of such a presumption could result in views not being taken at all. Removal may also result in increased assessments required for those age 12 and over in order to obtain their views.
- 3.2.21 Some respondents also felt that the current presumption was suitable as it did not preclude children younger than this from being able to contribute views. Indeed, several respondents indicated that, in practice, the courts regularly sought the views of children younger than this (although a few respondents felt that it was important/necessary to reinforce good practice in this respect to ensure views of younger children are sought when appropriate):

"...they embody a positive presumption of capacity, empowering children of 12 or older, while not precluding younger children from expressing views." (Individual)

- 3.2.22 A few also highlighted that the current presumption was consistent (and should remain so) with other legislation, particularly around making a will, instructing a solicitor, and consenting to adoption and permanence, etc.

Influencing a Child's Views

- 3.2.23 Many respondents across all respondent types raised concerns over the risk that one party may have negatively influenced the views of the child. It was suggested that a child could be influenced in such a way at any age, and therefore it was important that personnel gathering the views of children were trained to identify and deal with such situations/parental alienation:

“Children's views at all ages can be coloured by the situation they find themselves [in]. In particular, alienated children can hold a negative view of one parent unjustifiably.” (Individual)

- 3.2.24 Some considered this as a reason for not seeking (or giving weight to) a child's views, while others felt the child's views should be sought/considered on a case-by-case basis. For some, they felt that seeking (or giving weight to) the child's views in such circumstances could be counter-productive.
- 3.2.25 In addition, some suggested that gathering views from children could place them in an unfair and stressful position, where they may feel forced to choose between their parents. It was considered important that children are not made to feel they are responsible for the final case outcome.
- 3.2.26 A few other respondents also felt that insufficient information had been provided in the consultation over who and how a child's views would be sought.

Hearing Children's Views

- 3.2.27 Both the main consultation and the young persons' survey asked respondents to consider how best children's views can be heard in court/by a judge.

Q2. How can we best ensure children's views are heard in court cases?

	Number	Percentage
The F9 Form	54	21%
Child Welfare Reporters	74	29%
Speaking directly to the judge or Sheriff	70	27%
Child support workers	64	25%
Another Way	71	28%
No response	106	42%
Total Respondents	254*	

* Note: Multiple Responses were possible at this question.

- 3.2.28 Respondents to the main consultation were permitted to select all options they felt were appropriate. Each option received similar levels of support, ranging from

29% who selected child welfare reporters, to 21% who selected the F9 form. Most respondents selected more than one option, with many selecting all available options.

3.2.29 Suggestions for other ways to ensure that children's views were heard in court included:

- For the child to prepare a letter or email, video, audio recording for the court, or have a phone call with the judge;
- Online platforms, apps (including Mind Of My Own (MOMO)), avatars, art, written stories, emoji sheet, and play rooms for interviews;
- Speak with others who know the child well (e.g. extended family members and friends) and/or a known responsible adult (e.g. a teacher);
- Engage a highly qualified specialist (trained to identify parental alienation) to listen to the child (suggestions included child/educational psychologists, child behaviour experts, family/child therapists, safeguarder);
- Child advocacy;
- Social work reports;
- A system similar to CAFCASS in England;
- A system similar to Children's Hearings;
- Draw on some of the principles of the Barnahus model which supports vulnerable child witnesses to provide evidence in the criminal justice system;
- A new, specific type of panel, made only for these cases with representatives present who are experts in this area;
- Establish a special inquisitorial tribunal (similar to mental health tribunals) to look after the best interests of the child; and
- Videos submitted by the parents.

3.2.30 It was suggested that the situation of the child must be taken into account, with respondents highlighting that children will respond differently depending on their setting and when they last saw the non-resident parent. Many commented that a variety or combination of options was needed to both meet the needs and preferences of different children and to provide a broader understanding of a child's views:

"I have selected all available boxes to indicate that what is needed is a holistic approach that is able to recognise that a 'one-size-fits-all' solution is not appropriate and is therefore able to respond dynamically to the needs and capacities of individual children." (Individual)

"The method for finding out the views of the child would be on a case-by-case basis and children and young people should be asked about their preferred method for sharing their views." (Children's Organisation)

3.2.31 It was also suggested that the child should be afforded the choice, both whether to share their views and how they do so.

- 3.2.32 Any system was required to be child focused and flexible to suit the needs and preferences of different children. It was suggested that whoever is responsible for taking children's views should be independent and impartial, qualified to elicit views from children (including observing non-verbalised views and behaviour), trauma informed, and trained in identifying and understanding where a child's views may have been influenced. Building a rapport and trust with the child was also considered important (and therefore may require more than one meeting), both in order to encourage them to give open and honest views and to ensure they do not find the process intimidating. It was also suggested by several respondents that consideration needed to be given to the weight that will be attributed to children's views and for this not to be tokenistic.
- 3.2.33 In relation to the specific options outlined in the consultation document, some felt that the F9 form was helpful for children that might not want to/feel comfortable speaking with a stranger about their situation. However, many felt the current form was not child-friendly, that it was an inappropriate method to be used with children, and/or unreliable as there was a lack of control for influencing factors. It was felt that some children would prefer to speak directly to the Sheriff while others may be intimidated by this. A few respondents also suggested Sheriffs were not suitably trained in communicating with children, or that they do not have sufficient time to give this the thoroughness it requires. Child support workers were endorsed by some as they were felt to have a more child focused approach, however, others were concerned that they lacked enough understanding of the law. Some suggested that existing support workers already working with the child could assist in this process (and provide cost savings over setting up an entirely new service). A few suggested it would be important not to introduce additional personnel requiring children to repeat their views with different workers. Child welfare reporters were similarly supported as a good way to seek views but some recounted perceived shortcomings or issues experienced (personally), some felt that the report and recommendation process acted as a filter to children's views, while others raised concern over the current lack of training for people in these roles. As the child welfare reporters system was already established, some felt that introducing formal training and quality assurance could provide both time and cost savings compared to introducing a new child support worker service.
- 3.2.34 Many respondents also suggested that child advocacy may be an appropriate option to consider. Some felt that the description on child support workers was very similar to that of advocacy workers, and so this role could usefully be combined. Others indicated the forthcoming advocacy role within the Children's Hearings system, again suggesting an extension of the role into the civil courts.
- 3.2.35 The young persons' survey also asked respondents what they perceived was the best way for a child to tell a judge who they want to live with, speak to and visit. Similar options to those in the main consultation document were provided, although the wording was different.

YP7. What is the best way for a child to tell a judge who the child wants to live with, speak to and visit?

	Number	Percentage
Fill in a child-friendly form	61	21%
A person chosen by the judge to speak to the child and then provide a report to the judge (a child welfare reporter)	75	25%
The child telling the judge face to face what the child thinks	77	26%
Be given options for communication which suit their age and ability to understand	120	41%
Having a person whose job it is to help the child give their views (a child support worker)	92	31%
Another way	24	8%
No response	88	30%
Total Respondents	295*	

* Note: Multiple Responses were possible at this question.

3.2.36 The most popular responses for young people were being given options for communication which suits their age and ability to understand² (selected by 41% of respondents), and having a person whose job it is to help the child give their views (a child support worker) (31% of respondents). As with the main consultation, the least popular option for young people was to fill in a child-friendly form, although this was still selected by 21% of respondents.

3.2.37 Of those who specified ‘another way’, many used this opportunity to explain the reasoning behind their choice(s). Some suggested that a range of options would ensure that each child’s preference and stage of development/level of understanding was catered for. Others suggested that having a person to discuss things with the child was better than a form as, again, this was felt to be more adaptable for different ages and literacy/comprehension levels. It was hoped this would help to identify and limit any external influence/coercion of the child’s views, as well as provide reassurances to the child that there would be no negative repercussions from giving an honest view:

“A child may feel uncomfortable to say exactly what they are thinking, and they may find it difficult to get their point across. It’s also important to remember that young children have limited writing skills. Therefore, there should be options.”
(Young Person, Age 13-16)

² This option was not available in the main consultation document.

“Speaking to an actual person will always be better in those circumstances as they will be able to read the child and see that they are happy with the way the child is thinking through the situation.” (Young Person, Age 13-16)

3.2.38 Other people who were suggested by individual respondents as options to allow a child to tell a judge who they want to live with, speak to and visit included:

- A child psychologist;
- Teacher; and
- A trusted adult/older sibling.

3.3 Explaining Court Decisions to a Child

3.3.1 Again, both the main consultation document and the young persons’ survey sought views on how the court’s decision should best be explained to a child.

Preferred Options from the Main Consultation

Q3. How should the court’s decision best be explained to a child?

	Number	Percentage
Child welfare reporter	34	13%
Child support worker	59	23%
Another option	90	36%
No response	71	28%
Total	254	100%

3.3.2 Nearly one quarter (23%) of respondents to the main consultation indicated that a child support worker should explain the decision to the child, while 13% felt responsibility should lie with a child welfare reporter. Over a third of respondents (36%) felt that another option was more suitable, while 28% did not provide a response.

3.3.3 Other suggestions included the Sheriff/decision maker (n=16), a parent/main caregiver (or to have them there to support the child during the explanation) (n=14), a trusted adult (including family members or teachers) (n=14) or a trained professional (n=12) that may have supported the child through the court process. Some felt that a qualified family therapist or child psychologist/therapist (n=4) should be involved in preparing and/or delivering the explanation. Other options suggested by one respondent each included a mediator, a solicitor appointed to represent the child’s views, and advocacy services. Several (n=14) also suggested that this should not be a prescribed role, but rather a range of options should be available to meet the different needs and preferences of the situation/child.

Preferred Options from the Young Persons' Survey

YP8. After a judge has made the decision how should a child be told about this? This could include someone working for the court or one of the child's parents.

- 3.3.4 Respondents to the young persons' survey were also asked how a child should be told about the court's decision. A total of 162 young people provided a response, many of which were similar to those identified within the main consultation. The most common suggestions from young people included:
- One or both parents (n=54);
 - The judge or someone who works for the court (n=39);
 - A child welfare or child support worker (n=25);
 - Someone the child trusts and/or that has been supporting/working with the child during the case (n=22); and
 - A close family member (n=13).
- 3.3.5 Young people often suggested a combination of people would be preferable, including some mix of the judge, both parents, and a child support worker in order to provide a balance between information provision (in an age appropriate way), and support for the child.
- 3.3.6 Some young people appear to have misunderstood the question and rather than identifying who should provide the information they outlined how the information should be delivered. Most suggested this needed to be done in person, face-to-face. Some suggested it should be done in private while others felt that the child should be taken to do something fun and told then.

Reasons for Option Choice

- 3.3.7 It should be noted that only those respondents to the main consultation were invited to specifically outline the reasons for their choice. As such, the summary below is based on responses to the main consultation only, unless otherwise stated.
- 3.3.8 Where child welfare reporters (typically preferred by the legal profession) and child support workers (typically preferred by children's organisations) were considered the best option, it was generally felt that they would have built a rapport with the child throughout the process and that they would be able to provide support and answer any questions the child may have. It was felt this would also assist in providing consistency/continuity in which professionals the child has contact with. A few, however, felt that neither child welfare reporters nor child support workers were suitably qualified or experienced currently to undertake such a role. It was also noted that such professionals would not be appointed in every case, and that the benefits in introducing them purely to explain the court's decision were unclear given they would be unfamiliar to the child.

- 3.3.9 Others felt that parents or other family members would be more appropriate to discuss the outcome with the child. Some suggested that professional support could be provided in order to answer the child's questions and provide support to the child/guidance to the parents if necessary. However, some suggested it was important that an impartial person informed the child in order to avoid any blame being attributed or misinformation being given.
- 3.3.10 Some suggested that the information should come directly from the judge who made the decision. Both suitably worded (and age appropriate) letters and speaking in person were suggested as options, although some respondents also felt that a letter alone would not be suitable in all circumstances. It was felt that the judge should be accountable for their decisions, and that telling the child directly would provide them with reassurances that their views had been taken into account:
- "The judge/Sheriff should do this because it shows investment in the case as well as displaying to the child that they have taken their views into consideration and acknowledged them as a person and not a case number." (Individual)*
- 3.3.11 Many suggested that a range of options should be provided in order to meet the needs and preferences of different children/situations/outcomes, with all options being equally accessible across Scotland. Some felt that the judge should ultimately decide (on a case-by-case basis) how/who will provide feedback to the child, while others felt that the child should be given a choice in who and how the decision is explained to them:
- "We would also support flexibility in how feedback is given, as the most appropriate way will vary depending on the needs of the child." (Children's Organisation)*
- 3.3.12 Similarly, some young people (n=9) did not identify a specific person to have responsibility for telling a child about a judge's decision, rather they considered it would depend on the age and nature of the child and the specific situation:
- "I would assume that it would depend on the child. Who they are close to and how they are more likely to react." (Young Person, Age 19-25)*
- 3.3.13 Several respondents felt that a formal duty needed to be placed upon the court to ensure that the outcome and any orders are explained to children. It was also suggested that greater training and guidance was needed for any personnel responsible for speaking with children.
- 3.3.14 The lack of any real consensus (both via the main consultation and the young persons' survey) over who should tell a child suggests that there is no single option that will be suitable in all circumstances. The important message, however, is that the information should be provided by someone the child knows/has met previously, and who they feel comfortable with/trust. It should be delivered in a

way the child can understand, and the child should have the opportunity to ask questions and be supported throughout the process.

3.4 Arrangement for Child Welfare Reporters and Curators *Ad Litem*

3.4.1 Respondents to the main consultation only were asked about their views and opinions on the best arrangements for child welfare reporters and curators *ad litem*.

Q4. What are the best arrangements for child welfare reporters and curators *ad litem*?

	Number	Percentage
A new set of arrangements should be put in place that would manage and provide training for child welfare reporters	71	28%
The existing arrangements should be modified to set out minimum standards for child welfare reporters and allow the Lord President and Sheriffs Principal to remove them from the lists if the reporters cease to meet the necessary standards	60	24%
There should be no change to the current arrangements	8	3%
Another option	35	14%
Not answered	80	31%
Total	254	100%

3.4.2 Just over half of respondents felt that there needed to be some type of change to the arrangements. Overall, 28% indicated that a new set of arrangements should be put in place and 24% indicated that the existing arrangements should be modified. Only 3% suggested that there should be no change to the current arrangements, while 14% suggested another option, and 31% did not give a response.

3.4.3 Those who suggested another option gave mixed responses. Some considered that a combined approach between the new and modified arrangements would be appropriate. Several respondents felt that solicitors were not appropriate personnel to provide child welfare reporting services, with some suggesting that additional training was required in child development and child welfare, and others suggesting that child welfare reporters should be replaced with child support workers. Widening the scope for child welfare reporters was also suggested, i.e. to include professionals with a wide range of backgrounds (including social workers, psychologists, and mental health professionals). Child support workers were also suggested as a possible alternative/addition to help the child articulate what they want to say.

- 3.4.4 A few local authorities also highlighted that, in some areas, child welfare reports are prepared by local authority social work staff, and therefore the proposals to either amend or create new arrangements would have implications beyond legal professionals. It was felt that any new agency set up to manage the completion of child welfare reports could result in local authority staff being managed and trained by a separate agency (in relation to the completion of reports). Modified arrangements which allow the Lord President and Sheriffs Principal to manage a list of reporters would require social workers to submit information to them in order to be included on the list. Both options were considered unworkable as it was felt that the local authorities' staff and resources could be controlled and affected by a separate agency. It was suggested, therefore, that local authority reporters should be excluded from any new regulations.

Need for a Standardised System

- 3.4.5 Respondents who felt that a new set of arrangements should be put in place typically suggested that a more standardised/regulated system was required, where child welfare reporters would be regularly evaluated and the list of reporters would be under constant review. Some (typically individuals) recounted bad experiences and detrimental impacts of a child welfare report/er in their case, resulting in them considering the current arrangements not to work/be suitable. Others (including individuals and organisations) suggested that the current system was not child friendly and did not always operate in the best interest of the child, and therefore needed to be reformed to provide a child centred approach.
- 3.4.6 Some suggested that there was a need for transparent and consistent recruitment, selection, appraisal/monitoring and complaints systems, as well as the need for accreditation and accountability of practitioners. Many also identified a need for significant levels of training, all of which should be standardised across the country. Specific areas identified for training included child development, child welfare, child protection, children's and human rights, engaging with children, attachment, resilience theory, family dynamics, coercive control, parental alienation, and domestic and sexual abuse:

"Training, minimum standards, and appraisal as well as a support system for peer review of child welfare reporters must be in place to ensure a standardised system of justice for all children." (Individual)

"We believe that regulation of child welfare reporters and curators ad litem is essential to promote quality and best practice amongst practitioners, and also to ensure consistency of experience for all children who have contact with child welfare reporters or curators ad litem." (Children's Organisation)

- 3.4.7 The current funding structure for the provision of child welfare reports, i.e. where parties pay for this, was also considered by some to result in inequalities of access, (particularly for those who do not qualify for legal aid but are on a low income who therefore struggle to pay for these). There were also perceptions

around a lack of independence (where one party pays for the report). As such, it was felt that centralised funding should be provided.

Modified Arrangements

- 3.4.8 Those who agreed with the proposal to modify the existing arrangements suggested that specifying standards for child welfare reporters would enable the existing system to continue in a more formalised and regulated way, and would deal with perceived problems of inexperienced, inefficient or poorly trained reporters being instructed. It was felt that this would lead to increased/improved training (both initially and for continuing professional development), and would provide consistency in approach and quality both within and between jurisdictions/ Sheriffdoms.

No Change Required

- 3.4.9 Those who suggested that no change was necessary generally felt that the current arrangements worked well. One individual did note the need to be mindful of costs, however, suggesting that reports are currently too costly. Another respondent (from the legal profession) suggested that Sheriffs Principal consult locally and/or issue a practice note on the arrangements for appointment of reporters and the form and standards expected in relation to any such report in order to tackle perceived inconsistencies in the appointment of and quality of reports around the country.

4 Commission and Diligence

- 4.1.1 Commission and diligence is described in the consultation document as the procedure for recovering and preserving documents or other material for use in a court case and also covers the taking of evidence. This issue was explored in the main consultation document only, with no equivalent question asked in the young persons' survey.

4.2 Disclosing Confidential Documents

- 4.2.1 Following previous consultation with stakeholders, the Scottish Government sought views on whether specific legislation should be made in relation to commission and diligence in cases under section 11 of the 1995 Act.

Q5. 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?

	Number	Percentage
Yes	104	41%
No	52	20%
No response	98	39%
Total	254	100%

- 4.2.2 Responses were split, with 41% of respondents in favour of the proposed change, 20% against such a change, and 39% who provided no response.

Reasons for Supporting the Proposed Change

- 4.2.3 Respondents (both individuals and organisations) generally supported the need to maintain (and formalise) the focus on the child's best interests throughout and/or advocated that the child should have a voice and be more involved in the process. Several felt that this change would help uphold children's rights and ensuring that due consideration is given to their best interests:

“Confidential documents should only be disclosed if it is in the best interests of the child as all decisions made in such cases should revolve around this. If a confidential document directly relates to the child then their views should be obtained to ensure trust and confidence of the child in the process.” (Individual)

- 4.2.4 It was felt (by both organisations and individuals) that this would provide confidence for children (and support services), both in the court system and in the level of trust children place in support workers when disclosing sensitive/personal information.

- 4.2.5 Respondents (typically organisations) felt it was important that confidential documents were only disclosed with the permission of the child and that these continue to be dealt with sensitively/confidentially by the courts. Consideration should also be given to the potential consequences/impact on the child of any further dissemination to the parties. Otherwise, it was felt this would undermine the support provided and a child's trust in the service/system and could potentially lead to greater harm for the child:

"The child has to be spoken to first. Although the reporter may believe that they are doing what is in the child's best interest, the child may not agree."
(Individual)

"If a child fears the information shared in a confidential support session may be shared in court or to an abusive parent this could severely impact their experience of support and their recovery. Disclosure of confidential information to an abusive parent may also place the child in serious danger and create significant fear and anxiety." (Domestic Abuse Support Service)

- 4.2.6 Children's organisations also stressed that support must be provided to children following the disclosure of such information.
- 4.2.7 There was also a suggestion from children's organisations and domestic abuse support services that sharing this type of information without a child's consent could potentially violate a child's rights under Articles 2, 3, 6 and 8 of the ECHR and Articles 3, 12, 16, 19 and 39 of the UNCRC.
- 4.2.8 All LGBT organisations supported the proposal but felt that it should be extended to ensure that no sensitive equality information, and in particular sexual orientation or gender identity information is shared without the express agreement of the child.
- 4.2.9 One organisation from the legal profession, while broadly in support of the change, felt that it may be difficult to implement in practice. They noted that it would be difficult for the child to know the content of the confidential document, and/or it may be inappropriate or potentially harmful to the child to disclose the full contents to the child, in which case it becomes challenging for the child to express a view regarding its disclosure to the court.

Reasons for Not Supporting the Proposed Change and/or Caveats to Support

- 4.2.10 Some individuals and organisations felt that the legislation should remain as it is, typically indicating that the current system works well:

"The current system generally works and information which is confidential to the child is dealt with sensitively and appropriately." (Individual)

"The legislation already provides for weighing up the rights of the child in maintaining confidentiality." (Local Authority)

“The court is already required to consider the child's best interests in making a decision and issues of disclosure are more properly dealt with as part of this test.” (Legal Profession)

- 4.2.11 Others (both individuals and organisation) felt that the Sheriff needed to have access to all the relevant information (regardless of the confidentiality of such documents) in order to make a fully informed decision. There were also suggestions (typically from individuals) that parents should have access to relevant documents which they considered may assist them with their case or may be the reason why their case would be unsuccessful. Several individuals felt it was important to also allow parties to question/dispute the content of such documents, where they felt that factual inaccuracies were provided:

“When matters reach litigation the protection of “confidentiality” of documents should be waived. The Court must have a clear understanding of the issues engaged and of the contents of all relevant documents.” (Individual)

“Anything confidential need not be discussed in open court, but the Sheriff or judge should have access to all information so that an informed and balanced decision can be reached.” (Family Support Organisation)

- 4.2.12 Several organisations suggested that some cases could involve a conflict between the interests of the adult(s) involved and that of the child, with some also suggesting that the proposed changes to the legislation could potentially conflict with European law and the ECHR:

“There must be a balancing exercise having regard to the child's expectation of confidentiality, the need to respect the right to family life and therefore the requirement for family members to have the documents they reasonably require to be involved in decision making (under article 8) and the requirement of a fair trial (under article 6)... The Scottish Parliament cannot pass legislation that conflicts with these fundamental rights.” (Legal Profession)

- 4.2.13 It was also suggested that, while the best interests of the child should be taken into account when considering the need to disclose confidential information, that it was not always sensible to take the child's views into consideration. Several individuals and one family support organisation were concerned that the views of the child may not be impartial. Others suggested that a child may not be able to express their view, or that they may have been coerced/controlled or had their perceptions influenced by one of the parties (or a specialist support organisation):

“We agree that disclosure of confidential material should 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.” (Family Support Organisation)

“Children can be manipulated and adversely influenced so that what they say is neither accurate nor credible.” (Individual)

- 4.2.14 Similarly, one individual and one local authority felt that it was unfair/inappropriate to place the responsibility for disclosing information on the child, and suggested

that child may not in a position to understand, assess and deal with confidential information. They were concerned that overriding a child's view to withhold information would lead to diminishing trust, but that upholding a child's view not to disclose information may have longer term implications. It was felt that people may hold the child responsible for the final outcome which they may not have anticipated due to their lack of understanding at the time.

4.2.15 It was also suggested by some organisations (and one individual) that the views of the child may not always be the same as what was in their best interests. Some discussed the importance of identifying where abuse had been perpetrated, while others highlighted the damaging effects of receiving treatment for alleged abuse where none has taken place. It was felt that such issues were important to identify and for courts to be aware of when making orders.

4.2.16 It was also felt by some organisations (and a few individuals) that the term 'best interests of the child' was too subjective and not well enough defined for the legislation to rely on this. Clearly defining this terminology and providing guidance around the process and decision criteria (for parties and decision makers) was considered necessary, should the change be implemented. Likewise, a few organisations suggested that those requesting the information should have to justify their reasons for the request:

"The 'best interest of the child' is an opinion and varies depending on the person or even the situation." (Family Support Organisation)

"One way in which this may be achieved is to ensure that specifications are tightly drawn, with the applicants stating what is sought and why." (Children's Organisation)

4.2.17 Several organisations and individuals also felt that not enough information was provided regarding who would gather the views of the child and how this would be done. One other sector organisation suggested that it would be important to seek specialist advice, guidance and support in certain situations (e.g. where the child may have a learning disability).

4.2.18 Meanwhile, one organisation from the legal profession felt that it was important to consider imposing a general duty on the court to consider the child's welfare, and that legislating on this one specific area of procedure was not sufficient enough.

5 Contact

5.1.1 Both the main consultation and the young persons' survey sought views in relation to the contact a child should have with family members. Young people were asked to identify and discuss who a child should be allowed to keep in contact with, while respondents to the main consultation were asked to consider a wider range of issues, including:

- Whether contact centres should be regulated;
- 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;
- Whether there should be a presumption in law that children benefit from contact with their grandparents;
- Whether the 1995 Act should be clarified to make it clear that siblings, including those aged under 16, can apply for contact without being granted PRRs;
- What would strengthen the existing guidance to help a looked after child to keep in touch with other children they have shared family life with; and
- What can be done to ensure contact orders are enforced.

5.2 Regulating Child Contact Centres

5.2.1 The consultation document highlighted that contact centres can play an essential role in helping children to maintain relationships with the parent they no longer live with or with other family members. It also set out the areas where contact centres could be regulated, detailed the pros and cons of such regulation, and asked respondents to consider whether contact centres should be regulated or not.

Q6. Should Child Contact Centres be regulated?

	Number	Percentage
Yes	168	66%
No	16	6%
No response	70	28%
Total	254	100%

5.2.2 Two thirds (66%) of respondents agreed that contact centres should be regulated, while only 6% said they should not. The remaining 28% did not give a response.

5.2.3 Those who indicated that contact centres should be regulated commonly felt that this was required to provide and maintain minimum/consistent standards

across the country, and to ensure the safety of children. Some respondents (both individuals and organisations) suggested that the quality of contact centres varied across the country, indeed, some individuals recounted negative experiences while others discussed positive and supportive experiences:

“Essential to ensure that such a fundamental plank of child contact is not left to ad hoc provision around the country.” (Individual)

- 5.2.4 In addition, some respondents suggested that all childcare settings (which contact centres were considered to be) should be subject to regulation. Others highlighted that child contact centres often support vulnerable children and so, again, regulation was seen as necessary:

“Contact centres are regularly required to handle challenging situations and work with vulnerable children, and so it would seem appropriate to subject them to some form of regulation.” (Legal Profession)

- 5.2.5 The current qualifications and training of staff was questioned, with respondents (both individuals and organisations) listing a range of training they considered contact centre staff should have. This included training on children’s rights, domestic abuse, parental alienation, trauma, attachment and child protection.

- 5.2.6 Both individuals and organisations also thought that contact centres should be funded by the government, and while some hoped that the introduction of regulation would bring adequate and secure funding, others felt that regulation would only be feasible if funding was put in place. It was suggested that this would be necessary to allow contact centres to provide a consistent level of service and the required staff training, and to meet the requirements of the regulation:

“Regulation of contact centres cannot happen in isolation and will require appropriate funding and investment.” (Other Organisation)

- 5.2.7 Several felt that there was a greater need to record information regarding contact that took place within centres, both for child protection purposes and as feedback to the court. Again, however, respondents stressed the need for staff to be trained in such reporting responsibilities.

- 5.2.8 Many respondents (again both individuals and organisations) showed concern over the potential closure of contact centres following regulation, and were keen that regulation was used to improve standards rather than to reduce provision. Others (typically organisations), however, thought it appropriate that any centre that was unable to meet the minimum standards should close.

- 5.2.9 A few organisations also suggested that the purpose of contact centres should be restated and reinforced as a result of regulation. This was welcomed as it was felt that contact centres were sometimes used

inappropriately to facilitate unsuitable/unsafe contact and/or where contact was not in the child's best interests.

5.2.10 Those who felt that contact centres should not be regulated generally felt that they already operated well, with some suggesting that increased regulation/statutory oversight was not necessary or appropriate for family relationship settings. Some were also concerned about the risk of contact centre closures and the cost implications related to regulation.

5.2.11 A few respondents (generally from those who gave no response to the closed question) felt that additional consultation with service users and providers would be required. Detailed costings and greater clarity around what would be regulated and inspected was considered to be required before introducing such regulation.

5.3 Who a Child Should be Allowed to Keep in Contact With

5.3.1 The young persons' survey asked respondents who they considered it was important for a child to keep in contact with generally.

YP2. Who do you think it is important for a child to keep in contact with?

	Number	Percentage
Both parents	197	67%
One parent	35	12%
Grandparents	166	56%
Brothers/sisters (including step brothers/sisters and half-brothers/sisters)	182	62%
Step parents	95	32%
Aunts/uncles	146	49%
Anyone else	57	19%
No response	78	26%
Total Respondents	295*	

* Note: Multiple responses were possible at this question.

5.3.2 Young people generally felt it was important to keep in contact with a range of people, with most survey respondents selecting multiple responses from the options provided. Both parents, brothers and sisters, grandparents and aunts/uncles were all identified as important by around/over half of the respondents.

5.3.3 Two thirds (67%) of young people felt that it was important to stay in contact with both parents compared to 12% who indicated that it was important to stay in contact with only one parent. However, 20 of the 35 respondents

who selected one parent also selected both parents, therefore only 15 (5%) respondents truly favoured contact with one parent alone.

- 5.3.4 For those who selected one parent and not both parents, they typically reported that either they were part of a lone parent family and this was fine, or they felt that sometimes one parent can be unkind/abusive. It was suggested that children should not be made to see both parents where they did not want to, or it was considered unsafe:

“If the other parent is abusive then a child/young person should not be forced to see them.” (Young Person, Age 17-18)

“My mum is a single parent and she does fine.” (Young Person, Age 17-18)

- 5.3.5 When outlining the reasons for their responses (to the closed question), many indicated that they felt it was important to keep in contact with all family members. Respondents often felt that knowing a range of family members was important for a child’s development, and/or that it was important to ensure that a child received support during difficult periods in their lives (such as parental break-ups):

“All family members are important and give you a sense of belonging and who you are.” (Young Person, Age 13-16)

“It’s important for a child to have an extensive network of family in order to help them develop and mature.” (Young Person, Age 13-16)

- 5.3.6 Others felt that all options listed were important or that there should be no prescribed list for children to have contact with as suitability will vary by case:

“It depends on who is reliable, consistent, attuned and cares for the right reasons. It can be all or none of the above, it is not an entitlement based on title.” (Young Person, Age Undisclosed)

- 5.3.7 Some suggested that the child should have the choice regarding who they keep in touch with, often indicating that they should be allowed to keep in touch with anyone they want to. Others, however, caveated this with a need for the relationships to be positive or for the child to be safe:

“A child should have the right to see anyone that makes them happy.” (Young Person, Age 13-16)

“All family members who do not pose a risk to the child.” (Young Person, Age Undisclosed)

- 5.3.8 There was a strong sense across the responses that young people felt it was important for a child to have a choice in who they were in contact with, with

some highlighting that a child should not be forced to have contact with someone they do not want to have contact with:

“If the other parent is abusive then a child/young person should not be forced to see them. (Young Person, Age 17-18)

“It very much depends on circumstance. If possible and appropriate, then it is important to have contact with everybody, however, if the child is uncomfortable with it then they should under no circumstances be forced to.” (Young Person, Age 13-16)

- 5.3.9 Other people (not listed in the options provided) that were suggested as being important for children to keep in contact with included friends, cousins and, in one case, a youth worker (should a child feel this was what they wanted).

5.4 Supporting Children to Maintain Important Relationships

- 5.4.1 The main consultation document stated that, “when parents of a child split up or where children are cared for outwith the family home, children should be able to grow up with or continue to have relationships with family members, other than the parents themselves, who are important to them”. In line with this goal, respondents were asked to consider what steps should be taken to ensure children have relationships with other family members.

Q7. 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?

- 5.4.2 No quantitative element was included for this question, rather, respondents provided purely free text answers.
- 5.4.3 Respondents largely discussed continuing contact with grandparents and siblings (including half, step and foster siblings), but other family members mentioned included aunts/uncles, cousins, former step-parents, foster carers, and close family friends.
- 5.4.4 Most respondents felt that maintaining or developing relationships between children and other family members was highly important. It was suggested that grandparents in particular can provide childcare and/or have regular contact and close bonds, which can be detrimental to the child if contact is stopped suddenly. The distress caused to the other family members denied contact with a child was also detailed by some:

“Courts should enforce the rights of the child to have meaningful contact with both sides of their family, including grandparents, aunts, uncles, cousins, etc.” (Individual)

The Child's Views and Best Interests should be Paramount

- 5.4.5 Several respondents stressed that having a relationship with other family members needed to be the child's choice and only supported/encouraged where there was no harm to the child and/or it was in the best interests of the child. Respondents clarified that no contact should be allowed (or that safeguards be put in place) where there is a risk to the child (or the main caregiver) or where there is a history of abuse or alienation. A few organisations suggested that a risk assessment (covering domestic abuse and coercive control) should be undertaken before any decisions are made:

“Children have a right to continued contact with members of their family, if it is safe and in their best interests to do so and giving due weight to their views.” (Children's Organisation)

Need for a Legal Presumption

- 5.4.6 Some (typically individuals) felt that the default position should be that contact with other family members should be allowed (where this is not detrimental to the child). Indeed, some felt a legal presumption was needed in this respect. A few (both individuals and organisations) noted current laws in other EU countries (such as France³ and Spain⁴) and felt there was scope for Scots law to be brought in line with this. The 2006 Charter for Grandchildren was also referenced by a few respondents (again, both individuals and organisations) as providing a useful/desirable basis for the development of legal rights. Organisations also cited the right to family life as outlined in the Human Rights Act 1998, as well as Articles 5, 8 and 9 of the UNCRC.
- 5.4.7 It was also stressed by some respondents that not all family conflict and difficulty in maintaining contact with children happens as a result of parental separation. As such, it was considered important that the law supports contact between family members at any time/in any circumstances, and is not restricted to marriage or relationship break-ups.
- 5.4.8 Some, however, were against legal presumptions based on the status of specific relationships as it was felt that each child's circumstances will be different. It was felt this could risk undermining the paramountcy principle.

³ Article 371-4 of the Civil Code stipulates that “the child has the right to maintain personal relations with his ancestors. Only the interest of the child can hinder the exercise of this right”. The law 70-459 of 1970 was also seen to provide grandparents with various rights, including: right of access which allows them to visit or meet their grandchildren on occasions; right of accommodation which allows them to invite their grandchildren to sleep over; and right of correspondence which allows them to exchange letters, phone calls and emails. Further, it was stated that, as of May 2016 grandparents also have obligations to meet the nutritional needs of their grandchildren where their parents are unable to.

⁴ The Spanish Civil Code was considered to provide the legal right for grandparents (and other relatives) to see their grandchildren, and where this was denied by a parent they have the right to request visitation through the Spanish Courts.

Support from the Courts

- 5.4.9 Many organisations and individuals felt that greater consideration of contact with other family members was required, both in general and by the court as a matter of course in parental contact cases, without requiring a separate action. The cost and stress involved in undertaking a separate court action for contact was considered to be a barrier for many (particularly elderly relatives/grandparents).
- 5.4.10 Respondents regularly suggested that the child should be involved in identifying those individuals that are important to them and allowed to express whether they wish to maintain these relationships. Indeed, some suggested that wider family relationships should be actively considered in such a way when developing a child's plan and/or when preparing court reports (such as child welfare reports). It was also suggested that other relatives should be permitted to submit statements to the court during proceedings (again without the need for a separate action).
- 5.4.11 With specific reference to contact with siblings, a number of organisations felt it was important to clarify Section 11 of the 1995 Act. It needed to be clearer that court orders under that section may relate to sibling contact and that siblings, including those under the age of 16, can apply for contact.
- 5.4.12 A few individuals felt that grandparents and other relatives should be able to apply to the courts for contact, although others highlighted that this provision was already in place.

Increased Contact with Non-Resident Parent

- 5.4.13 Many individuals suggested that granting the child greater time to spend with the non-resident parent (often citing a presumption of 50/50 residency) could lead to meaningful relationships being maintained with other family members across both the maternal and paternal sides. They noted that, where a non-resident parent is only granted limited contact with a child (e.g. one afternoon a week) there was very little time to facilitate visits to other family members. A few also noted that contact orders only covered the non-resident parent and did not extend to other relatives, therefore a non-resident parent cannot arrange for the child to spend time with other family members without them being present (although there is no such requirement on the resident parent):

“The priority needs to be to ensure that the ‘non-resident’ parent is able to enjoy reasonable, meaningful contact. Then in most cases, contact with the other members of the family would naturally follow.” (Individual)

Support for Care Experienced Young People to Maintain Relationships

- 5.4.14 Several individuals and organisations also felt that it was important for care experienced young people to be facilitated and supported (by the state) to maintain relationships with family members. It was also suggested that

family should be understood in its broadest sense, thus allowing them to maintain contact with previous carers and other children who they shared a care placement with. One children's organisation considered particular need to reform the system to facilitate greater contact between siblings in care, or preferably, staying together in care.

- 5.4.15 It was also suggested by two other children's organisations that, while there was an appreciation of high workloads and staffing issues for social workers, they felt this should not be used as an excuse for not supporting or facilitating contact for young people in care. Indeed, it was felt that social workers, those managing residential houses, and foster carers should prioritise contact for those in care.

Other Suggestions

- 5.4.16 Other suggestions that were made by a few respondents included using mediation, contact centres and Family Group Decision Making approaches to help children maintain relationships with other family members. The provision of education/public health materials to highlight the detrimental impacts of family conflict over child contact and encouraging conciliatory approaches to resolve matters was also cited. One suggested that greater advertising and awareness raising of the current options available to grandparents and other family members was needed.
- 5.4.17 Several respondents also noted that views, situations and relationships can change over time and so there should be the opportunity to revisit and amend the arrangements (or to seek arrangements) at a later date.
- 5.4.18 There were also calls for greater training and awareness of alienation, and consequences/punishments implemented for those who perpetuate this (including both parents and extended family members). Similarly, it was felt that consequences were required where one party is obstructive in proceedings or fails to comply with a court order:

“Unless there is a penalty, children will still unfairly be separated from their family members.” (Individual)

No Changes Required

- 5.4.19 Some respondents felt that there should be no change to the current system, however. It was indicated that any person who claims an interest in the child could apply to the courts for contact with a child under section 11, and therefore provision already exists for other family members. Others suggested that this was more of a social issue and not something to legislate for. They felt that it should be left to the discretion of the parents/families, and were concerned that legal intervention may result in greater family discord and distress for the child.

5.5 Contact with Grandparents

- 5.5.1 The young persons' survey asked whether a child should have contact with their grandparents, while the main consultation asked whether there should be a presumption in law that children benefit from contact with their grandparents.

Young Peoples' Views

YP5. Should a child have contact with their grandparents?

	Number	Percentage
Yes, always	68	23%
Yes, but only if it good for the child	151	51%
No	4	1%
Don't know	2	1%
No response	70	24%
Total	295	100%

- 5.5.2 Most respondents to the young peoples' survey felt that children should have contact with their grandparents, however, a greater proportion (51%) indicated that this should only be allowed where it was good for the child. Only 4 people said 'no' to this question.

- 5.5.3 Those who indicated that contact with grandparents should always be allowed felt that this was an important family relationship to maintain. Grandparents could provide support and impart knowledge, and should not be excluded from a child's life when they have had no input to the parents' break-up. It was also perceived that grandparents always love their grandchildren, have their best interest at heart, and that it is important to support alternative family structures:

"Because they are wise and full of wisdom and always has the child's best interest at heart." (Young Person, Age 13-16)

"Grandparents usually come from a time when things were different and it's important to have various ways of living within families. Grandparents can learn a lot from their grandchildren and vice versa." (Young Person, Age 19-25)

- 5.5.4 Those who felt contact should only be allowed where it would be good for the child suggested that not all grandparents would be a good influence on the child, and that there could be risks where there is a history of violence, abuse, or drug addiction:

“Grandparents can be important caregivers. Even if not, extended family bonds are important. But they shouldn't be allowed around a child if they are perpetrating/compounding abuse or manipulation or if the child dreads seeing them.” (Young Person, Age 19-25)

5.5.5 Again, the young people stressed the importance of the child's voice, suggesting that contact should be facilitated only where the child wants it:

“...it should be a child's choice not a parent's.” (Young Person, Age Undisclosed)

“This should be the child's decision and they shouldn't be forced by adults.” (Young Person, Age 13-16)

Legal Presumption that Children Benefit from Contact with Grandparents

5.5.6 The main consultation document acknowledged the important role that grandparents often play in children's lives. It also indicated that grandparents can already make an application to the court to seek contact with their grandchild via section 11 of the 1995 Act. The Charter for Grandchildren (introduced in 2006) was also outlined, which aims to highlight the role of the wider family and explains that grandchildren can expect to know and maintain contact with their family, except in very exceptional circumstances.

5.5.7 The main consultation document sought to explore views on whether there should be a presumption in section 11 of the 1995 Act that children should have contact with their grandparents, with the courts' starting position being a presumption that children benefit from contact with their grandparents.

Q8. Should there be a presumption in law that children benefit from contact with their grandparents?

	Number	Percentage
Yes	114	45%
No	101	40%
No response	39	15%
Total	254	100%

5.5.8 Responses were split between those who thought such a presumption should be made in law (45%) and those who thought it should not (40%). However, most of those who thought there should be a presumption in law were individuals (102 individuals compared to just 12 organisations, largely consisting of family support organisations and local authorities). Those who felt there should not be a presumption were more evenly split between organisations and individuals (47 and 54 respectively).

Support for a Presumption in Favour of Contact with Grandparents

- 5.5.9 Most of the individuals who were in favour of such a presumption stressed the importance of, and positive impact that a grandchild/grandparent relationship can have. It was felt that grandparents often spend a lot of time with their grandchildren, often providing childcare. Grandparents were considered an important source of support, in forming a child's identity, understanding their history/where they come from, providing a sense of belonging, and imparting knowledge/wisdom/experience to the child. Therefore, it was considered sensible to make a presumption that contact would benefit the child and make it easier for grandparents to stay involved with their grandchildren:

*“Grandparents provide love, stability and continuity to children, generally.”
(Individual)*

- 5.5.10 A few family support organisations also noted that, having a presumption did not mean that grandparents were seeking/would be granted PRRs, rather it would assist in maintaining contact/important relationships.
- 5.5.11 It was also suggested (both by individuals and a few organisations) that acrimonious separations of the child's parents often impacted on grandparents (and other members of the family). It was felt that bad feeling/disputes between the parents often meant that the child was deprived of contact with grandparents/one side of their family, which was not considered to be in the best interests of the child:

“When a child is alienated from a parent, this is also likely to include the parent's family as well. This denies the child access to half their family. This is not in the best interests of a child.” (Individual)

“Even if relationships with parents have broken down grandparents shouldn't be punished.” (Individual)

- 5.5.12 Some (again, both individuals and organisations) felt that there should be a presumption for grandparents to have contact. It was felt that this should be the starting point, and the onus needed to be on showing contact was not beneficial/in the child's best interest rather than grandparents having to go to court to show it is in the child's best interests.

No Presumption in Favour of Contact with Grandparents

- 5.5.13 Most individuals and organisations who felt that there should not be a presumption in favour of contact with grandparents suggested that all situations/cases are different and should be assessed on individual merits. While many grandparents would be a positive influence for a child it was highlighted that some would not, i.e. they may have been abusive, may facilitate contact with other abusive family members/those with no contact rights, or perpetuate the alienation of others. As such, it would be wrong to make assumptions on relationships. Several individuals who supported the

introduction of a presumption also caveated that contact should not be facilitated where there was any such risk to the child:

“Grandparents are a diverse group, ranging from supportive quasi-parents to virtual strangers, with some enhancing the family dynamic and others bringing disharmony... It would be a mistake to make any assumptions about particular relationships.” (Individual)

“It is not true that children benefit from contact with all of their grandparents in every case, and to introduce a legal presumption to this effect would not be in the best interests of the child.” (Family Support Organisation)

- 5.5.14 It was also suggested (again by both individuals and organisations) that the primary consideration in each case needed to remain the welfare of the child, and that providing such an assumption may risk overshadowing this with the rights of adults. Several organisations also felt that it was important for the child’s view to be sought, both in terms of the relationships that are important to them and what would be in their best interests:

“The primary consideration is the welfare of the child... A presumption in favour of contact risks shifting the focus from the child to the adult.” (Individual)

“The focus on the child and the paramountcy of their best interests, along with taking account of their views should be maintained without the introduction of any legal presumptions.” (Legal Profession)

- 5.5.15 A few felt that the rights of the parents (including both parents and the resident parent) should also be prioritised over grandparents. It was suggested that, in some situations at least, where parents (either separated or together) refuse to allow a grandparent contact with the child there may be good reason for this (again a history of abuse, controlling behaviour, etc.), and it was important not to impose contact in such circumstances. One individual also felt that requiring resident parents to facilitate contact with grandparents may be challenging, both practically and emotionally. Another respondent suggested that, where parents are together, such a presumption could potentially impact family decisions, such as moving house, when this would impact on a grandparent’s ability to see their grandchild.

- 5.5.16 It was suggested by a few respondents that a broader presumption related to wider family members may be more suitable. This would incorporate grandparents, without being specific to them and placing their relationship with the child ahead of others. Several respondents who were in favour of a presumption for grandparents also suggested that children often benefited from contact with other family members, and felt this should not be overlooked.

- 5.5.17 As above, several individuals and many organisations felt that no presumption was required as the current court system already recognised

grandparents (and wider family members) and makes provision for contact where this is determined to be in the best interests of the child.

- 5.5.18 A few respondents suggested that consideration was needed of the potential impacts any such change may have for care experienced young people, parents with learning disabilities, and on the Children’s Hearing system.

5.6 Contact with Siblings

- 5.6.1 The young persons’ survey asked whether children should be allowed to keep in contact with their brothers and sisters, while the main consultation document explored whether the 1995 Act should be clarified to make it clear that siblings, including those aged under 16, can apply for contact without being granted PRRs in order to support sibling contact.

Young Peoples’ Views

YP3. Should a child be allowed to keep in contact with their brothers and sisters?

	Number	Percentage
Yes, always	92	31%
Yes, but only if it good for the child	131	44%
No	0	0%
Don’t know	2	1%
No response	70	24%
Total	295	100%

- 5.6.2 Most respondents felt that it was important for a child to be allowed to keep in contact with their brothers and sisters, although opinions were split as to whether this should always be allowed (31% of respondents) or only when it is considered to be good for the child (44% of respondents). Nobody answered ‘no’ to this question.
- 5.6.3 As with grandparent relationships, young people generally felt that sibling relationships were important, that there was often a close bond that should be maintained, and that having contact with siblings can help provide support and a sense of belonging. Some also suggested that siblings can provide someone that a child can look up to, while a few felt that children should not be separated just because the adults could not agree:

“Sibling relationships are important and it often helps if a child has someone they can relate to during a difficult time that they share an experience with.” (Young Person, Age 17-18)

“Because they need to have someone to look up to.” (Young Person, Age 8-12)

“The siblings haven't done anything wrong and shouldn't be taken out of the child's life.” (Young Person, Age 13-16)

- 5.6.4 Those who caveated support for contact (i.e. only where this would be in good for the child) typically felt that contact should either not be facilitated or should be limited/closely supervised where instances of abuse, bullying or violence were prevalent. It was also suggested that, where a sibling was considered a 'bad influence' or where siblings fight, contact may not be in the best interests of the child. Respondents often felt that contact should be allowed where it was considered to be in the best interests of the child or where it would have a benefit or positive outcome for the child:

“I would say always but if their siblings are abusive to them then no.” (Young Person, Age 13-16)

“Because some siblings do not like each other and might fight a lot.” (Young Person, Age 8-12)

“The child's interests should be put first.” (Young Person, Age 13-16)

- 5.6.5 One respondent however, highlighted that, even where the sibling may not be considered a good influence on the child, the child may provide a good influence on their sibling, and therefore the relationship was still important:

“I had to legally fight for this [contact] with my sibling and I was a positive influence to my sibling, and now one of the only constant people who has been in her life.” (Young Person, Age Undisclosed)

- 5.6.6 Again, the sense of giving the child a choice was important to young people.

Applying for Contact without Being Granted PRRs

- 5.6.7 The main consultation document discussed the importance of sibling relationships, covering all variations, such as full sibling, half sibling, step sibling by means of marriage or civil partnership, sibling through adoption, and any other person the child regards as their sibling and with whom they have an established family life.
- 5.6.8 While it is possible for a person to have contact with a sibling by seeking an order from a court, in practice, there has been confusion over whether a court can make an order to grant a person contact with a child without giving that person PRRs. As such, the main consultation document sought views on whether to amend section 11 of the 1995 Act to make it clear that a person under the age of 16 may apply for contact with a sibling without being granted PRRs.

Q9. 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?

	Number	Percentage
Yes	169	67%
No	18	7%
No response	67	26%
Total	254	100%

5.6.9 Two thirds (67%) of respondents agreed that the 1995 Act should be clarified in this way, compared to only 7% who disagreed with such a change. The remaining 26% gave no response. Both organisations and individuals were generally more in favour of the change, with 54 organisations and 115 individuals supporting this suggestion, compared to just four organisations and 14 individuals who were unsupportive.

Reasons for Support

5.6.10 Many individuals and organisations again suggested that it was important and beneficial for a child to build/maintain relationships with siblings/family members, and that children had a right to these relationships. Several considered this particularly important where relationships have already been established, and in the case of care experienced young people:

“Sibling contact should be promoted where it is in the child/ren’s best interests as these are lifelong relationships for each child that promote a sense of belonging and inclusion.” (Individual)

“Contact with siblings can be particularly supportive when children have experienced shared trauma and adversity. A sibling may be the only support who truly knows what the other has experienced.” (Family Support Organisation)

5.6.11 Individuals also considered it important for the child’s views to be heard and for contact (or non-contact) to be the child’s choice. Ensuring that the decision has not been controlled/influenced by an adult was key (whether that be a parent or the local authority in the case of adoption and children in care). Organisations similarly felt that it was important that the child’s voice was heard:

“This appears obvious that this change should occur to overcome resident parents that control the children.” (Individual)

5.6.12 Several individuals and organisations suggested that legislative clarity is always beneficial. They felt that current interpretation and practice in this area differed, and therefore greater clarity should help to standardise experiences and remove a potential barrier:

“There is uncertainty and conflicting case law on this point and so the wording of Section 11 of the Act needs to be amended to provide clarification.” (Individual)

“...there may be confusion over whether a court can make an order under s.11 of the 1995 Act to grant a person contact with a child without giving that person PRRs and it is appropriate that this should be clarified.” (Other Organisation)

5.6.13 A few also suggested that clarification of the legislation was required to ensure it was aligned with the UNCRC and the ECHR. One children’s organisation also felt similar changes were required in the Children’s Hearing system to widen the relevant persons’ test to include siblings and make it compatible with the ECHR. Similarly, one public body suggested that such clarification would also be in line with the United Nations Guidelines for the Alternative Care of Children, UN General Assembly, 2010, A/RES/64/142.

5.6.14 A few organisations (including one children’s organisation, one from the legal profession, and one local authority) suggested the following amendments to Section 11 of the 1995 Act:

11. Court orders relating to parental responsibilities etc.: (1) In the relevant circumstances in proceedings in the Court of Session or Sheriff Court, whether those proceedings are or are not independent of any other action, an order may be made under this subsection in relation to (a) parental responsibilities; (b) parental rights; (ba) contact with siblings; (c) guardianship; or (d) subject to section 14(1) and (2) of this Act, the administration of a child’s property.

5.6.15 A few respondents also considered it important to support any changes with further education/awareness raising, both for families and the authorities involved (e.g. solicitors, Sheriffs, and local authorities). This was relevant to both making people aware of siblings’ rights and legal options, as well as the benefits of maintaining sibling relationships. A few also felt that pursuing contact through the court should be avoided if possible, with voluntary/informal arrangements being agreed by those involved, or with the support of child centred mediation or family therapy advocated as less adversarial and preferable methods.

5.6.16 A few respondents also felt that the provision should be extended to other family members:

“We think that this should apply to all ‘people of importance’ not just siblings (so grandparents and others as well).” (Public Body)

Caveats and Potential Limitations

5.6.17 Several respondents (both individuals and organisations) caveated their support and suggested that certain limitations or exclusions should apply, for example, in the case of abuse and criminal activity that could result in

risk/harm to the child (or resident parent). It was considered important that child welfare and safety was paramount in any decision. Risk factors and whether such contact was in (both) the children's best interests needed to be considered on a case-by-case basis, it was felt.

- 5.6.18 It was also suggested by one individual that parents who have been previously denied contact may seek to facilitate this via sibling contact, and so any court/reporter needed to be aware of this possibility. A few individuals and organisations felt that court costs could be a potential barrier for siblings, therefore improved access to legal aid for young people was required. Two organisations also suggested that a child should not be held accountable/suffer any negative repercussions for any breach of a contact order.

No Need for Change

- 5.6.19 Among those who were unsupportive of the suggested change, a few individuals felt that children should not have to engage in court proceedings. Rather, they suggested that contact should be facilitated by the parents and/or that the child can seek out and build relationships when they are older. It was also highlighted that not all family members would be a good influence and that contact may not be in their best interests.
- 5.6.20 Organisations who were unsupportive typically felt it was not required as suitable provision and clarity already existed in the legislation. One suggested that better education on the issue may be a more suitable solution rather than legislative changes.
- 5.6.21 Two respondents (one individual and one organisation) also felt that young people would make little use of such a provision. This organisation also indicated that siblings should not be given a right to contact, but rather the views of the child should be considered in any decision.

5.7 Supporting Looked After Children Maintain Relationships

- 5.7.1 The main consultation document highlighted that the Looked after Children (Scotland) Regulations 2009 and subsequent Guidance recognises the importance of maintaining established family life between children who have lived together. The Guidance states that local authorities should try to ensure that siblings are placed together, or placed near each other where practicable and appropriate. Where siblings are not placed together, then it may be appropriate for frequent contact to be maintained.

Q10. 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?

- 5.7.2 Only free-text responses were sought at this question, no quantitative element was included. A total of 132 respondents provided a substantive response, consisting of 51 organisations and 81 individuals.
- 5.7.3 Adopting a broad understanding of who is important in a child's life was highlighted as being important by several respondents. It was suggested that the child should always be involved in identifying those who are important to them and that their views should be recorded in the child's plan. Two organisations also suggested that the current wording was too restrictive and may exclude the development of a relationship between a child and a new-born sibling, for example. Rather it was suggested the wording used at Q9 in the consultation was more appropriate.
- 5.7.4 Some individuals suggested that there should be a 'presumption', 'pre-requisite' and/or 'legal requirement' that these relationships are protected. Again, however, it was stressed (by organisations and individuals) that ensuring contact was in the best interests of all the children involved was paramount, and that the child's views regarding maintaining or re-establishing contact should be sought regularly. Several stressed that risks needed to be assessed and contact should be refused/restricted where it may place a child at risk:
- “Careful consideration, assessment and planning on the parts of both (or all) children involved is fundamental to making sure contact is in best interests of all children involved.” (Children's Organisation)*
- 5.7.5 Some respondents (both individuals and organisations) suggested that siblings should be supported to spend time together in the best setting possible (with some suggesting that contact centres could be used). It was also suggested that greater use could be made of new technologies in facilitating/increasing contact, such as texts, video messaging, and social media. Various suggestions were also given related to changes to practice (typically by only one/a few respondents each), including:
- Analyse current barriers and learn from existing good practice;
 - Greater training/guidance for foster and kinship carers, adoptive parents, parents, young people, social workers, etc. regarding the benefits of sibling contact;
 - Provide a clear definition of 'established/shared family life';
 - Recording all sibling relationships in official records, and ensuring life-story work for children permanently separated from their siblings;
 - Active consideration of sibling contact by those preparing reports, making decisions, and those involved in the development of the child's plan,
 - Consideration of reunification/contact at every review;

- Reducing drift and delay with permanence planning to allow practitioners time to assess contact with the wider family;
- National focus on the PACE 2 programme;
- Supporting siblings who are experiencing difficulties to repair their relationships rather than curtailing contact;
- Onus on local authorities and Children's Hearings to specify why one option is chosen over another, in particular, requiring them to record and evidence why co-placement/contact was not provided;
- Provide adequate resources for professionals to develop skills and capacity, and provide adequate resources/support for foster families to accommodate the co-placement/contact of siblings;
- Accountability of child welfare agencies (and parents where relevant) and sanctions where arrangements have not been upheld (including possible inspection of children's services); and
- Parenting co-ordinators assisting siblings to keep in touch.

5.7.6 Most local authorities and public bodies, along with some individuals felt that clearer and strengthened guidance may be helpful. One public body suggested guidance on contact should give much more prominence to sibling contact; and cover the looked after children regulations, evidence-based practice on contact (or point to resources), and all the interactions with the legal system, i.e. the tests that will be applied in children's hearings and in appeals against hearing's decisions, as well as the tests applied to decision making in the Family and Permanence/Adoption Courts. In addition, two organisations (including one local authority and one public body) suggested that guidance should also highlight that it is the responsibility of all of those supporting the child, including the local authority, foster carers and independent foster care agencies, family, multi-agency professionals, etc. to support positive existing relationships where possible. A few local authorities also suggested that wider use could be made of Lifelong Links (which can connect children with significant people from their past, including previous foster carers, children who were in care settings with them etc.) and family group conferencing/decision making.

5.7.7 However, it was suggested by several organisations (largely from other sectors) that, despite the current policy and guidance in place, siblings often continue to be separated, and have infrequent and poor quality opportunities for contact. It was therefore suggested (by five children's organisations, one family support organisation, and one member of the legal profession, as well as several individuals), that an enforceable legal duty should be placed on local authorities to promote and facilitate (co-placement or) sibling contact. One also suggested that the government needed to support local authorities financially to meet such a duty.

5.7.8 Several organisations (including children's organisations, family support organisations, those from the legal profession, and one local authority) identified/supported specific amendments, both for legislation and statutory and practice guidance. These amendments are included in full at Appendix

A. Such amendments were considered necessary to ensure that local authorities promote (and not simply assess) sibling contact, provide recourse for looked after children where a local authority does not prioritise sibling co-placement or contact, and place sibling relationships on an equal footing with parental relationships to ensure they are not overlooked.

- 5.7.9 It was also suggested by several organisations (and one individual) that similar changes were needed to the Children’s Hearings (Scotland) Act 2011 and the Adoption and Children (Scotland) Act 2007 (again, specific amendments are detailed at Appendix A). These were considered necessary to ensure sibling relationships are prioritised, that sibling contact is facilitated, and that siblings can participate in proceedings as appropriate.
- 5.7.10 One respondent also suggested that the current regulations needed to be promoted to a greater extent, with a promotional campaign suggested as one way to ensure young people in care are aware of the options open to them in this respect.

5.8 Enforcing Contact Orders

- 5.8.1 Currently, when someone believes a contact order has been breached they can return to court and either seek a variation of the contact order or seek to hold the person breaching the contact order in contempt of court. Contempt of court in civil cases carries penalties of up to two years in prison and/or an unlimited fine in the Court of Session, or up to three months’ imprisonment and/or a fine of level 4 on the standard scale in a Sheriff Court.
- 5.8.2 The Scottish Government outlined different options in relation to enforcement (which it highlighted could be used in combination), and sought views in relation to respondents’ preferences.

Q11. How should contact orders be enforced?

	Number	Percentage
Option one - no change to existing procedure	23	9%
Option two - alternative sanctions. (e.g. unpaid work, attending a parenting class or compensation)	44	17%
Option three - making a breach of a contact order a criminal offence with penalties including non-custodial sentences and unpaid work	73	29%
Another option	52	21%
No response	62	24%
Total	254	100%

- 5.8.3 Several possible enforcement options were suggested in the consultation document, with 29% preferring option three (making a breach of a contact order a criminal offence), 17% preferring option two (alternative sanctions), and 9% considering that option one (no change) was most appropriate. A further 21% suggested 'another option' and 24% gave no response. It should be noted that only two organisations advocated for option three. The popularity of this option was driven by individuals. All other responses received more balanced support from a mix of individuals and organisations.

Option 1: No Change Required

- 5.8.4 Of those who indicated that no change was required to existing procedure, a few felt that the current measures were appropriate and that the system was working. It was also suggested that increasing sanctions and/or establishing a breach as a criminal offence would not resolve the existing problems, may create more difficulties, and may be difficult to enforce in practice.
- 5.8.5 A few individuals also felt that the definition of a 'breach' was unfair as it focused on the resident parent not facilitating contact and only considered the non-resident parent to have breached the contact order if they failed to return the child. Respondents, however, felt that any failure of the non-resident parent to attend contact sessions should also be considered as a breach.

Option 2: Alternative Sanctions

- 5.8.6 It was felt by several respondents that current procedures to deal with breach of contact orders were not sufficient and that alternative sanctions could prove helpful in dealing with the issue.
- 5.8.7 Some felt that parties do not currently take breaching a contact order or contempt of court seriously, and felt that more needed to be done to ensure they understand the consequences and the severity of the matter. One respondent suggested that a notice advising of the consequences of breaching the contact order could be given to both parties at the point an order is made:

"Some parties do not take the issue of contempt of court/breaching an order anywhere near as seriously as they should as they remain convinced that nothing will happen if they do not obtemper the order... This would hopefully act as a deterrent on both sides and ensure parties adhere to orders." (Individual)

- 5.8.8 One individual suggested that contempt of court proceedings should not be used as a last resort, but happen earlier in cases where breaches of contact order occur. Again, it was felt that this would help parties to understand the severity and consequences of a breach, and help to prevent further alienation and dysfunctionality.

- 5.8.9 Alternative sanctions were typically considered more desirable (by both individuals and organisations) than making a breach a criminal offence and/or imposing a prison sentence. It was felt that financial sanctions (such as a fine or the suspension of social security benefits) were inappropriate as this would negatively impact on the child, and imprisonment could deprive the child of their primary carer. Ultimately, it was felt that any sanctions imposed should not be detrimental to the child.
- 5.8.10 It was suggested (by both individuals and organisations) that the reasons for a breach needed to be fully understood before any sanctions were imposed. Further, it was felt that a variation to the order or additional support to facilitate contact may be more appropriate than sanctions in some cases. Some highlighted that a breach may be due to a child's refusal to participate in the contact rather than a parent being obstructive, and stressed that the child should not face sanctions. In order to reduce such instances, it was felt important that the views and best interests of the child are central to the process in order to avoid ordering a child to have contact with a parent they do not wish to see. Others suggested that the breach could be a result of trauma or abuse (to the child and/or resident parent), and due to safety concerns:

“Given that currently there is not rigorous or evidence-based risk assessment of cases where there is domestic abuse, the decision for a parent to refuse contact could be based on their accurate assessment that contact will be a risk to their child.” (Local Authority)

“We do not advocate criminalising civil proceedings, there may be underlying trauma impacting on facilitating a contact order which need to be understood to ensure there is no re-victimisation of the victim.” (Local Authority)

- 5.8.11 Other comments made by one respondent each included the need for the process to allow contact to be stopped in the event that it was no longer considered to be in the best interests of the child, along with several suggestions for alternative sanctions, such as removing the contemtor's driving license or passport, and therapy (possibly as a condition of a probation order).

Option 3: Making a Breach of a Contact Order a Criminal Offence

- 5.8.12 As outlined above, only three organisations preferred this option compared to 71 individuals.
- 5.8.13 Typically, individuals felt that the current system was not sufficient at deterring or dealing with breaches of contact orders. Many felt that one party would withhold contact due to difficulties in their relationship with the other party, in attempts to hurt or alienate the other party, and due to the lack of consequences for such action. Some felt that, as the contact order would

have been made in the best interests of the child, withholding contact and breaking arrangements was negatively impactful:

“Far too many parents ignore a contact order knowing that little to nothing will realistically be done in relation to penalisation. This leads to continued confusion and insecurity to both child and parent.” (Individual)

“I have experienced several breaches of the contact order I have by my ex-partner and absolutely nothing has been said or raised about this, it is as if she can do as she pleases regardless. If there was the threat of a criminal conviction then I feel these breaches would not [have] occurred. There has to be consequences for any parent breaching contact orders or obstructing the child's contact.” (Individual)

- 5.8.14 It was felt that a strong deterrent was required in order to instil contact orders with necessary authority and reduce the perceived abuse of such orders. It was also suggested that the court needed to have sufficient means to ensure its orders are not ignored:

“The court must have the means to enforce any orders it makes, and the court should not make any order it is not prepared to enforce otherwise the authority of the court is fatally undermined.” (Individual)

- 5.8.15 Some individuals felt that breaking a contact order was/or should be a criminal offence and should be dealt with accordingly. One respondent highlighted that breaking court orders in other situations was a criminal offence and therefore contact orders should be treated in the same way:

“The person responsible is breaching a court order and this is criminal in other areas of legislation so why should this be different?” (Individual)

- 5.8.16 A few individuals also suggested that by criminalising the issue parties would be able to involve the police when a breach occurred. It was felt that this would provide a faster and less expensive response (for the party) than the current arrangements where they need raise an action and then go back to court:

“...even with a court order, the parent without custody has to incur more legal fees by engaging a lawyer and going back to court. This way, the police could enforce the order.” (Individual)

- 5.8.17 Of the two organisations (both family support organisations) who supported this option, one suggested that the family court should operate like any other court with breaches treated as criminal acts. The other suggested that those who break contact orders were “*playing the system*” (Family Support Organisation) as they know there will be no consequences.

- 5.8.18 Some of those who were opposed to making a breach of a contact order a criminal offence, however, suggested this was inappropriate, would not resolve the situation between the parties. It was also felt this could create

additional difficulties for parents, and would not be in the best interests of the child:

“Criminalising breach of a contact order would be a wholly-inappropriate response to troubled family relationships. It would do nothing to resolve the conflict between the parties and, indeed, might well exacerbate it. It risks burdening a child who refused contact with a lifetime of guilt over the parent’s punishment, while creating a criminal record for an otherwise law-abiding parent.” (Individual)

“In imposing any kind of sanction, consideration must be given as to what is in the best interests of the child. We believe the imposition of a criminal record or custodial sentence on parents will not support or promote a child’s wellbeing and could serve only to create further problems for parents, and consequently adversely impact upon their child.” (Children’s Organisation)

Another Option

5.8.19 Some options suggested by respondents were close in nature to options one to three outlined in the consultation document, although some additional sanctions suggested. These included that a combination of options two and three would be beneficial, so that sanctions are applied in minor/early breaches, and criminal convictions used as a last resort for those parties who persistently and wilfully breach orders.

5.8.20 While several individuals suggested that a prison sentence was the most suitable penalty for breaching court orders, and a few organisations felt it was appropriate to retain imprisonment for extreme cases, several indicated that they did not support making a breach of a contact order a criminal offence.

5.8.21 Other options suggested (typically by just one/a few respondents each) included:

- Robust re-consideration of the contact arrangement prior to sanctions;
- Use of a child welfare reporter to obtain the child’s views and potentially review/revise the order;
- Increased support or use of alternative dispute resolution (ADR) to facilitate contact, including mediation (which involves the child), family therapy, use of a family support worker or contact facilitator, social work involvement, and contact centres;
- Referral to the Children’s Reporter;
- Earning arrestment/benefit sanctions, asset seizures as optional sanctions, and/or compensation;
- Other classes could include Parenting Apart classes and domestic abuse classes;
- Sanctions such as community service or incarceration to be undertaken during a child’s contact time with the compliant parent (or

some other time) so as not to limit a parent's ability to earn and/or care for the child;

- Contact to cease with offending party or transfer of residence;
- Creating a simplified procedure to enforce contact orders after the final order has been issued; and
- More welfare workers to speak with children and parents about the contact.

5.8.22 The reasons given by respondents for these other options were, on the whole, similar to those provided for options two and three above. Those in favour of sanctions and punishments mainly felt they were necessary to stop parties from thwarting contact unnecessarily. However, some felt that imprisonment and/or criminalising a breach of contact orders was rarely appropriate. Others highlighted that children may not want the contact and that they should not be forced to spend time with someone they don't want to see. Some suggested that a breach should be treated as a flag for concern indicating a need to investigate if there are underlying concerns for the child's (or parent's) safety or best interests. Several suggested that greater importance needed to be placed on the voice and experiences of the child (both to understand the reasons for any breaches and to create more suitable orders which would result in lower instances of breaches), and that all investigations of a breach needed to be trauma and abuse sensitive. It was also stressed again that breaches should be considered to apply equally to resident and non-resident parents.

5.8.23 Again, some respondents suggested that (any/all) sanctions were inappropriate and failed to solve the problem - they were seen as reactionary. Rather it was felt that a better option would be to try and understand the reason for the breach and/or why children were not being made available for contact, and to provide support to ensure that it could be facilitated or amend the order as necessary. It was also considered inappropriate to criminalise the behaviour of parents with learning disabilities who may not understand the order or require support to arrange contact. Similarly, it was considered inappropriate to criminalise domestic abuse victims who were trying to keep their children safe when (it was considered that) inappropriate and unsafe decisions had been made. In addition, it was suggested that the use of sanctions could risk the perpetrators of abuse using this as a further method of coercive control to continue the abuse, and so parents that continually raise contempt of court actions for this purpose should be prevented and penalised for doing so, it was felt.

5.8.24 Several respondents, regardless of which option they supported, felt that the use of parenting classes as a sanction was inappropriate. They highlighted that the purpose of the class was to develop the parent/child relationship, which was not seen as the key issue for a breach of a contact order. Also, the voluntary nature of such classes was important to their success, and therefore it was felt they would be ineffective if parents were forced to attend. Others, however, were supportive of the use of such classes.

5.8.25 Finally, some of those who did not provide a quantitative response but provided qualitative comments felt that it was important to fully understand any non-compliance and implement more supportive approaches to facilitate contact. Others thought the current system should continue, and that it was important to retain the potential for fines and imprisonment (in cases of last resort) to ensure there is an incentive for parties to comply with the court process, but that it may also be helpful to introduce some more child-friendly sanctions.

6 Cross Border cases within the UK: Jurisdictional Issues

6.1.1 Section 27 of the Family Law Act 1986 allows any person on whom any rights are conferred by an order to apply to the court which made it for the order to be registered in another part of the UK. In Scotland, the “appropriate court” is currently the Court of Session which has the same powers for the purpose of enforcing the order as it would have if it had made the original order itself.

6.2 Definition of “Appropriate Court”

6.2.1 As part of the main consultation, views were sought on whether the definition of “appropriate court” should be widened to include Sheriff Courts as well as the Court of Session. This would require an amendment to primary legislation.

Q12. 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?

	Number	Percentage
Yes	104	41%
No	25	10%
No response	125	49%
Total	254	100%

6.2.2 Almost half (49%) of respondents did not answer this question. Among those who did, most agreed that the definition should be changed. This included individuals and organisations, with organisational agreement being expressed by local authorities, third sector organisations and the legal profession alike.

Reasons for Support

6.2.3 The main reasons given in support (by organisations) were that Sheriffs working in local courts would already have considerable experience of dealing with child contact and child welfare or protection cases. Sheriffs’ familiarity with local communities/geographies would also mean that they were able to determine if orders were workable relative to the context in which they were being applied. Some respondents noted that this type of case was not overly complex and therefore, including Sheriff Courts in the definition would free up time for those working in the Court of Session to dedicate to more challenging cases.

- 6.2.4 Other key reasons for agreement (among organisations) included the potential for cost savings (including legal costs for clients), improved accessibility for parties (i.e. improved access to justice), and increased speed or efficiency in dealing with such cases if the workload was more widely dispersed:

“For convenience and cost purposes and to allow cases to be heard in the appropriate court. This would ensure Court of Session resources are utilised to best effect.” (Legal Profession)

“By changing the definition to include Sheriff Courts this would make the associated costs more manageable for parties, and would enable them to access the court more easily.” (Legal Profession)

- 6.2.5 The main reasons given in support by individuals were largely the same, i.e. widening access to justice, convenience/speed, potential cost savings and acknowledged expertise of Sheriffs to deal with such cases:

“This would help ensure greater access to justice, by enabling parties to select the court most appropriate to them.” (Individual)

- 6.2.6 Other reasons given (typically by organisations) included that involving Sheriff Courts may strengthen working relationships between Sheriffs and local solicitors, lead to more consistency in how such cases are dealt with and would make family cases “more open” *per se*. One local authority expressed that, if changing the definition was advantageous to children and families, this should outweigh other considerations. Some individuals also suggested that Sheriffs may be perceived as more accessible to parties and that it may make the system “fairer” and more consistent.

Caveats to Support

- 6.2.7 While generally supportive of the change, some organisations did stress that they would only wish Sheriffs or judges with experience and training in child contact and child welfare cases to be involved, and another stressed that the option of Court of Session involvement should remain for complex cases. One family support organisation also stressed that any change should be accompanied by guidance for Sheriffs, judges and court officials on how such cases should be handled. A small number of individuals also indicated that up-to-date training on family law was important to accompany any change, to ensure that Sheriffs were adequately prepared.
- 6.2.8 Only one organisation (a local authority) caveated their support by suggesting that any change would need to be achieved with minimal cost and fuss. They felt that the UK-wide implications may make it uneconomical, particularly as it would affect only a small number of cases.

Reasons for No Change

- 6.2.9 Among those who did not agree with changing the definition the main reasons given (by organisations) were that the small volume of cases where the legislation was relevant would not warrant what some perceived to be a complex legal and legislative move, requiring liaison with other governments. Similarly, a few individuals also commented that the small volume of cases affected meant that the change was not warranted, with one suggesting it may cause more confusion than clarity:

“Additional legislative change would likely be required which will require liaison with the UK Government and Northern Irish administration. The benefits derived from the amendment, appear to be limited and may not be realised given the need for further enabling legislation.” (Local Authority)

“The Family Law Act 1986 is a piece of UK legislation. It is difficult to see how Scotland could have a different definition of the “appropriate court” from all the other parts of the UK affected by the Act.” (Other Organisation)

- 6.2.10 The complexity of some of these cases was also seen as a reason for always ensuring that they were heard in the Court of Session, at the most senior judicial level. Similarly, two individuals commented that the Court of Session should remain the only “appropriate court” as they felt that it had developed expertise in what they perceived as a specialist field (including expertise in ensuring that the law is used in the best interests of the child). The need for Court of Session involvement was cited as being entirely appropriate in some cases and so its inclusion should be retained.
- 6.2.11 Only one respondent (an individual) commented that the definition should include Sheriff Courts only, removing the need to decide which level of court would be best suited for the case in hand.
- 6.2.12 Some organisations also pointed out that maintaining a register of orders under a widened definition would be challenging, whereas a central register is currently maintained in the Court of Session. This was felt to make it easier to keep track of all court orders currently registered for enforcement in Scotland.
- 6.2.13 Others, mainly from the legal profession, stressed that the change may be inappropriate on the basis that it may weaken the system, especially around enforcement of orders:

“The jurisdiction of the Sheriff Court is generally limited to the Sheriffdom in which it is situated. A litigant could therefore defeat the jurisdiction of the Sheriff Court by moving outwith the Sheriffdom. The jurisdiction of the Court of Session is Scotland wide.” (Legal Profession)

6.2.14 The same respondent noted that the current arrangement was consistent with other international measures such as the Hague Convention on the Civil Aspects of Child Abduction, where the Court of Session has exclusive jurisdiction in relation to enforcement measures. The provision should continue, they felt, as a stronger law enforcement option.

6.2.15 One domestic abuse support service also expressed a view that there was potential for considerations around the welfare of the child and their safety having been overlooked in the jurisdiction making the order (if outwith Scotland), and that this meant that the Court of Session should be involved to ensure adherence to Scot's law:

“...de-prioritising these considerations to a lower court runs the risk of facilitating perpetrators using the legal system to access children without due process being followed.” (Domestic Abuse Support Service)

6.2.16 Other organisations disagreed with the change on the basis that the current system was unproblematic and already allowed for a consistent approach to be taken to cases. Two individuals also commented that there seemed no need for change as current legislation already worked “fairly well” in practice:

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

6.3 Other Steps to Tackle Jurisdictional Issues

6.3.1 The consultation set out plans by the Scottish Government to prepare a guidance note regarding section 41 of the 1986 Act. Section 41 provides that a child under the age of 16 who is habitually resident in a part of the UK and becomes habitually resident in another part of the UK without the agreement of all persons who have the right to determine where the child is to reside, or in contravention of a court order, is to be treated as continuing to be habitually resident in the original part of the UK for one year. The proposed guidance would be issued to various interested parties, including legal practitioners, in both Scotland and further afield. Views were sought on whether any other steps were required by the Scottish Government to further guide understanding of issues in cross-UK border family cases.

Q13. Are there any other steps the Scottish Government should be taking on jurisdictional issues in cross-UK border family cases?

	Number	Percentage
Yes	62	24%
No	56	22%
No response	136	54%
Total	254	100%

6.3.2 More than half (54%) of respondents did not answer this question and, among those who did, there was a split in opinion as to whether other steps were needed.

Suggested Other Steps

6.3.3 Suggestions put forward for 'other steps', each put forward by just one organisation, included:

- Scottish Orders such as Guardianship Orders and Compulsory Supervision Orders (CSOs) being recognised cross borders;
- Steps being taken to provide a clear legislative basis for the jurisdiction of a Children's Hearing in cases involving cross-UK issues;
- That it would be useful to allow an order from England or elsewhere to be recognised and valid in Scots Law until there is an opportunity for a Hearing or Court in Scotland to consider and judge on a family law matter;
- Reducing the time taken to process cross border cases;
- Improving mechanisms for transferring a case from one territorial jurisdiction to another/simpler mechanisms to determine the court with jurisdiction and, if necessary, to effect transfer of the action to the most appropriate part of the UK;
- More to be done to determine the reasons for re-location that occurs without the agreement of all parties;
- Further attention being given to the issue of cross-UK border placements for children and young people placed in secure care, particularly those being placed from England into Scottish secure care centres;
- Greater focus on understanding the needs, experiences and outcomes of all children and young people looked after away from home in a placement which is a cross-UK border placement;
- Addressing inconsistencies for unmarried fathers registering parental rights in different parts of the UK; and
- Addressing section 11 and section 42 of the 1986 Family Law Act which can prevent a father raising a contact action in Scotland if a divorce, nullity or judicial separation has previously been obtained in England or Wales.

Need for Change

- 6.3.4 Several organisations noted more generally that guidance would be beneficial as long as it was clear and flexible, was developed in consultation with stakeholders across different jurisdictions, and included consideration and safeguards to protect children (especially those experiencing domestic abuse):

“Guidance note would be beneficial, depending on what it would include. We need to consider what makes sense for families and children in terms of where they are residing. It should make it easier for families to access justice, be flexible and ensure access to the right support.” (Local Authority)

- 6.3.5 One legal organisation (that did not provide a quantitative response) also commented that they perceived that *“the jurisdiction provisions for child cases within the UK are overly complex, cause considerable confusion, and legislative re-drafting is required.” (Legal Profession)*. This was echoed by a children’s organisation (who also did not provide a quantitative response):

“We are aware of instances where other UK courts have taken jurisdiction inappropriately and agree that consistent rules are needed across the UK, along with the flexibility to transfer a case as is possible within European jurisdiction under Brussels BIS II. This will require joint working across UK jurisdictions.” (Children’s Organisation)

- 6.3.6 Many individuals who suggested that ‘other steps’ were required commented that there was a general need to ensure that all court orders are enforced no matter which legal system they originate in. A residence change should be considered in court before it is accepted, it was suggested, and there should be independent investigation into cross border cases to ensure that the child’s best interests are always upheld:

“Prior to the child being moved over the border the parent should apply to the court to make a decision in the best interest of the child and the non-resident parent. If two parents are in agreement for the child to be moved then there is no need to go to court, but an agreed parenting plan to be held in the files in the event of later disagreement.” (Individual)

- 6.3.7 There seemed to be general consensus among individuals that the current system was not sufficiently stringent, but also that greater flexibility needed to be built in, where appropriate. The shared view of individuals was that the current system allowed for some inequity and imbalance of power, with some parents benefiting to the detriment of others. This led to some contrast in views (many of which did not directly address the question). While some individuals supported the need for resident parents to be able to move for their own/the child’s wellbeing, others felt that cross border movement without consent should be prevented:

“Preventing movement between Scotland and other parts of the UK should only be done in exceptional circumstances. There should not be the current practice which allows parents to be prevented from removing their child from a Sheriffdom almost immediately on petition of the other party. There is too much focus upon parental rights in this part of the law. Child autonomy does not feature until too late in the process.” (Individual)

“The removal of children from their habitually residential area needs to be dealt with swiftly and cannot be allowed without full agreement by both parents. Speed is key when bringing these matters to court to minimise the disruption to children.” (Individual)

Suggested Amendments to Section 41

- 6.3.8 One domestic abuse support service questioned whether section 41 provision of one year is a reasonable amount of time before residency was changed. They felt that this was insufficient time for a parent to contest it, especially given what they perceived to be a lack of solicitors who can practice cross-jurisdiction.
- 6.3.9 One individual urged that section 41 of the 1986 Act should be revised in line with recent UK Supreme Court case law on habitual residence (e.g. In re R [2015] UKSC 35) and suggested that clarity should be provided on the (non-)application of Brussels II bis pre- and post-Brexit.

No Further Steps Needed

- 6.3.10 Among both organisations and individuals who felt that no further steps were needed, the main views were that the current legislation was already satisfactory/worked well, that the proposed guidance would be sufficient to help clarify things further for practitioners, and that any significant changes to the 1986 Act would require wider consultation across the UK. Some did suggest that the legislation may need to be reconsidered in the future as political contexts changed:

“The current legislation makes sufficient provision but may require to be considered in the context of potential Brexit implications on definitions for example of domicile.” (Legal Profession)

“Jurisdiction is a well-established principle and I agree that section 41 does not require to be amended, however a guidance note is something to be welcomed.” (Individual)

- 6.3.11 Finally, a small number of individuals stressed that, while the guidance was welcomed, and they saw no need to change the legislation, it was essential that, going forward, the legislation was applied rigorously and fairly in practice.

7 Parentage

7.1.1 Part 6 of the consultation sought views on parentage. Specifically, sections 5(1)(a) and 5(1)(b) of the Law Reform (Parent and Child)(Scotland) Act 1986 currently set out that a husband of a woman is presumed to be the father of her child if they were married at any time between conception and birth or, where this does not apply, the child’s parentage has been registered as such under either section 13 or section 44 of the Registration of Births, Deaths and Marriages (Scotland) Act 1965.

7.2 Husband of a Mother is the Father of her Child

7.2.1 While not having caused any substantive problems historically, the presumption that the husband of a mother is the father of her child has been questioned by some as being old-fashioned in the context of changing family structures and relationships. Statistics show that most children in Scotland are now born outside of marriage. Views were sought, therefore, on whether this presumption should be retained.

Q14. Should the presumption that the husband of a mother is the father of her child be retained in Scots law?

	Number	Percentage
Yes	83	33%
No	80	31%
No response	91	36%
Total	254	100%

7.2.2 This question attracted an equal split between those who agreed that it should be retained, those who disagreed and those who provided no response (around a third of respondents in all cases).

Support for the Presumption

7.2.3 The main reasons given in support (by both individuals and organisations) were that the existing provision was unproblematic, that it would continue to protect fathers in gaining PRRs (thus avoiding disputes which may occur otherwise), and that the presumption is rebuttable, meaning there was always scope for decisions to be contested if necessary:

“There does not appear to be any pressing need to change this. It is a fair presumption that if the mother of a child was married, that the husband is the father. There is legislation in place which allows this to be rebutted should another party believe they are the father.” (Individual)

7.2.4 Some indicated that more problems/disputes may be triggered by its removal than by its continued operation. Several also stressed that removing the presumption may further reduce the responsibilities and rights of a father and that this should be avoided. Indeed, some wanted to see greater safeguarding of responsibilities and rights for unmarried fathers.

7.2.5 Others supported retention on the basis that it afforded clarity around inheritance and some offered support on the basis that alternatives, such as DNA testing, were less appealing, too intrusive and often an unnecessary means of attributing parentage. Some considered that the assumption, at present, was accepted as being reasonable:

*“It would be perverse if it were necessary to establish parentage via a DNA test before a husband was presumed to be a child's father.”
(Individual)*

7.2.6 Some who agreed with retaining the presumption did make suggestions that it could be altered to reflect civil partnerships (although it was recognised that this may be covered by other legislation), long-term non-married partners, and to better reflect how modern families are constituted.

7.2.7 Some also highlighted that, although one of the justifications for dropping the presumption may be that most children are now born to unmarried mothers, there was still a large and almost equal number born within marriage:

“A substantial number of children are born to married parents. The presumption that the mother's husband is the father is generally helpful. We are not aware of any major problems arising as a result of the presumption and would favour retaining it.” (Legal Profession)

7.2.8 Removing it for being ‘old fashioned’, therefore, was not seen as a compelling enough argument and one individual highlighted that they were not aware of any other jurisdictions who had changed similar presumptions as a result of changing familial structures over time.

7.2.9 Indeed, some stressed that retaining the presumption was important for ensuring that the strongest family units were in place:

“The present consequence of the presumption is that married fathers will automatically have parental rights and responsibilities. This is appropriate given that it serves to encourage fathers to have active and possibly equal roles in the child's life alongside the mother. We also feel that removing the presumption would undermine marriage and potentially create division and disharmony, while serving no real purpose. If the wife, or husband, believed that the husband was not the father, steps could be taken to confirm parentage, and, if it was established that the husband was not the father, appropriate steps could be taken. As this would happen in relatively few cases, removing the presumption would be a disproportionate solution as it would affect all children born into marriage, rather than the relevant few.” (Legal Profession)

7.2.10 Despite this, some also stressed that they felt children had a right to know who their biological father was, regardless of any formal parentage decisions. This need not influence daily living arrangements but would be in the child's best interests in the long term, it was felt.

Removal of the Presumption

7.2.11 Indeed, among those who felt that the presumption should be removed, one of the main reasons given (mainly by individuals) was that DNA testing was a more reliable and fool proof way to determine parentage. It was felt that this should win over any other parentage definition mechanisms, i.e. *"the father should be the biological parent."* (Individual). Others (both individuals and organisations) agreed that children had a right to know who their biological father was and *vice versa*:

"Ultimately children have the right to know if a person is or not their birth father and fathers have the right to know if a child is their biological child or not." (Individual)

"Children deserve to know who their father actually is, not just who is presumed to be." (Legal Profession)

7.2.12 Some commented that married parents have the option of joint registration of the birth under section 5(1)b and that this, therefore, seemed to negate the need for the presumption based on marriage. Removing the presumption was also important, it was felt, in cases of rape and domestic abuse in marriage, and, in such cases, the joint registration of birth may be a more reliable indicator of parental wishes:

"The presumption that the husband of a mother is the father of her child should not be retained in Scots law. This is no longer in-keeping with social realities that the majority of children are now born out of marriage. The presumption also does not take account of rape and domestic abuse in marriage, nor does it take into consideration separation. Parentage should be acknowledged when registering the birth and not through a presumption in law." (Domestic Abuse Support Service)

7.2.13 That being said, several individuals felt that the ability of mothers to cite current partners on birth certificates, instead of the known biological father, was used inappropriately by some to prevent contact with the child or input to their lives by the biological father.

7.2.14 The other main reason given for removing the presumption was that it no longer reflected the diversity and complexity of different family arrangements, and so was indeed seen as 'old-fashioned':

"Society has changed drastically since the original law was introduced, and families are far more complex these days. The law should reflect this." (Individual)

“For consistency and present reflection of family dynamics today, need to use more gender-neutral terms to ensure the same parental rights and responsibilities are understood in the statement and afforded to same-sex couples with children...Whoever attended the registration of a child's birth as first and second parent should be given full parental rights and responsibilities and seen as the registered parents.” (LGBT Organisation)

- 7.2.15 One organisation specifically highlighted that the presumption currently presents particular challenges for unmarried same-sex couples, or those looking to conceive through surrogacy:

“For unmarried female couples to be jointly recognised as parents, their child must be conceived through a licensed UK fertility clinic with both parents named on the paperwork, and they must then jointly register the birth. If the child is conceived through an informal surrogacy arrangement, or in a previous relationship, then the second female parent needs to apply for a parental order to be considered a legal parent. This can only take place after the birth of the child, and therefore means the second parent will not be named on the birth certificate. The complexity of these processes can be difficult to follow, and can be distressing for expectant parents, particularly where couples are unaware of the law prior to conception.” (LGBT Organisation)

- 7.2.16 The same organisation suggested that all parents should have the same access to parental rights, regardless of their gender or marital status.

- 7.2.17 Another organisation also expressed that they were in favour of a single system for the registration of all births, based on that currently in operation for unmarried heterosexual parents. They felt that this would be practically beneficial for professionals working to support children and families:

“This would remove potential discrimination against children depending on the relationships status or sexuality of their parents. Whilst any change would only apply to children registered from the time of introduction, it would ultimately result in it being much easier for service providers such as schools and the health service to understand who has PRRs, which at present can cause some confusion.” (Children’s Organisation)

- 7.2.18 Relying more on the registration of births as a system of determining parentage would also help to remove or reduce barriers faced by some professionals around things such as information sharing and who should/should not be notified of matters relating to the child:

“We question the fairness of the current law which results in the potential sharing of information with men who are not the father of the child, along with all potential personal information pertaining to their previous partner.” (Local Authority)

- 7.2.19 Several individuals said that they disagreed on the basis that nothing should ever be ‘presumed’ in the light of current social diversity in family life (and

took exception to the use of the notion of ‘presumption’). One children’s organisation stressed that they felt the core consideration in any presumption about ‘fatherhood’ must be the relationship the father has with the child, and with the mother of the child, and whether he is fulfilling his parental responsibilities. A similar sentiment was also expressed by some individuals, i.e. *“Being a father has nothing to do with marriage.”* (Individual)

7.2.20 Finally, on a practical note, one public body noted that there may be a need for the Scottish Government to consider any increase in caseloads that may result from removing the presumption, and which may impact on public bodies, in particular SCTS.

7.3 Compulsory DNA Testing in Parentage Disputes

7.3.1 At present, a person may apply to either the Court of Session or the Sheriff Court for a declarator of parentage or non-parentage which, in turn, may be used to seek PRRs.

7.3.2 The consultation sought views on whether DNA testing should be compulsory in parentage disputes if the court deemed it was in the best interests of the child.

Q15. Should DNA testing be compulsory in parentage disputes?
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	Number	Percentage
Yes	117	46%
No	47	19%
No response	90	35%
Total	254	100%

7.3.3 Nearly half (46%) of all respondents agreed that DNA testing should be compulsory in parentage disputes. A fifth (19%) disagreed and just over a third (35%) did not answer the question.

Support for Compulsory DNA Testing

7.3.4 For those who supported the proposal, most simply stressed that this form of testing was necessary for ensuring there was no doubt about parentage, that this was the quickest, simplest and most cost-effective way of proving parentage, and that children deserved to know conclusively who their parents were:

“DNA testing is a quick and relatively inexpensive way to resolve parentage disputes. Separate to litigating parents, a child has a right to know who its parents are.” (Legal Profession)

- 7.3.5 In addition to providing certainty to children around their family history, several respondents commented that knowing one's genetic history was important for understanding or predicting ill-health in the future, or being able to seek family support where organ donation may be required, etc.
- 7.3.6 Views were expressed by individuals that compulsory testing could lead to a reduction in dispute cases remaining in court (which can waste time) and that it could reduce the burden placed on some men who unwittingly pay child support benefits for a child who is not their own. It may also prevent some men from making emotional investments into relationships with a child who was proven in the long term not to be their own (recognising that some fathers may still wish to have that relationship, regardless of biological parentage being proved/disproved).
- 7.3.7 Two individuals specifically expressed that testing should occur automatically at birth and the results recorded on birth certificates, to remove any ambiguity in future disputes. Several respondents commented that DNA testing to inform what was recorded on birth certificates may also reduce what they perceived to be an inequity or imbalance of power currently available to mothers in registering births:

“It would also remove this idea in society that the mother has the power to determine paternity simply by failing to register the father on the birth certificate.” (Individual)

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

- 7.3.8 While some who disagreed (discussed below) suggested that the proposal was invasive and contrary to human rights, some who supported it indicated that providing certainty of the child should supersede any such contentions:

“Keeping the child at the centre, we believe every child has a right to know about their parentage. Family background is crucial to the emotional and mental wellbeing of children and informs an important part of their life story work.” (Local Authority)

- 7.3.9 Indeed, several highlighted that they believed mandatory testing served a much wider remit than practically determining PRRs, and was important at an emotional and social level:

“Parentage doesn't equal PRRs, it is only the biological affirmation of a bond. Just as much as this is undeniable for a mother, it should be undeniable (through DNA testing) for a father, as it is in the best interest of the child to know his or her biological roots (for emotional reasons, but also for, for example, medical reasons). I still would like to hear from a child that simply did not wish to know where he came from, rather than a

child that knows but simply doesn't want to act upon that information. I doubt they exist.” (Individual)

- 7.3.10 Other comments (made by just one or two respondents each) included that mandatory testing of all children (not only those involved in disputes) would remove the need for discretion on the part of Sheriffs, that mandatory testing was already in force in other EU jurisdictions, and that parents should meet the costs of testing.
- 7.3.11 It is important to note that, among those who supported mandatory testing some caveats were put forward. These included concerns that adequate provisions must be in place for children with additional support needs to help them understand the implications of consent/non-consent, that children and young people would need to be supported throughout the process, including support after parentage has been proven to support those who previously understood another man to be their father, and that consideration would need to be given to cases where children were born from abuse/non-consensual sexual interactions. In such cases, careful consideration would need to be given to use of compulsion:

“Making DNA testing would, on the one hand, be desirable in establishing parentage. On the other hand, there would need to be some caveats around why it might, on occasion, not be desirable, and should not be granted. The consent of children and young people should continue to be necessary.” (Family Support Organisation)

- 7.3.12 One individual also urged that it was always important to consider the child's views if they were of sufficient age and maturity to provide a view. It was felt that, if a child deemed by a Sheriff to be able to express a view refused to undergo a DNA test, the child should not be forced to do so.

No Compulsory DNA Testing

- 7.3.13 Among those who did not agree with mandatory testing in parentage disputes, the main views expressed (by both individuals and organisations) were that no child should be forced to give a sample (as it was an infringement of civil liberties and human rights), that children should always be able to give truly informed consent, that it could be traumatic for children, and that it would be difficult to implement in practice. Another main concern was that parenting/parentage should not be defined in biological terms only.
- 7.3.14 Mandatory DNA testing would do nothing to enhance relationships, it was felt, and could simply add to or complicate disputes further. Similarly, some who did not answer the closed component of this question suggested that the assumed parent of a child may be the person who has the child's best interests at heart, and the requirement to conduct DNA testing which may disprove their parentage could unnecessarily undermine that relationship.
- 7.3.15 Some particular concerns were raised (mainly by organisations) around the impact of testing on children's emotional, psychological and mental health

and the need for appropriate support to be in place for children made subject to tests. The question and proposition, as worded, did not sufficiently consider cases where a child may have different wishes from their parent around taking/not-taking a test, or set out how child consent would be factored into decisions:

“We believe that the consent of a capable child should be sought in the event of potential DNA testing... We understand that at present, the written authority of any adult being tested is a strict pre-requisite and that it is a criminal offence to take samples without consent. As such, we would question why a child with capacity and support to make that decision, should not be offered the same protections.” (Children’s Organisation)

“We also cannot safely assume the child would always be a baby and need to be mindful of the potential trauma. If the mother refuses, then there should be a mechanism by which the child is able (if they so wish), when they are of sufficient ability, to make an informed decision with support as to whether they would want to undertake DNA testing. Even with the less invasive techniques, the implications of such testing are significant and potentially traumatic.” (Local Authority)

7.3.16 Many felt that DNA testing should be available, on application, rather than routinely and should only be used in such cases where it was felt it was truly in the child’s best interests:

“DNA testing should be an option that can be used in certain circumstances rather than compulsory, using professional judgement as to whether the best interests of the child require such a test.” (Local Authority)

“The court should be able to order DNA testing in suitable cases, but testing should not be automatically mandatory in all cases.” (Individual)

7.3.17 Indeed, several respondents commented that any decisions around DNA testing should be informed predominantly by the best interests of the child in each case⁵. A few were concerned that forcing children to take DNA tests could breach their rights under Article 8 of the ECHR:

“Regardless of which approach is taken, the child’s best interests must be the paramount consideration in the court’s decision, so it is concerning that the consultation suggests that a child could be subject to forced DNA testing and that children be forced to provide “non-invasive mouth swab” samples. To do so cannot be considered to be looking after the welfare of the child and their best interests.” (Domestic Abuse Support Service)

⁵ Some respondents expressed disappointment that reference to the child’s best interests was not reflected more clearly in this consultation question and others questioned the relevance and appropriateness of this question within the consultation

7.3.18 Several organisations and individuals felt that Sheriffs were best placed to decide when testing was required in the case of disputing parents. As such, they felt that the current system was more satisfactory than mandatory testing. Several others commented that they agreed with the fundamental principle of civil procedure (where the case is won or lost in any event on the balance of probabilities) that a party should not: (a) be compelled to produce evidence that benefits their opponent; and (b) be subject to the physical intrusion of having a DNA sample taken against their wishes:

“Where one party is refusing to allow consent for DNA testing and that test is required in order for further decisions to be made in the child’s best interest then it should be open to the Court to require the test... However, this should be a case-by-case decision for the Court, not a compulsory decision in every case.” (Public Body)

“Compulsory DNA testing... would be a highly damaging step to take. The existence of the presumption in s.70 of the 1990 Act provides appropriate protection where consent for DNA testing is not given, without giving the state the power to override an individual’s refusal (either personally or on behalf of a child).” (Individual)

7.3.19 Leaving open the option for courts to reject a request for DNA testing was seen as being particularly important by some, especially in cases where children had been born from violence or abuse:

“...the court should use the welfare test to support its discretion to refuse to order a DNA test on the child, on the grounds that it would not be in the child’s best interests for a particular man to be permitted to establish paternity (and gain the responsibilities and rights that would follow if he could re-register the birth).” (Domestic Abuse Support Service)

7.3.20 More generally, some comments were again made regarding a perceived imbalance of power between mothers and fathers in respect of recording parentage. It was suggested that unmarried fathers require the consent, cooperation and support of mothers to be named on birth certificates, while the mother can have the father registered (and thereby conferring parental responsibilities and rights) without their knowledge or consent. They noted that this had far reaching implications, particularly in adoption cases *“where the threshold test to dispense with consent applies only to a parent with parental rights”*. (Legal Profession)

7.3.21 Overall, there was support that, in deciding whether to require a DNA test, the court should weigh up the potential risks to children, children’s rights to information and wishes about their parenting, and parents’ rights around parentage. Making DNA testing mandatory in all dispute cases was, however, seen as disproportionate and unnecessary by several respondents. Among those who agreed and disagreed with compulsory DNA testing there was a shared view that any decisions around testing always needed to be made in the best interests of the child.

8 Parental Responsibilities and Rights

- 8.1.1 The consultation sought views on a number of topics related to who should have Parental Responsibilities and Rights (PRRs), the terminology used, whether children benefit from both parents being involved in their upbringing, and the role of non-resident parents.
- 8.1.2 The main consultation asked a range of different questions, while the young persons' survey also included a few questions with relevance to these topics. Where questions or responses relate to the young persons' survey, this has been highlighted in the relevant sections below.

8.2 Step Parents' Parental Responsibilities and Rights

- 8.2.1 The main consultation document sought views on whether to introduce a step parents' PRR agreement so that step parents could obtain PRRs without having to go to court. Should this agreement be established, it was suggested that it could be registered in the Books of Council and Session (for a fee) operated by Registers of Scotland.
- 8.2.2 It was highlighted that such an arrangement had been consulted on previously (in 2004), but due to the serious reservations expressed about how to safeguard children's views and interests, this was not taken forward.

Q16. Should a step parents' parental responsibilities and rights agreement be established so that step parents could obtain PRRs without having to go to court?

	Number	Percentage
Yes	61	24%
No	111	44%
No response	82	32%
Total	254	100%

- 8.2.3 Compared to the consultation results from 2004 where 54% of respondents were in favour of such an agreement, only 24% of respondents in the current consultation felt that such an agreement should be established, while 44% were against this. The remaining 32% did not provide a response.

Reasons Not to Provide Step Parent PRR Agreements/Caveats for Support

- 8.2.4 Several individuals felt that PRRs should be for the biological parents only:

“Only a biological parent should have PRR. This ensures that the full rights of the biological parent cannot be eroded or removed.” (Individual)

8.2.5 More specifically, it was suggested (by both individuals and organisations) that a step parent PRR agreement could potentially create confusion and dilute the effectiveness of PRRs. One individual and one organisation suggested that the proposal would make it easier for step parents to obtain PRRs than is currently possible for some biological/non-resident parents. A few others were concerned that the PRRs of those living with the child may become more important than those of the non-resident parent. It was also highlighted by a few individuals and organisations that, where a parent has many new partners they could all be provided with PRRs, and without a limit on how many PRRs could relate to a child at any one time this risked many individuals holding PRRs for a child, even when some will no longer have any contact with that child. As such, it was suggested that this risked turning the system into “a farce”. Further, it was felt that such an agreement could create more conflict and disagreement between the parents (or those with PRRs), and also provide scope for one parent to have greater control, manipulate situations and risked it being used as a tool to push a parent out of a child’s life:

“Giving a third adult greater rights in respect of a child increases the risk of conflicted views between those adults... one parent may push a new partner to get PRR with a view to thwarting or overruling the future choices of the other parent of the child.” (Individual)

“This could lead to multiple step parents having PRRs in respect of a particular child which in turn, could lead to more dispute and litigation.” (Local Authority)

8.2.6 It was felt that the proposal was not child-focused, that the new system would not take account of the views of the child, and that additional PRRs could be conferred on individuals when it would otherwise not be considered as in the best interests of the child. It was felt that such a change was focused primarily on the adults involved rather than on the child, with several commenting that this ‘commodified’ the child. Those generally in favour of step parent PRR agreements also felt that there needed to be some way to take the child’s views into account and/or to review the situation on a case-by-case basis:

“A step parent agreement may not take into full consideration the child's best interests and views, as it is likely in many cases to mirror what the resident parent and step parent want rather than the child.” (Individual)

“In order to obtain PRRs without the need to go to court the rights of children and their views would be omitted from the application and would therefore be open to abuse.” (Domestic Abuse Support Service)

8.2.7 Such an agreement was also felt to be unnecessary. Many commented that step parents can already apply to a court where they desire PRRs. This was considered to be a more appropriate setting for such decisions, as the views, welfare and best interests of the child would be safeguarded. It was also

suggested by a few organisations that this formal legal process helped to ensure that all involved understood the legal implications and responsibilities involved in granting PRRs. In addition, it was highlighted that extensive provision already existed for step parents to have significant responsibilities for a step child, without the need for PRRs:

“Step parents’ roles differ in different families. If they want parental responsibilities it is appropriate that they go to court.” (Individual)

“For a step parent to have parental rights and responsibilities, they should thus have to go through the formal court process, and the views of the child should be carefully considered. We are also concerned that without this formal process, it may be possible for people not to understand the legal responsibilities associated with PRRs.” (Public Body)

8.2.8 A few individuals and organisations also suggested that step parent PRR agreements could create greater levels of conflict and result in more cases going to court should the parent and step parent separate/divorce, either due to the step parent seeking contact with the child or to have step parents PRRs removed. A few organisations and individuals also highlighted a lack of safeguards for domestic abuse, highlighting that this could be used as a tool by perpetrators to gain and retain control over their victim and their children.

8.2.9 Many organisations and individuals (both for and against the proposal) also felt that greater clarity was required over the definition of a step parent.

Support for a Step Parents PRR Agreement

8.2.10 Both individuals and organisations who agreed that such an agreement was suitable typically acknowledged that children and step parents often have strong relationships/bonds, that step parents are generally invested in the child’s welfare/care, and that they can often be more involved in the upbringing of a child than a biological parent. Several also suggested that step parents were often performing the role of a parent and so providing them with PRRs should be made easier and should not require court procedures. A few also highlighted that society and family norms has changed a lot and so procedures needed to be updated to reflect this:

“Society has changed much over the last 25 years, step parents are now a common and important part of family life. A step parent who is loving, caring and compassionate in helping a child enter the adulthood should not have to go to court to prove this.” (Individual)

8.2.11 A few individuals felt that such an approach would be more convenient and cheaper for the parties involved, and would help to take the pressure off the court system. However, a few organisations and individuals suggested that both biological parents (or those with existing PRRs) should have to give consent before PRRs could be conferred via such an agreement.

Young People’s Views Regarding Step Parent PRR Agreements

- 8.2.12 The young persons’ survey also asked respondents whether step parents should be able to have responsibility for a child without going to a judge by signing a document with everyone else who already has PRRs for the child.

YP10. Should step parents be able to have responsibility for a child without going to a judge by signing a document with everyone else who already has responsibilities and rights for the child?

	Number	Percentage
Yes	81	27%
No	84	28%
Don’t know	37	13%
No response	93	32%
Total	295	100%

- 8.2.13 Responses from young people were more evenly split between those who said ‘yes’ (27%) and those who said ‘no’ (28%) compared to respondents in the main consultation. A further 13% of young people replied ‘don’t know’ and 32% did not provide a response.

- 8.2.14 Again, those who supported this method indicated that step parents can be very important in a child’s life, and are sometimes more stable/a better influence than the biological parent(s). It was felt that, where they are involved in caring for a child, they will be given responsibilities concerning the child and therefore they should be provided with the necessary rights to support this. Respondents therefore felt, that provided everyone agreed, there was little need to involve a judge:

“The minute a step parent becomes one of the children’s ‘parents’ they then have the responsibility to look after that child therefore they should have the rights too.” (Young Person, Age 13-16)

“Step parents can be just as/more important and formative as parents. If everyone agrees responsibility should be able to be given without involving judge.” (Young Person, Age 19-25)

- 8.2.15 Others caveated their support, suggesting it would depend on the situation, the step parent and their relationship with the child, and whether the child consented or not:

“It depends on the situation, not all family’s circumstances are the same.” (Young Person, Age 13-16)

8.2.16 Several disagreed with the suggested method as they felt that any agreement and conferring of PRRs to step parents should be more robust, official and/or legally binding. One respondent also suggested that there must be a legal overview of the arrangement as it impacts on consent:

“Needs to be legal to be enforced.” (Young Person, Age Under 8)

“There should be more checks done than simply asking a group of people to sign a form...” (Young Person, Age 13-16)

8.2.17 Other young people disagreed with the suggestion as they felt that the only people who should retain PRRs were the biological parents (similar to views expressed by adults). A few respondents were concerned that this may result in rights being taken away from a biological parent or that one party may feel coerced into signing the form. Risks were also highlighted by a few young respondents that step parents may be abusive or unsuitable as parents.

8.3 PRR Terminology in the 1995 Act

8.3.1 The main consultation document outlined the responsibilities and rights that parents have, and highlighted that a person has parental rights to enable them to fulfil their parental responsibilities. The consultation sought views on whether to remove the term “rights” and just refer to “responsibilities”, which would be more in line with the terminology used in England and Wales, and in the Brussels IIa Regulation.

8.3.2 The consultation also identified that the 1995 Act uses the terms “contact” and “residence” to describe two of the types of orders that a court may make, but that the terms could be seen to suggest that one parent has a better position in relation to a child than the other. Therefore, the consultation also sought views on whether to replace the terms “contact” and “residence”, perhaps for “child’s order.”

8.3.3 Responses to each of these proposals are outlined below.

Parental Rights

Q17. Should the term “parental rights” be removed from the 1995 Act?

	Number	Percentage
Yes	42	17%
No	128	50%
No response	84	33%
Total	254	100%

- 8.3.4 Half (50%) of all respondents felt that the term “parental rights” should not be removed from the 1995 Act, while 17% felt it should. The remaining third (33%) did not provide a response. Only nine organisations agreed that the term should be removed, with the remaining 33 respondents being individuals.

Reasons to Retain the Term ‘Parental Rights’

- 8.3.5 It was felt that parents should have, and indeed did have rights, in particular the right to a family life as outlined in Article 8 of the ECHR was cited. It was felt that parents should have the right to bring up or be involved in the upbringing of their child, with organisations stressing the importance of parents being supported to do this:

“A child, like both parents, have the rights to each other on, not only the safeguarding and raising the child to adulthood, but also gives the parents the right to be there equally to raise that child. If changed to responsibility then it will weaken the rights for the child to be raised by both parents. A parent who is in dispute with the other parent will also use the terminology as a weapon to remove responsibility away from the other parent.”
(Individual)

“...we would be concerned that this could be perceived as parents losing rights. Instead, we see child rights and PRRs as being complementary rather than in conflict and are clear that families should be supported to ensure they can fulfil their children's rights.” (Children’s Organisation)

- 8.3.6 Several (both individuals and organisations) felt that it was important to stress that parents have both responsibilities and rights, and that these reinforce each other, that you cannot have rights without fulfilling certain responsibilities:

“The reference to "rights" and correlative "responsibilities" is appropriate. One without the other would be wrong, but it is clear that with rights come responsibilities.” (Individual)

“Section 2 of the 1995 Act already provides that a parent has parental rights to enable him or her to fulfil parental responsibilities. The two are complementary to one another. They co-exist, but are discrete and the recognition of that is proper.” (Legal Profession)

- 8.3.7 It was also suggested that parents should have equal rights, but was often felt that currently the system favours the resident parent. Several individuals also suggested that the term PRR gave non-resident parents some legitimacy when liaising with authorities about their child:

“There are already limited rights that a father can exercise. Removing this will make it even worse for a father to perform his duties.” (Individual)

“...the term parental rights should remain as it is one of the few things a non-resident parent can quote when speaking with organisations that are bias[ed] against non-resident parents.” (Individual)

- 8.3.8 Similarly, several organisations also stressed the importance of the term “parental rights” when parents need to liaise with statutory services and, in particular, with social work (although health and education were also mentioned, albeit less frequently). Further, it was considered that such a change could loosen local authority responsibility to provide supported parenting services to parents with learning disabilities. As such, it was felt appropriate/necessary to retain the terminology to assist parents:

“The emphasis of the word ‘rights’ is a clear reminder to services that parents should be supported to exercise their responsibilities and rights on important decisions about their children.” (Local Authority)

“...the term ‘rights’ is far too critical for parents with learning disabilities in establishing their role as parental caregivers in child protection procedures, which evidence suggests do not often operate in their favour.” (Other Organisation)

- 8.3.9 Many also saw no need for a change that was simply related to semantics. They felt that the current wording was clear and effective, and that the cost/resources involved in such a change would be disproportionate to the benefits (if any) that would be gained. Further, several respondents (both individuals and organisations) felt that removing “parental rights” would not be consistent with other international instruments, including the 1980 Hague Convention on the Civil Aspects of International Child Abduction, Article 5; the 1995 Hague Convention on Child Protection, Article 3(b); the Brussels II bis, Article 2.7; the UNCRC, and the UN Convention on the Rights of Disabled People Article 18. Similarly, it was highlighted that other parts of Scottish legislation were framed around the 1995 Act, such as permanence orders in the Adoption and Children (Scotland) Act 2007, and would need to be addressed if any changes were made:

“Sections 1 and 2 of 1995 Act are admirably clear as to the relationship between rights and responsibilities and I see no reason for change.” (Individual)

“The change would require extensive change to other primary and secondary legislation; if such a change is only semantic, there is no discernible benefit in going to such lengths.” (Local Authority)

- 8.3.10 It was suggested by several individuals and organisations that better education and awareness raising was required rather than changing the terminology used in the legislation. Several respondents also suggested that greater consistency in the use of the terminology may be helpful, in particular ensuring the order of ‘parental responsibilities and rights’ is maintained to reinforce the importance of a parent’s responsibilities over their rights.

Reasons to Remove the Term ‘Parental Rights’

- 8.3.11 Those who agreed that the term should be removed typically gave one of two arguments for this. The first was that the terminology implied that the parents have rights, which was not felt to be the true meaning/interpretation of the Act. As such, it was felt that removing the term would provide clarity that parents have responsibilities to their children rather than rights to/over them:

“...the retention of the language of parental rights gives a message to parents that they have "rights". The truth is that they do not... Changing the terminology would harmonise the legal reality and the social understanding of what the law is saying.” (Individual)

“Parents can often be caught up in their own rights and neglect to focus on the responsibilities they have as a parent therefore the term rights should be dropped from the act.” (Local Authority)

- 8.3.12 The second argument suggested that parents should not have “rights” over the child, but rather that the child’s welfare and best interests should be paramount. It was felt that the parent’s right to see the child often overshadowed the best interests of the child:

“The change emphasises responsibility for children rather than rights over them and would make parental disputes focus on who is responsible to provide an upbringing, rather than adults using their “rights” to fuel their own arguments.” (Local Authority)

“The key difficulties with the current system stem from the adversarial nature of these cases. Too often parental rights override those of children. We support efforts to strengthen the rights of children and provision for considering children’s best interests as paramount.” (Domestic Abuse Support Service)

- 8.3.13 A few also agreed that the change would bring Scottish legislation into line with England and Wales.

Child’s Order

Q18. Should the terms “contact” and “residence” be replaced by a new term such as “child’s order”?

	Number	Percentage
Yes	84	33%
No	85	33.5%
No response	85	33.5%
Total	254	100%

- 8.3.14 Responses were mixed in relation to this proposed change, with one third each in favour of such a change, against, and not providing a response.

Reasons to Replace “Contact” and “Residence”

- 8.3.15 Many individuals and organisations who were supportive of replacing the terms “contact” and “residence” with “child’s order” felt that the current terminology inferred greater importance of rights on one parent over the other. They were keen that any changes provided greater equality. Some felt that the terms “contact” and “resident” versus “non-resident parent” often demeaned and undermined non-resident parents, inferred social judgements on their care/interest in their child, and perpetuated a hierarchy/sense of “winner” and “loser” in the outcome:

““Contact” is a particularly pathetic term, as if the “contact” parent is not expected to play any significant part in the child’s life.” (Individual)

“...parents who hold a residence order consider themselves to be in a stronger position than those who have a contact order only. It is seen in some situations as the “higher” order. Any shift that give equal weight to each parent’s role as parent would generally be beneficial.” (Public Body)

- 8.3.16 Indeed, it was stressed by several individuals that a greater emphasis needed to be given to shared care, with this being considered the default position (unless it was determined not to be in the best interests of the child):

“We need to move towards ‘shared parenting’, which does not have to mean a 50/50 split in time, but which should mean equal responsibilities and equal opportunities for parents to parent in the best interest of the child.” (Individual)

“Increasing shared care orders which come under neither heading so child’s order is non-judgmental and does not favour one parent (with residence) over another (with contact).” (Individual)

- 8.3.17 It was also felt that the “child’s order” terminology helped to place a greater emphasis on the child rather than the parents:

“Doing this may help encourage professionals and parents to keep the child at the centre of the court process.” (Individual)

“Renaming the term to Child’s order would help keep the child/young person as the primary focus and maintains the principles of GIRFEC.” (Local Authority)

- 8.3.18 A few respondents, however, highlighted that, should changes be made, it may be helpful/necessary to mirror this across children’s services, and in the Children’s Hearing System in particular, so that terminology is consistent across all settings.

8.3.19 While generally supportive of a change in terminology, several respondents suggested that “child’s order” was inappropriate/misleading and so felt that greater consultation (including with children themselves) was required around suitable replacements. Others suggested possible alternative terms, which included child arrangements order, shared residence order, parenting order, parenting plan order, parent’s agreement and responsibility order, family order, living arrangements, care arrangements and child’s best interest order.

Reasons for No Change

8.3.20 Individuals and organisations who were against such a change typically felt that the use of “contact” and “residence” was helpful as it described the nature of the order. It was felt that these were definitive and easily understood terms, with one individual suggesting that a “child’s order” would sound *“so much worse to a very upset parent”*. Some organisations also felt that the term “child’s order” lacked clarity, could be misleading, and could create confusion:

*“Contact and residence describes the order so leave it as it is.”
(Individual)*

“A Child’s Order is not clear - it could be confused with a Child’s Plan and also could be perceived as requiring a child to do something.” (Family Support Organisation)

8.3.21 As with the proposed change to “parental rights” above, many respondents again suggested that a change to “child’s order” was unnecessary and would make no real difference to attitudes or practice:

*“This is only playing with words and does not necessarily add to ones understanding of the concepts, especially for the child. Keep it simple!”
(Individual)*

“In practice, changing the statutory language is unlikely to resolve the animosity that can exist in these situations.” (Legal Profession)

8.3.22 Several also felt that the change would make no real difference to the rights and wellbeing of the child, and may indeed not be in their best interests. It was suggested that the change was designed to provide balance for the adults involved but could impact negatively on a child’s understanding of where they live and their sense of belonging:

*“The present advantage of a residence order is that it clearly demarks the child’s primary residence. Existing research suggests that children who have experience of shared care arrangements would prefer the sense that they have a fixed home address rather than of shifting sands. A ‘child arrangements order’ or similar may appease the adults’ need to feel they are on an equal footing, but is not clear how it benefits the child.”
(Individual)*

“...any changes to terminology to the types of order a court may make should be rooted in the child’s best interests, not parents’ concerns about position.” (Domestic Abuse Support Service)

8.4 Fathers’ Parental Responsibilities and Rights

8.4.1 Both the main consultation document and the young persons’ survey sought views on whether all fathers should automatically be granted PRRs. The main consultation asked whether all fathers should be granted PRRs, while the young persons’ survey asked whether every dad should automatically have parental responsibilities and rights for their child.

Q19. Should all fathers be granted PRRs?

	Number	Percentage
Yes	107	42%
No	74	29%
No response	73	29%
Total	254	100%

8.4.2 Just over two in five respondents (42%) who responded to the main consultation felt that all fathers should be granted PRRs, while 29% felt that they should not. A further 29% did not provide a response.

YP9. Do you think every dad should automatically have parental responsibilities and rights for their child?

	Number	Percentage
Yes	116	39%
No	67	23%
Don’t know	20	7%
No response	92	31%
Total	295	100%

8.4.3 Similarly, nearly two in five (39%) respondents to the young persons’ survey felt that every dad should be automatically granted PRRs, while nearly a quarter (23%) felt they should not. A further 7% did not know and 31% provided no response.

Fathers Should Have Automatic PRRs

8.4.4 Across both consultation formats, those who felt that every father should automatically have PRRs for their child often cited equality issues for men

and women, and that both parents were considered important. Several young people also felt that children needed a male role model. In particular, many felt that mothers and fathers should have equal parental responsibilities and rights, with young people often highlighting that both were responsible for the child's conception and therefore they should both be responsible for their care:

"Father's also created the child and unless they are a risk to the child, should have rights and responsibilities." (Young Person, Age 17-18)

"The system should encourage equal rights to both parents." (Individual)

"This would provide each biological parent with parity in relation to their status as a child's parent." (Legal Profession)

- 8.4.5 Again, respondents to both the main consultation and the young persons' survey suggested that fathers should be automatically given rights at the child's birth. These could be removed if it was deemed necessary at a later stage, (either due to abuse, incest or rape, or being entirely absent in the child's life), in the same way the system works for mothers. It was also highlighted that mothers could be 'unfit' parents and/or perpetrators of domestic abuse, and therefore it was considered highly unfair that all/innocent fathers should be "punished" due to the perception of risk created by a few when the same reasoning did not apply to mothers:

"Once a person becomes a dad, they should be trusted instantly to be a good one. It should be afterwards that a decision could be made to take away his rights for the child if it wasn't the best for the child." (Young Person, Age 8-12)

"PRRs should be legally presumed as it is for mothers, then if required in cases of abuse for example the court can remove these rights." (Individual)

"It is very discriminatory against all the very decent fathers out there [who] need to fight to see their children, and says nothing about the abusive mothers out there whom have these rights presumed." (Individual)

- 8.4.6 A few individuals and organisations in the main consultation also felt that the notion of automatic PRRs for mothers but not (unmarried) fathers was outdated:

"Time has changed a lot in the way fathers think about their priorities in how they raise a child since 1985. Fathers are and want to be a big part in a child's life and how that child is nurtured and raised. Fathers now look after a child as equally as a mother does. In days of equality why should one parent be treated differently from the other parent due to what gender they are." (Individual)

“Societal norms have changed and families where parents are unmarried are recognised as accepted and normal family structures.” (Children’s Organisation)

- 8.4.7 A few organisations also felt that the current court process in order to obtain PRRs was complex and varied across different courts. It was suggested that automatically granting PRRs would save on time and costs for both parties and the court, while also being more equitable (both in terms of mothers and fathers, but also between married and unmarried parents) and compatible with human and child rights. It was also felt that automatically granting PRRs would send a message to fathers that they have responsibilities to their child, regardless of their relationship with the mother.

Reasons Fathers Should Not Have Automatic PRRs

- 8.4.8 Respondents across both consultation methods who indicated ‘no’ (or ‘don’t know’ in the young persons’ survey) typically felt that this should not be an automatic right for fathers, but rather, it should depend on the circumstances. It was suggested that absent fathers, and those who were considered unfit fathers (for reasons including being irresponsible, abusive, violent, etc.) or a danger to the child or mother should not be given PRRs. However, where a father was considered to be actively involved in their child’s life and have their best interests at heart it was felt that PRRs should be granted:

“Just because someone is a parent does not mean that they are fit to be one, if the parent is financially stable and responsible enough then yes they should be given parental responsibilities and rights, if not then they should be given a chance to prove that they can be to a legal official, if they can be responsible then they get parental rights and responsibilities if not then they don’t.” (Young Person, Age 13-16)

“I would like to believe that all fathers should have PRRs but unfortunately that is not always possible or in the best interest of the child. I think each individual case should be discussed and the decision made.” (Individual)

- 8.4.9 Most organisations (and one individual) also stated that the granting of PRRs on fathers should not be automatic, but rather should take account of the child’s best interests:

“It is only beneficial for PRRs to exist when it is in the best interests of the child - this should not be presumed.” (Individual)

“PRRs are for the benefit of the child, not the parent... The best interests of the child cannot be ascertained if PRRs are automatically granted.” (Domestic Abuse Support Service)

- 8.4.10 Some organisations and individuals felt that the current arrangements worked well, were suitable, and struck an appropriate balance between granting PRRs to fathers where appropriate, protecting vulnerable mothers,

and upholding the best interests of the child. It was suggested that the current system ensured most fathers were granted PRRs for their children, and that the small numbers of fathers not named on the birth certificate had the ability to pursue PRRs via court, therefore such a change was unnecessary. This method was considered preferable to forcing mothers who had been raped or subject to domestic abuse having to go to court to remove PRRs. Some also felt that providing automatic PRRs on all fathers would not necessarily result in more fathers being actively involved in a child's life, while it may create significant difficulties for the mother or delays in adoption or permanence proceedings.

- 8.4.11 Further, a few respondents noted that there would be practical difficulties related to automatically granting PRRs to all fathers. One respondent from the legal profession noted that a father would still have no legal paperwork proving his PRRs for the child, plus a disinterested father with PRRs could create difficulties for the mother and potentially generate the need for court action on the part of the mother each time they wished to go abroad on holiday. A local authority suggested this could create significant delays in adoption or permanence proceedings. One individual noted difficulties around who would identify the father and queried whether this would require compulsory DNA testing of babies in order to confirm paternity. It was felt that the practicalities of such a system required further consideration.
- 8.4.12 A few individuals felt that the question needed to be broader and also seek views on whether mothers should/should not have automatic PRRs, as it was felt they could also be irresponsible and not act in their child's best interest.
- 8.4.13 Overall, both those who were in favour of the proposal and those against it stressed that, in certain situations, it would not be appropriate for a father to assume parental responsibilities, e.g. sperm donors or in rape cases. Further, cases involving domestic abuse and other vulnerable mothers (such as those with learning disabilities) would also require specific provision.

8.5 Joint Birth Registration

- 8.5.1 The main consultation document also sought views on a number of issues related to joint birth registration.

Joint Birth Registration and PRRs – Backdating

- 8.5.2 The consultation outlined that, from May 2006 fathers obtained PRRs automatically when they jointly registered a child's birth with the mother, however, the provision was not made retrospective. Views were therefore sought on whether backdating PRRs to before this change should be allowed.

Q20. Should the law allowing a father to be given PRRs by jointly registering a birth with the mother be backdated to pre 2006?

	Number	Percentage
Yes	86	34%
No	88	35%
No response	80	31%
Total	254	100%

8.5.3 Views were largely split on this matter, with 34% in favour of backdating, 35% against, and 31% not providing a response. It should be noted, however, that among those who supported backdating, only 10 were organisations.

8.5.4 Again, for those that were supportive of backdating PRRs for fathers, equality was cited as the most common reason for support (by both individuals and organisations). This included equality between mothers and fathers, between fathers, and also between children born on different dates. Three respondents also highlighted that a father with two children born on different dates would not have the same PRRs for both children, while one described this as a barrier for parents in re-establishing contact with children born before the legislation change:

“Having two children but born either side of the date gives PR to one child, but not the other. Crazy.” (Individual)

“[We] often hear from unmarried fathers who have children born both before and after 4th May 2006. These children are currently being considered differently in law because of the lack of backdating.” (Family Support Organisation)

8.5.5 A few also felt that if this change was considered to be ‘right’ post-2006 then it was also right for fathers and children before this date. A few individuals could not understand why it had not happened before or when the change was first introduced in 2006. Similarly, professionals felt it had been an arbitrary date and so there was no reason not to backdate it:

“There will still be children affected by this. 2006 was essentially an arbitrary date and accordingly there does not appear to be any child welfare based reason why the law should not be backdated to pre 2006.” (Legal Profession)

8.5.6 However, many who were against backdating PRRs noted that the further change to legislation would likely take so long to come into effect that it would be unlikely to help very many people as the children would be close to turning 16 years old. As such, the passage of time meant that no change

was required. It was also suggested that children affected by this were already 12 years old and over, and were therefore old enough to form a view on this and be consulted on major decisions affecting them so it was not something that should happen automatically. In addition, it was suggested that fathers affected by this and who desired PRRs would most likely have already done something about this, and where they had not it was felt that automatically conferring PRRs could result in conflict within previously settled families. Further, it was highlighted that where PRRs had been sought and refused by a court, it would be inappropriate to automatically grant them now with no consideration of the child’s best interests:

“A change in the law resulting in automatic granting of PRR to all birth fathers could prompt hostile interference in settled families - including those in which a court has previously adjudicated. In some circumstances it could result in men automatically obtaining PRR in respect of a child they have limited or no involvement with.” (Individual)

8.5.7 Some also said there was a lack of compelling reasons to make the law retrospective. Further, it was suggested that this may confer PRRs on individuals that do not want them:

“It is inappropriate for parents who had registered the birth of their child on the basis of one set of legal consequences then to find that subsequent legislation had materially changed those legal consequences.” (Local Authority)

“This was deemed appropriate at the time and there is no significant reason to change that now.” (Family Support Organisation)

Making Joint Birth Registration Compulsory

8.5.8 As outlined in the consultation document, since 2006 one of the ways that an unmarried father can obtain PRRs is by jointly registering a child’s birth with the mother. The consultation sought views on whether joint birth registration should be compulsory, i.e. the person registering the birth would be obliged to name both parents.

Q21. Should joint birth registration be compulsory?

	Number	Percentage
Yes	94	37%
No	85	33%
No response	75	30%
Total	254	100%

8.5.9 Respondents were similarly split in their opinion regarding this proposal - 37% agreed that joint birth registration should be compulsory, while 33%

disagreed, and 30% did not provide a response. Of those that agreed, only 15 were organisations.

- 8.5.10 Similar to the responses to earlier questions, many respondents (both individuals and organisations) who agreed that joint birth registration should be compulsory felt that it was important for a child to know/have a link to both parents, and that it was important for both parents to have equal/shared responsibilities and rights. Several indicated that both parents had been required to conceive the child, and therefore both should be shown on the birth certificate:

“Every child has a right to his or her identity, however disturbing their antecedents are. Ensuring registration of both parents... reflects reality and protects the child's right to know where he or she came from.”
(Individual)

“Both parents matter and it would highlight the responsibility and commitment of both parents.” (Family Support Organisation)

- 8.5.11 A few individuals and organisations felt that this change could limit instances of mothers deliberately excluding the father's name when registering a child's birth, resulting in fewer fathers having to seek recognition via the court (thus saving both the father and courts time and expense, as well as the stress/emotional turmoil experienced by the father):

“This prevents a mother doing it behind the father's back deliberately so that he cannot get the appropriate rights.” (Individual)

“This would ostensibly remove the requirement for non-resident fathers/unmarried father to have to go to court (and all the time and money that costs) to get PRRs.” (Individual)

- 8.5.12 It was also suggested that such a change could help with compliance with article 7 of the UNCRC.

- 8.5.13 Several indicated that the exemptions outlined in the consultation document appeared adequate, while others specifically cited rape, incest, domestic abuse, and sexual deviance on the part of a parent as suitable reasons for exemption. Other legitimate reasons for the absence of the father at birth registrations were considered to include where they are serving in the armed forces or where the father may have died. However, one individual, while agreeing with the need for some exemptions, felt that exemption based on assumptions of the parent's suitability/worth was not acceptable. Similarly, another felt that a casual relationship was not a robust enough reason for fathers to be excluded:

“I would NOT make exceptions based on the unsuitability of the father, for example because of a history of domestic violence. The law should deal with domestic violence directly and effectively, and not simply punish violence in this way. In any case, being married is no guarantee of a

violence-free relationship. No exception should be made based on our assessment of the parents' worth. That is not the point. A parent is a parent whether they deserve to be or not.” (Individual)

“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 [as incest and rape].” (Family Support Organisation)

- 8.5.14 Those respondents who were against making joint birth registration compulsory gave a variety of reasons. It was suggested that it would not always be possible for both parents to attend registration appointments, and that the range of different circumstances which could warrant an exemption could make the legislation convoluted. Indeed, it was felt that a vast range of exceptions would be needed, not only for the father’s absence but also for the mother’s (e.g. where she may be ill or still in hospital). In addition, it was felt that the victims of incest and rape should not feel that they have to justify why no father’s name is being provided:

“The number of potential exemptions are wide and varied therefore would seem to out-weigh any advantage.” (Local Authority)

“I have serious concerns at a system which puts the onus on the mother to give reasons for why she is not registering a partner as the father - to justify herself through pointing to rape, incest, violence, etc.” (Individual)

- 8.5.15 Further, it was argued that the change had not been linked to the best interests of the child, and that such a requirement would provide PRRs in a blanket fashion to all fathers, including those who were unsuitable and/or a danger to the child or its mother. It was also felt that the descriptions of the exemptions were too strict to protect victims of rape and domestic abuse as it was noted that not all victims would have reported the incident, had a conviction, or be involved with social workers or medical practitioners:

“The consultation paper has not demonstrated how compulsory joint birth registration would be in children’s best interests, at a child population level or at an individual level.” (Family Support Organisation)

“For women who have experienced rape and/or domestic abuse compulsory joint birth registration undermines their right to safety and recovery from abuse.” (Domestic Abuse Support Service)

- 8.5.16 It was also suggested that, whilst promoting positive parenting relationships was to be encouraged, compulsory joint birth registration may not be the best way of achieving this. Similarly, there was a concern that, where several potential fathers exist, forcing a mother to name someone on the birth certificate could result in erroneous information being recorded:

“I think there would have been an incredible risk if the mother was forced to put a name down, that she would just have picked the one [potential father] that she liked best at the time.” (Individual)

“It would result in males claiming children which are not their own and people finding out at a later date that the person they thought was their father is in fact not.” (Local Authority)

8.5.17 Further, it was felt that, where both names are not being registered at the time of birth it was likely that there would be some form of dispute, and it was felt more appropriate for disputes to be dealt with by the court:

“The flaw with this approach is that it moves the decision in what could be a situation of conflict from the courts to an administrative process. It is better to leave disputes firmly with the courts so that decisions can be taken on the basis of the child’s welfare.” (Individual)

8.5.18 Some respondents (one generally supportive of the proposal and the others against) felt that it may be difficult to enforce compulsory joint birth registrations in practice. Indeed, two respondents highlighted that it would be easy for mothers to claim they did not know who the father was:

“Quite easy for mother to deny knowledge of who father actually is, which would undermine any proposed legislation.” (Individual)

“We foresee difficulties in enforcing compulsory registration which would significantly outweigh any benefits.” (Legal Profession)

Joint Registration of Births Overseas

8.5.19 The main consultation document also sought views on whether fathers who jointly register the birth of a child in a country where joint registration leads to PRRs should have their PRRs recognised in Scotland.

Q22. 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?

	Number	Percentage
Yes	140	55%
No	22	9%
No response	92	36%
Total	254	100%

8.5.20 In this case, over half of the respondents (55%) agreed that PRRs conferred in this way should be recognised in Scotland, while only 9% said they should not. A further 36% did not provide a response.

8.5.21 As in previous questions, a number of respondents supported this proposal as it was considered to provide greater equality. Most felt this was a logical “*common-sense*” approach which would treat people fairly and equally whether they were originally from Scotland or not. It was also highlighted that other legal provisions that occur overseas, such as marriage and divorce, are recognised in Scotland, and therefore there was no reason not to recognise PRRs in the same way:

“We cannot have different rights or responsibilities for different parents just because their child was not born in that country.” (Individual)

“We believe this recognition is reasonable and common-sense based on the parallel precedent that a marriage conducted in a different country would automatically be recognised in Scotland.” (Children’s Organisation)

8.5.22 Several respondents also felt that this approach would be in the best interests of the child.

8.5.23 One organisation indicated that parents relocating to the UK/Scotland already assume that their PRRs are still applicable, and highlighted that there is currently a lack of information altering them to the contrary:

“Most parents who relocate to the UK with their children assume that their PRRs move with them, and the reality only comes to light once problems arise and it is often too late to rectify the problem.” (Family Support Organisation)

8.5.24 Several individuals (and a few organisations) again suggested that all fathers should have PRRs granted automatically, and therefore joint birth registration (in any country) was a redundant point.

8.5.25 A few supportive individuals did caveat, however, that the PRRs that would apply once in Scotland should be those set down in Scottish law, which may not necessarily match those the father had enjoyed in the country of birth registration.

8.5.26 Of those who were against the proposal, several individuals felt that Scots law should prevail. It was considered too confusing to have different laws applying to different people, while one organisation suggested that managing such a system could involve significant levels of bureaucracy (although one organisation suggested this system may alleviate a layer of bureaucracy as fathers would no longer need to comply with a further process for recognition):

“We cannot have different laws for different people if you live in Scotland you abide by Scotland’s laws.” (Individual)

8.5.27 A few (individuals and organisations) were also concerned about differing legal standards and diverse cultures awarding rights to fathers that are not compatible with Scottish culture/law. In particular, one individual felt that

fathers should have to apply in Scotland in order to safeguard women and children “*who may have arrived from more repressive regimes*”, while one organisation was concerned about instances of forced marriage:

“Different legal standards can apply and may not be rigorous in other jurisdictions.” (Family Support Organisation)

- 8.5.28 Several organisations indicated that they agreed with the arguments set out in the consultation document, i.e. that it may not be straightforward in practical terms to find equivalents overseas to the procedures in Scotland for joint birth registration and to PRRs; that any list of countries laid down in regulations made by the Scottish Ministers would need to be reviewed from time to time to reflect any changes in procedures in law by overseas jurisdictions; that the number of fathers affected is likely to be low; and that consideration would need to be given as to whether any change could be retrospective i.e. cover children whose birth is registered before any regulations come into effect.
- 8.5.29 A few organisations, however, suggested that a system similar to Intercountry Adoption may be helpful, where PRRs are only recognised from a list of countries which are deemed to meet certain standards.
- 8.5.30 Two domestic abuse support services were similarly concerned about the implications of applying the system to jurisdictions where women’s rights are less progressive and are overpowered by the rights of fathers, or where joint registration is compulsory (which was not perceived to be appropriate), or where there are insufficient safeguards in place (e.g. where forged birth certificates may be easily obtained). It was felt that there was a risk of unsuitable fathers obtaining PRRs through a “*back door*” and therefore greater consideration of all the implications was needed.

8.6 Presumption that Children Benefit from Contact with Both Parents

- 8.6.1 Understanding whether a child benefits from, and should have contact with both parents was explored across both the main consultation document and the young persons’ survey.

Young Persons' Survey - Contact with Both Parents

YP4. Should a child have contact with both parents?

	Number	Percentage
Yes, always	51	17%
Yes, but only if it is good for the child	158	53%
No	11	4%
Don't know	2	1%
No response	73	25%
Total	295	100%

8.6.2 Most respondents to the young persons' survey felt that a child should have contact with both parents, however, a greater proportion felt this was only the case where it would be good for the child (53%). Only 11 respondents (4%) felt that children should not have contact with both parents.

8.6.3 Those who indicated that contact should always be allowed felt that it was important for children to know both parents, to have role models, and to enhance their childhood:

"It is important for kids to have a relationship with both of their parents as they deserve to know who made them and they deserve the chance to get to know them." (Young Person, Age 19-25)

"It's good to have a male and female role model." (Young Person, Age 13-16)

8.6.4 One respondent suggested that parents can lie about each other in order to stop contact, while two suggested that supervised contact could be provided in more risky situations.

8.6.5 For those who caveated contact to indicate it should only happen where it would be good for the child (as well as a few who said no to contact with both parents), typically it was felt that the safety of the child was paramount, and that, largely the choice should be the child's. They felt it was important that a child was never forced to have contact with someone they didn't want to or who they may be scared of:

"A child shouldn't be forced to have contact if they don't feel safe." (Young Person, Age 13-16)

"It has to be the child's choice to see or not, not one parent going against another." (Young Person, Age Undisclosed)

- 8.6.6 It was also suggested that contact should not be permitted (or should be monitored) where a parent may be abusive, violent, addicted to drugs or alcohol, or generally not a good influence and/or may be considered to be incapable or an unfit parent:

“Because you could have contact with a dad/mum that is bad.” (Young Person, Age 8-12)

“If one parent is dangerous or not fit to have a child, then it should only be one [parent they have contact with].” (Young Person, Age 13-16)

Legislation: Presumption of Benefit from Both Parents Being Involved

- 8.6.7 A similar question was also asked as part of the main consultation, around the presumption that a child may benefit from both parents being involved in their life.

Q23. Should there be a presumption in law that a child benefits from both parents being involved in their life?

	Number	Percentage
Yes	126	50%
No	70	27%
No response	58	23%
Total	254	100%

- 8.6.8 Half (50%) of the respondents to the main consultation document agreed that there should be a presumption in law that a child benefits from both parents being involved in their life. Over a quarter (27%) said there should not. The remaining 23% provided no response. This differed to the young persons’ survey, where only 17% of young people felt that contact with both parents should always be implemented.

- 8.6.9 Respondents who were supportive of such a presumption frequently cited the evidence or belief that a child typically benefits from having both parents in their life, with both parents seen to bring different skills, knowledge, experience, hobbies/activities, and extended family. It was felt that such a presumption was reasonable, fair, equitable, and more in keeping with modern family life. While some did acknowledge the difficulties associated with those who may present a risk it was felt unfair to penalise all (non-resident) parents. Further, respondents felt that the rebuttal presumption would continue to provide flexibility for Sheriffs to make orders which reflected the circumstances of individual cases, and for safeguards to be implemented when either (or both) parent presented a risk:

“You cannot discriminate against the majority of good fathers because of the issues with a minority.” (Individual)

“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.” (Family Support Organisation)

- 8.6.10 Again, several respondents cited equality issues between mothers and fathers, stressing fathers were just as important in a child’s life and can be equal care givers. Others felt it would help to limit the extent/prevalence of children being turned against a parent. It was felt that a bias existed within the system currently, favouring the mother/resident parent, and that this presumption could help to alter that mind-set. It was also suggested that such a presumption may result in cases being resolved more quickly and with less conflict (and without having to go to court as often), which was considered to be in the child’s best interests:

“Currently, there is a very strong bias amongst the courts, social workers and the police, that mothers are somehow inherently better parents. This is not true. Women and men are capable of exactly the same when it comes to children, however unfortunately mothers are now taking full advantage of the bias[ed] court system. Good, hard working, hands-on fathers are not having contact with their children as a result of court orders - even though they desperately want to see their children.” (Individual)

- 8.6.11 A few individuals appeared to assume that a presumption in law that a child benefits from both parents being involved in their life would therefore mean that shared (50/50) care of the child would be the starting point in any court hearings. Others, however, felt that this should not provide a presumption of equal time/care arrangements but rather focus on joint and shared responsibility, and that it would be important to stress this to avoid setting unrealistic expectations.

- 8.6.12 Those against such a presumption in law were concerned that this would encourage courts to make decisions which reflect that position rather than starting with an unbiased view and fully considering what would be in the best interests of the child. Indeed, many respondents described situations where contact would not be in the child’s best interests, e.g. where there is abuse, drug or alcohol addiction, negative impacts on the child’s mental health, etc. They indicated that every situation was different so broad assumptions such as this were inappropriate:

“Some parents are toxic and inconsistent bringing disruptions into a child’s life. This can cause psychological trauma.” (Individual)

“A presumption of a relationship would be particularly concerning for children who have experienced domestic abuse and for whom an ongoing relationship may be unsafe.” (Children’s Organisation)

8.6.13 Further, it was suggested by a few respondents that such an assumption already informally operates in family courts (in conflict with the bias suggested above by those in favour of the presumption), which was felt to be inappropriate and often detrimental to the welfare and safety of children (and victims of domestic abuse). It was felt that such a change would make the situation worse. It was also considered that such an assumption may create an additional barrier for victims to raise issues of domestic abuse.

8.6.14 Many also highlighted that such a presumption did not take the child's views into account and, indeed, several felt this risked drawing the focus away from the child towards the parents. It was felt that such a presumption did not recognise the potential negative impact upon the child or the risks posed:

"[We] would consider any legal presumption in favour of shared parenting to be further loading the system against children's views and experiences being heard." (Children's Organisation)

8.6.15 A few also suggested that, while in the majority of cases this presumption may be acceptable, those cases that go to court are not 'normal' family situations and there will be a level of dispute/conflict involved. Indeed, several organisations suggested that domestic abuse features in over half of all court actions related to contact. As such, the 'normal' presumptions are often no longer applicable and therefore unhelpful for it to be included in legislation or as a starting point for court proceedings.

8.6.16 Several also felt that such a presumption may contravene the UNCRC which states that children have a right to contact with both parents, but also makes clear that this right must not be enforced if it could cause the child harm. However, others (in favour of the presumption) suggested that the presumption would still be in keeping with this.

8.6.17 Ultimately, many who opposed the presumption felt that the current system should remain unchanged and continue to be focused on the child's best interests, welfare, and the child's voice:

"We would be better to retain the clarity that best interests (supplemented by views of the child) are the key tests." (Individual)

"Decisions concerning parental contact should be based entirely upon the rights of the child. As each child is unique and their circumstances are unique, decisions made about contact should also be unique and built around their needs." (Children's Organisation)

Legislation: No Presumption of a Benefit from Both Parents Being Involved

8.6.18 The opposite presumption to that discussed above was also explored by the main consultation document, i.e. whether primary legislation should be made laying down that courts should not presume that a child benefits from both parents being involved in their life.

Q24. Should legislation be made laying down that courts should not presume that a child benefits from both parents being involved in their life?

	Number	Percentage
Yes	56	22%
No	131	52%
No response	67	26%
Total	254	100%

- 8.6.19 On this occasion, just over half (52%) of all respondents felt there should be no such presumption, while 22% felt there should be. The remaining 26% did not provide a response.
- 8.6.20 Those against such legislation typically felt that it was important for both parents to be involved in a child's life (with some citing the evidence to support this and suggesting this presumption was more appropriate), and that equality should be provided. Many also suggested that presumptions (in either direction) were not helpful, but rather all cases should be considered individually, from an impartial perspective, and that the focus should remain on the child's welfare/best interests. Again, it was suggested that safeguards already existed to investigate and protect children against abuse and high risk contact, and therefore legislation against a presumption of benefits to the child was unnecessary.
- 8.6.21 It was also suggested that a negative presumption would require a burden of proof for a rebuttal. Further, it may be difficult for non-resident parents to prove the benefit of their involvement in their child's life where the child in question is a baby and/or they have not had a lot of previous contact/involvement due to the other parent's resistance. It was felt that such a negative presumption could therefore present a barrier to contact and risked (further) excluding some parents (typically fathers) from their child's lives:
- "...parents being involved in an uphill struggle from the start trying to demonstrate that it is to their child's benefit for them to be involved when for example this could involve a child who is very young and the non-resident parent may not have had extensive involvement or contact due to the other parent inhibiting or preventing their involvement." (Individual)*
- 8.6.22 Those in favour of such legislation felt this was appropriate as not every relationship could be assumed to be positive, and it was felt this would explicitly remove the presumption that contact was always best. Again, it was felt that courts needed to be impartial (and not make assumptions from the outset), that individual circumstances needed to be considered, that risks needed to be assessed in each case, and safeguards implemented (where necessary). It was suggested that this would help to ensure that the child's

welfare/best interests and voice were paramount in any decisions taken about contact:

“A lot of law makers want everyone to get along, so will force children to see their parents, even if they don't want too. If there was legislation to prevent it, then it would lead to less damage on a child.” (Individual)

“Given that domestic abuse is featured in around half of all court actions over contact then we should not presume that it is in the child's best interests for both parents to be involved in the child's life.” (Local Authority)

8.7 Encouraging Involvement from Non-Resident Parents

- 8.7.1 The main consultation sought views on how best to ensure that non-resident parents are kept informed by schools, particularly around pupil enrolment and annual updates to schools about information on pupils, and by health boards and GP surgeries.

Sharing of Educational Information

Q25. Should the Scottish Government do more to encourage schools to involve non-resident parents in education decisions?

	Number	Percentage
Yes - put the pupil enrolment form and annual update form on to a statutory basis	70	28%
Yes - issue guidance on the enrolment form and annual update form	49	19%
Yes - other	24	9%
No - no further action by the Scottish Government is required	40	16%
No response	71	28%
Total	254	100%

- 8.7.2 Just over a quarter (28%) of respondents suggested the best option was to put the pupil enrolment form and annual update form on to a statutory basis. One in five (19%) suggested it was most appropriate to issue guidance on the enrolment form and annual update form, 9% felt other actions could help, while 16% indicated that no further action was required by the Scottish Government. The remaining 28% did not provide a response.

Statutory Basis for the Pupil Enrolment Form and Annual Update Form

- 8.7.3 Respondents in favour of putting the pupil enrolment form and annual update form on to a statutory basis felt that it was important for both parents to be

involved in a child's education, but that currently, it was too easy for a non-resident parent to be side-lined/excluded. It was suggested that non-resident parents were currently often excluded both by the resident parent and by schools themselves:

"Non-resident parents often have a battle on their hands to be involved in their child's education and have a voice at schools." (Individual)

Guidance on the Pupil Enrolment Form and Annual Update Form

- 8.7.4 Those who preferred guidance for schools in the pupil enrolment form and annual update form suggested that legislation was not required but that guidance to clarify the position for schools would be helpful. It was felt that schools often did not know what their obligations were and/or what information they can and cannot disclose to the non-resident parent. Indeed, it was suggested that requested information was often withheld or that information about one parent was inappropriately shared with the other. It was also felt that this could help to provide consistency across Scotland, while still providing flexibility to allow schools to tailor solutions appropriately.

Other Actions

- 8.7.5 A few suggested that it was important for schools to share all communication (including absence reports) with both parents, however, it was indicated that the current information management systems used in some schools limits their ability to communicate with more than one parent resulting in relevant people in the child's life not receiving communications. It was, however, highlighted that it should be the parents' responsibility to ensure that their child's schools has accurate information on them (e.g. contact details and communication preferences).
- 8.7.6 Other actions that were suggested by more than one respondent included:
- For there to be both guidance and a statutory basis for collecting information;
 - Provide schools with guidance about how to respond to requests from parents in situations of separated parents;
 - Training for school staff so they know how to engage with parents who are apart, and are alert to any possible risks; and
 - To update the definition of 'parent' to ensure that it covers all aspects of parental and caregiver involvement and engagement, to reflect kinship carers, corporate carers, etc. and ensure definitions are aligned between family law and education settings.
- 8.7.7 Regardless of which option was favoured, support was caveated to highlight that care was required in any case where risk had been identified, where it was not in the best interests of the child, or where a court had ordered no contact. It was again stressed that the welfare of the child, their wellbeing and rights were given paramount importance.

No Change Required

- 8.7.8 Respondents who felt that no change was necessary generally considered that the current system was appropriate. It was felt that, non-resident parents who were interested in being involved in their child's life/education could go to the school and request to be included in communications/decisions, and they were concerned that changes could lead to absent parents being kept informed when this may not be what the child wants or be in their best interests. It was also suggested that a flexible approach was required to deal with pupils' wishes, safety/risk, domestic abuse, and non-resident parents using the contact/information inappropriately:

“Non-resident parents are quite able to contact their child’s school and obtain any information desired regarding their child. Interfering in that ensures non-resident parents that do not willingly care for their children are still kept informed when the child may not have any desire for them to be involved. The legislation would ensure the child’s views were not adhered to...” (Individual)

- 8.7.9 It was also suggested by a few respondents that schools found balancing their responsibilities/input difficult when families are in dispute (with a few suggesting it was inappropriate for schools to be expected to mediate/get involved in parental disputes). Schools already have significant workloads and should not be required to take on such an administrative burden.
- 8.7.10 Some respondents felt that this issue was not relevant to the 1995 Act, however, but was more an education law issue. As such, it was felt that greater consideration was required on this issue, with wider consultation required to ensure all key stakeholders could contribute.

Sharing of Medical Information

Q26. 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?

	Number	Percentage
Yes – legislation	80	31%
Yes – guidance	52	20%
Yes – other	14	6%
No – no further action is required	37	15%
No response	71	28%
Total	254	100%

- 8.7.11 In relation to whether the Scottish Government should do more to encourage health practitioners to share information with non-resident parents, around a third (31%) felt that greater legislation would be helpful, 20% thought guidance would be preferable, 6% preferred some other option, while 15% felt that no further action was required. The remaining 28% gave no response. It should be noted that very few organisations preferred legislation, with only 5 selecting this option.
- 8.7.12 Again, reasons given to support quantitative responses were similar to those at Q25 above. It was felt that access to both educational information and health information should be treated in largely the same way.

Legislation

- 8.7.13 Those in favour of legislation typically felt that it was important/in the best interests of the child for both parents to be involved in their child's life and to know about health/medical issues in order to carry out their responsibilities effectively. It was considered necessary in order to keep a child safe, both when in the care of the non-resident parent, but also to allow the non-resident parent to seek medical attention for their child when necessary. Equality between genders/parents was again cited as important. It was felt it was too easy to exclude the non-resident parent and that it can be very difficult for them to access relevant information.
- 8.7.14 Some individuals suggested that guidance alone would not be robust enough to change attitudes and it could be ignored. A few organisations also felt that guidance would not create a consistent approach, and that legislation was required to achieve this:

*“Legislation means that doctors are left in no doubt and know how to act.”
(Family Support Organisation)*

- 8.7.15 Several did caveat that exceptions would be needed where it was determined that sharing of information would not be in the child's best interests, or where there were legitimate child protection/safety concerns.

Guidance

- 8.7.16 Those who felt that guidance would be helpful tended to think that this would provide clarity to health practitioners (in what was considered to be a challenging situation). It would also encourage consistency in practice across Scotland, whilst still allowing the child's voice to be considered and discretion/flexibility for practitioners around when and with whom to share information. It was suggested that the current system was appropriate and that further legislation was not required, but a greater understanding of and adherence to the existing legislation would be helpful, as it was noted that non-resident parents with PRRs often find it difficult to obtain information and engage in a meaningful way about medical issues without the support of the resident parent.

8.7.17 It was noted that the British Medical Association (BMA) already provide guidance, but that guidance from the Scottish Government could also be helpful. It was suggested that the content of the guidance would need to cover the privacy rights of the child, risks associated with domestic abuse situations, as well as the duties and responsibilities of corporate parents and the sharing of information with the parents of children in care. A few also suggested that it should be up to the non-resident parent to seek the information and provide accurate contact details rather than the onus being on health practitioners.

Other Actions

8.7.18 A few individuals who felt that other actions may be more appropriate suggested that having a mandatory need to share information with both parents, or all those with PRRs, was necessary. This was considered to be required to ensure that decisions regarding information sharing were not coerced by false information given by the resident parent.

8.7.19 It was also suggested that both legislation and guidance may be required.

No Further Action

8.7.20 Those who felt no further action was required again outlined a range of views, including:

- that there was no need to change the current system as it provided appropriate levels of access;
- that information should only be shared with those with PRRs;
- concerns were raised over who and how it would be determined that sharing information was in the child's best interests;
- if/how the preferences of the child would be considered;
- issues of confidentiality;
- risks that perpetrators of domestic abuse may use this as a tool to continue the abuse; and
- that health practitioners should not be involved in disputes between parents and should not have the administrative burden of maintaining contact lists for information sharing purposes:

“Currently, anyone with PRRs has the right to access to the child’s medical records as long as the child agrees if they have capacity and it is in the best interests of the child. No further action is required.” (Local Authority)

8.7.21 Again it was suggested that this issue did not seem to fall within the remit of the 1995 Act, and that wider consultation would be required to ensure that all stakeholders could contribute their views.

8.8 Clarifying that Orders do not Automatically Grant PRRs

- 8.8.1 The main consultation sought views on whether section 11 of the 1995 Act should be clarified to provide that orders do not automatically lead to PRRs or to a change in PRRs, except from orders specifically in relation to residence or to PRRs themselves. It was stated that the key aim would be to make it clear that a contact order does not have to grant PRRs.

Q27. 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?

	Number	Percentage
Yes	99	39%
No	59	23%
No response	96	38%
Total	254	100%

- 8.8.2 Over a third (38%) of respondents did not provide a response to this question. Of those who did, most (39%) agreed that such clarification was necessary, while 23% felt it was not.
- 8.8.3 Several of those who felt that clarification was required indicated that their responses to Q9 of the consultation were again relevant here. It was suggested that confusion currently exists, with those granted contact sometimes assuming they also had PRRs, and therefore clarity would be helpful. It was suggested that it was right to keep contact and PRRs as two separate issues, with a few highlighting that contact orders could be sought by a wide range of people, including grandparents and siblings, and therefore clarity that such a contact order did not also confer PRRs was seen as appropriate. Indeed, a few felt that greater clarity could help encourage other family members who simply want contact to go to court to seek it:

“To ensure the position is clearly understood. It is not at the moment. There is an assumption made that contact means PRR.” (Domestic Abuse Support Service)

“While this may be clear to legally qualified individuals it does not appear to be so to the broader public.” (Individual)

- 8.8.4 Similarly, it was felt that clarity was required for non-parents who acquire a residence order for a child (in the case of kinship and other carers). It was suggested that such orders do not routinely contain information as to whether PRRs have been granted, making it difficult for carers to access certain services.

- 8.8.5 Those who felt that clarity was not required, however, generally felt that the law was already clear. It was suggested that perhaps guidance could be provided (rather than legislative changes), that Sheriffs could ensure the wording of orders were clear (or include greater information within the orders themselves), or that parties could be given information to ensure that people understood what this provided/did not provide.
- 8.8.6 A few individuals however, felt that all parents should automatically be granted PRRs, while a few organisations suggested that if PRRs were to be granted automatically (as considered at Q19) then such confusion would no longer exist.

8.9 Turning a Child against a Parent

- 8.9.1 The consultation document sought views on what action, if any, the Scottish Government should take to try and stop children being put under pressure by one parent to reject the other parent.

Q28. Should the Scottish Government take action to try and stop children being put under pressure by one parent to reject the other parent?

	Number	Percentage
Yes	143	56%
No	41	16%
No response	70	28%
Total	254	100%

- 8.9.2 Over half (56%) of all respondents felt that action was required to try and stop children being put under pressure by one parent to reject the other, while 16% felt this was not needed. The remaining 28% did not provide a response.
- 8.9.3 Those who considered that action should be taken to tackle such behaviour suggested that trying to influence a child against a parent could be harmful to the child:

“The child is often in the middle between parents, fearful of the consequences of anything they say. They are often afraid, intimidated, experiencing anxiety due to split loyalties and worried for their parent’s wellbeing if they say something that contradicts their wish. We are also aware that children can be coaxed and emotionally abused by the controlling actions of a parent.” (Local Authority)

- 8.9.4 It was also reported to be harmful to the parent (with both parents having the potential to suffer), requiring a long and difficult process to maintain contact, and strained relationships with the child from then on:

“Some parents do not have the emotional energy, mental strength, finance or wherewithal to continue to fight, and in these cases contact can break down completely... Parental alienation is real and needs to be taken far more seriously.” (Individual)

8.9.5 A wide range of suggested actions were provided by respondents. Those cited by more than one included:

- The use of child support/welfare workers to assess whether a parent has attempted to negatively influence their child, support a child to express their own view, and provide impartial information;
- To provide training on domestic violence and how children can be turned against a parent for all professionals and service providers (particularly for child welfare reporters);
- Parenting Apart session, family counselling and/or family therapy;
- Greater use of child psychologists;
- Mediation for the parents;
- Education, guidance and information for parents (whilst being mindful not to empower the perpetrators of abuse);
- Wider campaign to increase public awareness;
- Grounds for a referral to the Children’s Reporter;
- It should be made a criminal offence (with several describing it as a form of emotional, psychological, domestic and/or child abuse);
- Introduce and enforce sanctions (possible suggestions included a reduction/increase in contact time (as appropriate), fines, and in extreme cases imprisonment and transfer of residence);
- Some form of assessment/wellbeing checklist;
- Ensure the voice of the child is heard in every case; and
- Make court processes less adversarial.

8.9.6 Those that were against any actions felt it was inappropriate to make assumptions about the reasons why a child may not wish to see a parent. Respondents highlighted that a wide range of factors may be involved, including the child’s own views and feelings towards the adult in question (either due to the circumstances of the parents separation or the dynamics in their own relationship with the parent) and valid concerns for the child’s safety and wellbeing:

“This works from the presumption that child rejects a parent because of parental pressure rather than because a child does not want to see them or is frightened with good reason of them.” (Individual)

“...children are becoming labelled as “alienated” and their voice is being diminished - with assumptions being made that if a child says they do not want contact it must be due to pressure from one parent. As a result the non-resident parents’ accusations gain more power than the voice of the resident parent or child.” (Other Organisation)

- 8.9.7 Several organisations cited that ‘Parental Alienation Syndrome’ had been largely discredited (although a few in support of additional action did not agree with this), with some suggesting that the perpetrators of domestic abuse commonly allege that a child has been turned against a parent in an attempt to control the situation or to continue the abuse. It was suggested that allegations of alienation are routinely used by abusers to undermine a victims concerns, resulting in exposing children to dangerous situations:

“This is very risky. Abusers are very aware of the term parental alienation. They play the victim and use it as a way of painting the other parent as a monster to continue the cycle of abuse and control.” (Individual)

“We are aware that perpetrators of abuse often construct the concept of ‘parental alienation’ as a weapon against women in an attempt to twist the truth, manipulate mothers into facilitating contact, and discredit accusations of abuse.” (Domestic Abuse Support Service)

- 8.9.8 Some respondents (both for and against action by the Scottish Government) could see no way for legislation to tackle the issue and reduce/stop such a practice, or felt it would be ineffective and unenforceable. Several organisations felt that the courts were better placed to investigate and tackle such allegations on a case-by-case basis. A few organisations suggested that in-depth training was required about the dynamics of domestic abuse, its impact on children, and the potential for parental alienation to be used by perpetrators of abuse to manipulate the court and discredit survivors.

8.10 PRRs and Serious Criminal Convictions

- 8.10.1 The final question on PRRs invited comments on whether a parent found guilty of a serious criminal offence could potentially have their PRRs removed by the criminal court, (either by application to the criminal court following conviction or courts being given a duty to consider the removal of PRRs when a person is convicted of certain types of offences).

Q29. Should a person convicted of a serious criminal offence have their PRRs removed by the criminal court?

	Number	Percentage
Yes - by an application to the criminal court following a conviction to remove that person's PRRs	13	5%
Yes - by giving the criminal court a duty to consider the removal of PRRs when a person is convicted of certain types of offences	63	25%
No - leave as a matter for the civil courts	92	36%
No - another way	16	6%
No response	70	28%
Total	254	100%

- 8.10.2 Some mixed views were expressed but the most popular response was that this issue should be retained as a matter for the civil courts (36%). That being said, almost a third indicated that they felt the current situation should change, either by way of court duty (25%) or by application (5%). Just a small number felt that change should be implemented in another way (6%) and the remainder gave no response (28%).
- 8.10.3 Among those who felt that giving the criminal court a duty to consider the removal of PRRs was a good idea, the main reasons given in support were that this would protect the best interests of the child and that it would leave courts able to determine relevance of punishment individually, depending on the nature and severity of the crime. Crimes that were mentioned as being relevant for consideration by the court included physical and sexual assault, in particular, as well as other offences that related directly to the wellbeing of the child concerned. Other serious criminal offences (such as fraud) which may be less directly damaging to a child's wellbeing or their relationship with the parent may require a different approach by the court, it was suggested.
- 8.10.4 One respondent indicated that this approach would also give confidence to the remaining parent about PRRs following release of the offending parent:
- “By giving the Criminal court a duty to consider the removal of PRRs at the time of conviction it leaves no doubt for the other parent as to what will happen when the offender is released. The whole point of the PRRs is to show the child that they are a responsible adult and have a duty of care to them.” (Individual)*
- 8.10.5 Removing PRRs for parents who commit serious offences, especially against the child, was also seen as important in providing the child with a sense of confidence and security that their exposure to risk in the future was minimised.

- 8.10.6 One individual and one domestic abuse support service indicated that such an approach would remove the onus on the innocent parent to need to apply for removal of PRRs (which they felt was important):

“In practical terms, access to civil justice is expensive and out of the reach of most in society. However, it should not be left to those left in care of a child or the child themselves to have to take this action. If a serious offence has been committed, then the court should have a duty to think about PRRs and whether it is in the child's best interests and most importantly safe.” (Domestic Abuse Support Service)

- 8.10.7 Similarly, among the small number of respondents who supported an application to the criminal court following a conviction to remove that person's PRRs, there were views that due consideration would have to be given to each individual situation, as a serious criminal offence might not exclude the parent from acting in the child's best interests in other ways.

- 8.10.8 Having this measure available, however, would send a strong message about the consequences of the unacceptable parenting behaviours, i.e. to set a good example:

“A person who chooses to commit a serious offence has made a choice. If a child has not been taken into consideration when making that choice then the child is not one of the person's priorities. A person who commits violence cannot be considered to be a positive role model for a child. A person who has committed sex offences would also fall into not being a positive role model.” (Individual)

- 8.10.9 A number of respondents commented that it would be important to have the child's voice represented in any decisions, and one individual indicated that there may be merit in considering reinstatement of PRRs in some cases, so long as there was no risk to the child. One individual indicated that they felt that a system of criminal court applications could potentially exist alongside civil routes to ensure that, in cases where the child's voice was against criminal charges, there were still means of ensuring that PRRs could be exercised in a way that benefited the child:

“...there should be a civil process which is fully integrated with the criminal process and involving a safeguarder which should advance alongside the criminal process so that the child is protected and the parental rights adjusted accordingly.” (Individual)

- 8.10.10 Among those who felt that the current system should remain unchanged, the reasons given were that it was important that cases were always considered on their individual merits, and that family law Sheriffs working in the civil courts may be more experienced with dealing with such complexities, and understand the nuances which would need to be considered. They would know, for example, those cases in which removing the PRRs was not

appropriate and those cases where criminal involvement did not manifest itself in bad parenting *per se*:

“The best interests of the child should be paramount and the circumstances of each case should be considered...Just because a person commits a serious criminal offence does not make them a bad parent.” (Individual)

8.10.11 Again, among this group, the nature of the offence was considered to be an important factor in determining relevance of removing PRRs, with several suggesting that some ‘serious crimes’ which did not directly involve the child would not make a parent unfit. Crimes against the child (especially physical harm) were again seen as being an indicator of where removal of PRRs would be appropriate, however. Overall, parenting in general, was considered to be a civil matter which should remain as such with attempts to rehabilitate and stabilise families, wherever possible, rather than punish them:

“In Scotland, we do not use their children as way of punishing errant parents and governments that do are rightly subject to international condemnation. The removal of PRRs is predicated on what will serve the child’s welfare, taking account of the child’s views. If the thinking behind this question is that some offences indicate that the parent poses a risk to the child, then there is already the remedy of removing PRRs in a civil court. Criminal courts are not the appropriate place to make that decision.” (Individual)

8.10.12 Other considerations noted by respondents who said no to this question included the perceived long duration and costs of criminal proceedings, the complexities of adding criminal proceedings alongside civil proceedings, and the prospect that children were less likely to be given a say in criminal proceedings, i.e. their voice was likely to be hidden. The civil court was also described by one respondent as being a more “child friendly” environment and others too stressed that this was a more appropriate forum for the matter at hand:

“A criminal court is not the appropriate forum to consider children’s rights. They need to be considered on the basis of the child’s best interests, taking into account their views, in a setting where this is the primary focus. Removal of parental rights inevitably impacts upon the rights of the child and this must never be used as a criminal sanction.” (Children’s Organisation)

8.10.13 Creating a clearly defined and objective list of what may be deemed ‘serious criminal offences’ may also be problematic and this was stressed by several respondents, as the seriousness of the crime may not correlate with the impact on the child:

“...we do not support the proposal that there should be an automatic removal of parental responsibilities and rights, but each case should be assessed independently to understand the context in which the ‘serious criminal offence’ occurred. We are aware of individuals who have committed serious criminal offences yet are doting parents, thus in itself the committal of a serious criminal offence does not make someone a bad parent. As noted, the views of the child are crucial.” (Local Authority)

8.10.14 Overwhelmingly, as with other parts of the consultation, the views expressed supported protecting the best interests of the child, and the current situation which allows an application via the civil court to remove PRRs was seen as sufficient. It allowed matters to be determined with the child's best interests at the heart of the decision-making process. It was suggested by respondents from the legal profession, public bodies and individuals alike that removal without consideration of the best interests of the child may run contrary to the provisions of the UNCRC and may infringe the child's as well as the parent's Article 8 rights.

8.10.15 A final comment made by just one respondent was that the proposed change may impact negatively on applications for legal aid and add complexity to the legal aid process.

8.10.16 Among those who said that this issue should be addressed in another way, there were no substantive suggestions for alternative approaches (except that leaving such considerations for the civil court was preferable). A more general comment was made by one children's organisation that a much more detailed and in-depth consultation exercise may be required in this area and another suggested that a “blanket policy” must be avoided. One response from within the legal profession agreed that more consideration was required and suggested that, at most, consideration could be given to legislating to enable the criminal court, following conviction, to refer the matter to a civil court for consideration.

9 Child Abduction by Parents

- 9.1.1 The main consultation document sought views on how the law could be changed to ensure that civil and criminal child abduction by parents can be prevented going forward.

9.2 Exercising Parental Rights

- 9.2.1 The 1995 Act prescribes that no person shall be entitled to remove a child habitually living in Scotland from, or to retain any such child outwith, the UK without the consent of a person who for the time being has and is exercising their PRRs. Views were sought on whether the wording of the 1995 Act should be changed so that a person unable to exercise their rights because a child has been removed from the UK is not excluded from this provision.

Q30. 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?

	Number	Percentage
Yes	95	37%
No	33	13%
No response	126	50%
Total	254	100%

- 9.2.2 Although half (50%) of respondents did not answer this question, among those who did, the majority (37%) supported the proposed change to the Act.

Support for an Amended Reference

- 9.2.3 Reasons given for the amendment included that the change would bring clarity, would protect the best interests of parents and children and would make the legislation more effective. It would also remove any option for removing parents to accuse others of failing in their parental responsibilities and rights for not having seen the child:

*“...the removal of the requirement to be “exercising” parental responsibilities and rights would avoid any arguments on the part of the abducting parent that the other parent had not seen the child recently.”
(Other Organisation)*

- 9.2.4 Several individuals and organisations suggested that it would also be helpful to define the term “exercising” and one family support organisation suggested that 'exercising' should be changed to 'has been or was exercising parental rights'. Other suggestions for changes to the wording included:

“Section 2(6) should be amended to read, e.g., “a person (whether or not a parent of the child) who for the time being has been and, but for removal or retention of the child outwith the United Kingdom, would be exercising in relation to him a right mentioned...” (Individual)

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

- 9.2.5 Additional clarification may also be helpful for professionals working with families, to help them fulfil their duties:

“...clarification as to the extent of “exercising” within the Act would be helpful for parties including local authorities, who can be required to address certain matters (e.g. consents) on the basis of parents who have and are exercising PRRs.” (Local Authority)

- 9.2.6 Indeed, two local authorities noted particular concerns in relation to the existing provision and how this negatively impacted on looked after children, specifically:

“[We are] concerned more broadly about this section of the Act, and in particular the current adverse impacts on looked after and accommodated children and their ability to go abroad on holiday with foster carers or kinship carers. If a parent still holds PRRs for a child, their consent has to be obtained before a child can be taken abroad for a holiday. There have been issues whereby one or both parents refuse consent, meaning that a court order would be required. As consent can be withdrawn at the last moment, this can cause difficulties in obtaining the necessary consent order in time.” (Local Authority)

“The provision as currently drafted presents difficulties which it is believed, were not intended by the legislature. It can result in unnecessary disruption to the lives of children ‘in care’. The effect of the proposed change may be to compound difficulties, thereby further disrupting these vulnerable children’s lives...The issue of looked after children travelling abroad and the interaction with s.2 of the 1995 Act is a complex issue, needs to be carefully examined and a clear solution found.” (Local Authority)

- 9.2.7 The Scottish Government was urged by these respondents to consider the consequences of this part of the 1995 Act in more detail, as well as to consider the equivalent English provisions relating to looked after children as these were perceived to be clear and unambiguous.

- 9.2.8 Several individuals and organisations agreed with the changes on the basis that parents must not be excluded due to changes/movement of children that occurs beyond their control:

“You can’t exercise a right if you are being denied that right.” (Family Support Organisation)

“Change is required here, to recognise that a failure to exercise PRRs may be because of the actions of the other party in removing the child from the jurisdiction.” (Individual)

“Yes, it would seem appropriate to clarify this situation so that a person is not disadvantaged for not exercising their rights if they are not able to do so.” (Family Support Organisation)

No Need for Changes

- 9.2.9 There were no substantive reasons given against the change and most who said ‘no’ to this question went on to explain that they perceived that section 2 as currently enacted works well and does not need to be reformed. There was no evidence of a need for change, it was suggested, and a clearer definition of ‘exercising rights’ may simply be needed instead:

“The present provisions are sufficient and to change it may cause confusion, and it is important that in this area of child law the provisions are clear.” (Legal Profession)

“Instead there should be a clear definition of ‘exercising’ rights - which takes account of a person’s intention to exercise rights were it not for barriers which can prevent this from happening.” (Public Body)

- 9.2.10 Among both those who answered positively and negatively to the closed component of this question there were sentiments that no child should ever be forcibly removed/moved out of the UK as this was most often not in the best interests of the child. One individual suggested that changing the wording would ensure that there was not uneven power given to the removing parent. Two pointed out that parental responsibilities and rights could still be exercised remotely when children are removed to a different country, using technology (e.g. Skype, Facetime, etc.) and that this should be acknowledged. Although not answering the question, parenting had no boundaries, it was suggested by several individuals:

“A parent doesn’t stop loving or wishing to be a parent due to the fact the child isn’t in the country.” (Individual)

“A parent’s rights should remain independent of the country the child resides. Parenthood is non-geographical.” (Individual)

9.3 Creating a Criminal Offence for Removing a Child from the UK without Appropriate Consent

- 9.3.1 The consultation also sought views on whether it should be a criminal offence in Scotland, as in England and Wales, for a person connected with a child to remove that child from the UK without the appropriate consent. This would mean amending section 6 of the Child Abduction Act 1984 (the 1984 Act).

Q31. 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?

	Number	Percentage
Yes	124	49%
No	13	5%
No response	117	46%
Total	254	100%

- 9.3.2 Although almost half of respondents did not answer this question, among those who did, there was a large majority (49%) who supported amending the 1984 Act.

Support for the Creation of a Criminal Offence of Removing a Child without Appropriate Consent

- 9.3.3 The main reasons for support were that there was a lack of alternative deterrents for removing children from the country and existing civil routes being seen as not to be taken seriously by some. Others stressed that making it a criminal offence would also highlight the seriousness of non-consensual removal:

“It acts as a significant disincentive for someone to take a child out of the country without the consent of another parent for example, especially if there is malicious intent.” (Individual)

“To make it clear in legislation the seriousness of child abduction and how this is understood in Scotland, regardless of whether a specific order is in place.” (Family Support Organisation)

“Civil law seems to be ineffective in areas where, in spite of a court order existing, one parent can defy the wishes of a court with apparent impunity.” (Individual)

- 9.3.4 The current system of court orders being available to try and prevent removal of children was seen by some to be a particularly ineffective

deterrent and was also difficult to implement and police in practice, they perceived:

“One of the difficulties with this is that an abduction may come completely out of the blue, or immediately after the initial relationship breakdown between parents, and so there is sometimes no opportunity to ask the court for an interdict or other order prohibiting the removal of a child from the UK. In such situations the police are the only authority who can act to prevent the removal of a child, and so leaving children without such protection can have long-lasting consequences.” (Family Support Organisation)

9.3.5 Others commented that it was difficult and sometimes costly to make an application under the 1980 Hague Convention for the return of the child/children and that this also offered no guarantee that a child would be returned to their country of residence. Prevention, therefore, was seen as being necessary to remove the need for reactive measures. Making it a crime may also allow the police to act more swiftly to intervene in any emergency cases that arose, it was suggested.

9.3.6 As with the preceding question, several respondents simply stressed again that they felt it was wrong that any child should be removed from the UK without written consent from all those actively involved in their parenting/guardianship, and views were expressed that to do so could lead to parental alienation. Thus, they felt, it should be a “punishable crime” which served to safeguard the parental rights of both parents:

“Both parents should know where their child is and what travel arrangements are - so that both parents know that their child / children are safe at all times.” (Individual)

9.3.7 Among those who agreed with the change, there seemed to be general consensus that it should be a criminal offence regardless of who commits it (i.e. either the mother or father or other person with PRRs). Similarly, a respondent from the legal profession suggested that the definition of who should give consent should be broad, and that it was logical to align the criminal offence with the civil law at section 2 of the 1995 Act in this respect.

9.3.8 There were also some affirmative views that the law should apply to movement within the UK, as well as movement outwith. This was seen to be potentially equally distressing for children/parents as movement further afield:

“The issue arises within the UK where a child sometimes removed from Scotland to England. It is clear that the removing parent does not always appreciate the significance of this. The law of Scotland already has the offence of plagium but this is seldom prosecuted. Making child abduction criminal offence would underline the seriousness of such action.” (Other Organisation)

9.3.9 In contrast, some legal professionals commented that they agreed with the revision applying to taking a child outwith the UK only, not outwith Scotland, for the reasons set out in the consultation paper itself.

9.3.10 As with earlier sections of the consultation, respondents urged that removal must always be in the best interests of the child, and several felt that this often was not the case. This, they suggested, justified making it a crime:

“There has to be a deterrent for parents or guardians of a child who think that it is appropriate from them to remove the child from the UK without permission. It is certainly not in the best interest of the child to be removed and usually under false pretences.” (Individual)

“When a parent who has split from the other parent removes the child from their current area to stop the other parent or their family having contact then this should be treated as a criminal offence as they are clearly not thinking of their child and how it will have a major impact on their lives.” (Individual)

9.3.11 It is important to note that many simply expressed that they did not consider it “right” for children to be removed but did not answer the more nuanced component of the question i.e. around whether such removal (without consent) should be criminalised. Indeed, there were some mixed views, even among those who supported criminalisation, that this could potentially be a source of trauma to the child (i.e. if a parent was sent to prison or punished too harshly for non-compliance). This type of vicarious trauma for children should be avoided, wherever possible. The penalties used to punish the crime would need to be very carefully thought out and be proportionate, it was stressed.

9.3.12 Some individuals reflected on their own personal experiences of having children removed from the UK and stressed that civil proceedings had taken too long and that contact had taken too long to be re-established.

9.3.13 This being said, others who supported the amendment recognised that there would be logistical problems in implementing and enforcing any change to the 1984 Act, and so delays to processing cases and problems with broken contact may not necessarily be reduced or removed by the change. The introduction of criminal charges may also impact negatively on the duration of civil proceedings being applied to the same case.

9.3.14 Another key concern was how border authorities would know which parents to question about consent (i.e. how would they identify those parents who require consent and those who do not), and how would a parent leaving the UK with their child prove to authorities that consent had been given. This would require awareness raising among the public, it was suggested:

“There would also need to be a clear way for consent(s) to be given - and a public awareness raising in relation to the new offence and how it could be committed. It would seem that the offence could apply to anyone

travelling with children - it is difficult to see how specific individuals of concern could be targeted.” (Public Body)

9.3.15 Concerns were expressed that considerable work would need to be done cross borders and across the UK to ensure that this worked in practice. Suggestions (by just one respondent each) included:

- That joint parental consent be checked at border control by means of a certified letter of agreement or another similar document; and
- That children’s passports (or other documents) required to be jointly signed by both parents, to show consent.

9.3.16 Some (including legal organisations and family support organisations) indicated that they perceived it was a necessary change in order to bring Scotland in line with the rest of the UK and to ensure that the language used was up-to-date:

“The [organisation] considers that section 6 of the 1984 Act should be amended to ensure consistency across the UK, i.e. removal by a connected person without appropriate consent should be an offence. The offence should not be restricted to cases where there is an order for "custody" or an order prohibiting removal... This section requires to be updated in any event, as it continues to use the term "custody".” (Legal Profession)

9.3.17 Finally, comments were made that criminalisation should only apply to long-term planned removal of the child, instead of short periods of leave, including holidays. While some (mostly individuals) felt that even short-term removal for holidays should require consent, others felt that this was overly punitive. The views of the child/young person (if able) should be sought, it was suggested and an assessment made of the motivation of the parent removing them from the U.K. Parents should also be afforded to give a ‘reasonable explanation’ before any charges were brought, suggested one organisation.

Against the Creation of a Criminal Offence of Removing a Child without Appropriate Consent

9.3.18 The very small number of respondents who did not agree with this change did so on the basis that:

- Some cases may genuinely occur as a result of nativity or lack of awareness on the part of the removing parent about their seriousness of their actions (i.e. no criminal intent);
- The deterrent effects were likely to be minimal and not sufficiently off-putting to parents with a strong intent to remove their child/children; and
- That it would be difficult to implement in practice.

- 9.3.19 Two organisations also commented that the change could be subject to abuse or manipulation, may result in crimes being alleged in inappropriate circumstances and that it could, in some cases, complicate disputes further:

“If this change was made, it could open up the provision to abuse. For instance, in high-conflict cases, the ability to withdraw consent to a holiday abroad at the last minute and threaten with criminal proceedings could be counterproductive and also used as means to control another parent.”
(Legal Profession)

- 9.3.20 Some disagreed on the basis that it may prevent some children from travelling in cases which would be to their benefit (e.g. school trips abroad, etc.) and a small number of individuals commented that they felt it was wrong that a parent should ever have to seek consent to take their child out of the UK, especially for holidays and especially if they were the resident parent.

- 9.3.21 Some simply felt that it was appropriate for any offence of taking a child out of Scotland to continue to relate to a specific breach of a court order, rather than introducing a wider criminal offence. Indeed, three respondents who did not answer the closed component of this question commented on what they perceived was the disproportionate strength of this measure and the unnecessary criminalisation of this behaviour:

“This is not an issue which has arisen in our casework. We question however whether it is a disproportionate method of dealing with the issue, especially if PRRs are extended as proposed elsewhere in the consultation.” (Legal Profession)

“...while I think it would be useful for the law to be the same throughout the UK (and this amendment of s.6 would be required), it can also be questioned whether this should be criminalised at all. Thus, I would prefer any reform here to follow on the back of a holistic UK-wide review of the law in this area.” (Individual)

- 9.3.22 Finally, several comments were made in response to this question about vulnerable groups. This included questions around how consent would be achieved if a parent was in prison (especially if not named on the birth certificate), and questions around how cases would be handled where children were being removed for their own safety (e.g. in the case of a violent parent). Arrangements for looked after and accommodated children may also need to be handled differently. It was felt that special considerations would be needed to protect some of the most vulnerable children and parents:

“This is a difficult area particularly in relation to domestic abuse cases and where the parent may be fleeing the country and this needs to be considered when making changes to this section. The law should protect the child from the emotional upset and practical consequences of

abduction irrespective of whether there is a current court order regulating exercise of parental rights. There may be a variety of reasons (including cost or perceived trust) why a parent does not take court action to regulate the exercise of PRRs and the child will have little or no influence in this decision. The criminal offence should act as a deterrent to a parent inclined to remove a child which in turn should minimise the trauma/emotional upset suffered by the child him or herself.” (Local Authority)

9.3.23 Overall, it seems that there was consensus that more needed to be done to prevent child abduction by parents and others with PRRs, and that the existing system could be strengthened or changed, however, the challenge of designing a system that was proportionate and responsive to individual cases was seen as significant. This was an area where more work may be required prior to a final decision being made:

“In our experience, parents often fail to appreciate the effects of removing a child from his or her country of habitual residence. Abduction is very much treated as a civil wrong in Scotland. Because the offence of plagium is not generally prosecuted, people in this jurisdiction do not see it as a crime and are perhaps too cavalier in removing children from the country in the reasonably secure knowledge that they will not be prosecuted. We can therefore see the merit in considering this issue.” (Other Organisation)

10 Domestic Abuse

10.1.1 The main consultation document sought respondents' views on a range of topics focused on protecting victims of domestic abuse and their children during court proceedings, including:

- Banning of personal cross examination of victims of domestic abuse;
- Protection of victims and vulnerable parties in child welfare hearings;
- Protection of children from abuse or risk of abuse;
- Preventing repeated litigation;
- Ensuring the civil courts are provided with information on domestic abuse in actions under section 11 of the 1995 Act;
- Promoting the use of domestic abuse risk assessments; and
- Improving interaction between criminal and civil courts in the context of domestic abuse.

10.2 Personal Cross Examination of Domestic Abuse Victims

10.2.1 The Scottish Government consulted on banning personal cross examination of domestic abuse victims in contact and residence cases as there is evidence that this could be used to prolong domestic abuse.

Q32. Should personal cross examination of domestic abuse victims be banned in court cases concerning contact and residence?

	Number	Percentage
Yes	114	45%
No	49	19%
No response	91	36%
Total	254	100%

10.2.2 Nearly half (45%) of all respondents agreed that personal cross examination should be banned in such circumstances, while 19% said it should not. A further 36% did not provide a response to the question. It should be noted that only three organisations disagreed with banning personal cross examination, and the majority of the resistance to this proposal came from individuals.

Reasons for Supporting such a Ban

10.2.3 For those (both individuals and organisations) who supported banning the personal cross examination it was felt that this was important to protect the victims, who would find such an ordeal to be difficult, intimidating, place them at an emotional disadvantage, create further trauma, allow the perpetrator further control, and potentially subject the victim to further abuse:

“For victims of domestic abuse, it would be particularly traumatic to be cross examined by their abuser. Abusive individuals may use subtle phrases, references and body language that has threatening meaning for the victim (but may be indiscernible by others).” (Individual)

“Cross examination of domestic abuse victims perpetuates abuse and prevents survivors giving their best evidence... This process is potentially devastating and triggering to be questioned in an adversarial system by someone who has abused you. Again, it must be recognised that this process is commonly used by abusers as a means of perpetuating ongoing abuse. It is a place where power and control can be too easily acquired by abusers.” (Domestic Abuse Support Organisation)

10.2.4 Some described their own personal situations and the impact that the stress and trauma had had on them and their children. Even just being in the same building/court room was seen to be highly distressing and potentially dangerous. As such, several individuals and organisations suggested that suitable safeguards and the use of special measures/reasonable adjustments were needed to allow victims to provide their evidence, such as via a report, a recorded interview, or video link from another building and not being able to see/hear the perpetrator.

10.2.5 Many organisations and several individuals suggested that automatic legal aid/provision would need to be made available to allow the (alleged) victims of domestic abuse to be cross examined by a professional rather than the (alleged) perpetrator. Similarly, one domestic abuse support organisation suggested that similar provisions were needed to ensure that self-representing victims were not placed in a position to have to personally cross examine their abuser:

“The result may be a small increase in the cost of legal aid so that a solicitor can conduct cross examination in place of a self-represented litigant but, if that is the price of improving protection of abuse victims and their children from continuing persecution by their abusers, it is a price worth paying.” (Individual)

“...similar to the provisions under the Criminal Procedure (Scotland) Act 1995, the state would incur the cost of providing a lawyer to carry out the cross examination and the necessary preparatory work but this is a worthwhile cost when considering that this will lessen the trauma experienced by women and the resultant impact of that on their evidence.” (Domestic Abuse Support Organisation)

10.2.6 Two organisations also highlighted the need for greater recognition that men can be victims of domestic abuse, and that, due to social norms, there is a risk that female perpetrators could ‘turn the tables’ and falsely accuse their male victims and/or that men may be arrested for having defended themselves.

10.2.7 In addition, many organisations (and a few individuals) also suggested that, as this was the process for criminal proceedings, it was sensible/important to extend this to civil cases as well. It was felt that this would align criminal and civil law. One

organisation also suggested that the process must dovetail with Scotland's domestic abuse legislation, and therefore needed to also cover psychological abuse and controlling behaviour. Another suggested such a ban should also be implemented in cases involving sexual offences, child abuse or stalking. It was also suggested by one organisation that such a ban would be in keeping with the spirit intended by the Victims and Witnesses (Scotland) Act 2014, and consistent with proposals in the Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill.

- 10.2.8 There were mixed views among individuals, however, around the circumstances when such a ban should apply. Some felt this should only apply when domestic abuse has been proven and either a criminal conviction or civil protection order is in place, while others felt that it was important in any case where domestic abuse has been alleged (proven or otherwise). A few organisations also sought further details/clarity over the definition of 'a victim' and around the circumstances when such a ban would be implemented, as well as in relation to how and when costs would be met and/or when legal aid would apply/be stopped.

Reasons Not to Ban Personal Cross Examination

- 10.2.9 Those individuals who were unsupportive of the proposal typically indicated that false or exaggerated allegations can be made, with several suggesting this happens frequently and others recounting their own experience of this. It was suggested that claims of domestic abuse needed to be fully explored and the truth established before any judgement could be made regarding the situation and possible risk to the child.
- 10.2.10 Several felt that it would depend on the circumstances and care was needed in the case of false allegations being made by one party to punish the other and/or to further their own interests. It was suggested that such a ruling could risk alleged victims taking advantage of the system:

"Where the claims are hearsay and haven't been proven I don't agree. Some women claim domestic abuse to punish their partner in separation cases. This allows them to exploit social services, legal aid and councils and further allows for the alienation of their children." (Individual)

- 10.2.11 Three individuals highlighted that such a ruling would make it very difficult for party litigants to conduct their case properly. A few also felt that personal cross examination could proceed as long as this was conducted responsibly and the judge closely monitored and intervened where necessary.
- 10.2.12 Two organisations agreed that such a ban should only occur in proven cases of domestic abuse, while the third again highlighted the difficulties posed to party litigants and suggested that, in order to balance protection for victims of domestic abuse and the need for a fair hearing, this would result in the need for the court to provide representation and for this to be paid for from public funds.

10.2.13 Two respondents (one individual and one organisation) also felt that the arrangements for vulnerable witnesses afforded from the Vulnerable Witnesses (Scotland) Act 2014 should provide sufficient protection in most cases.

10.2.14 Regardless of respondents' perceptions in relation to the personal cross examination of adults, several respondents suggested that protections should be extended to children and that special measures were needed to allow them to provide evidence, with a few suggesting that children should be kept out of court proceedings wherever possible.

10.3 Protection of Victims and Vulnerable Parties in Child Welfare Hearings

10.3.1 The consultation document specified that Child Welfare Hearings are designed to be informal hearings. However, the Scottish Government indicated that they had received representations and concerns about negative experiences of domestic abuse victims attending court.

10.3.2 Views were sought on whether section 11 of the 1995 Act should 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. The consultation referred to this, building on work done by the Family Law Committee of the Scottish Civil Justice Council in relation to case management. This included proposals for a fast track process.

Q33. 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?

	Number	Percentage
Yes	131	51%
No	27	11%
No response	96	38%
Total	254	100%

10.3.3 Around half of all respondents (51%) agreed that the court should have such discretion, while 11% said it should not. The remaining 38% provided no response. Of the nine organisations who disagreed with such a change, five were from the legal profession.

Support for the Court Giving Directions to Protect Vulnerable Parties in Cases under Section 11 of the 1995 Act

10.3.4 For those who agreed with the proposed change, most felt it was important that victims of domestic abuse were suitably protected and that they should not have to

be in the same room as their abusers. It was suggested that the proposal would also assist the court in obtaining greater quality and accuracy of information, resulting in the best decisions for the child:

“This type of behaviour has to be stopped. Any vulnerable person, child or adult, must be protected.” (Family Support Organisation)

“Any changes which can minimise the trauma for a party appearing at the child welfare hearing should benefit the quality and accuracy of information being supplied to the court by the parties and ultimately lead to better decisions in the welfare interests of the child.” (Local Authority)

- 10.3.5 It was suggested that the proposed amendment would be suitable to protect victims of domestic abuse and those with learning disabilities. One organisation suggested that, in the options of special measures available, advocacy support should be included to best assist those with learning disabilities, and that parties should be allowed to determine the special measures they wish to use rather than having this imposed on them.

Perceived Difficulties with the Fast Track Process Proposed by the Family Law Committee of the Scottish Civil Justice Council

- 10.3.6 One local authority felt that it may be difficult in practice to determine at an initial triage hearing which cases would require the proof track and which would suit the fast track. They noted that, often a series of Welfare Hearings are required to determine the level of conflict and complexity involved.
- 10.3.7 One domestic abuse support organisation also suggested that the nature of the triage hearing did not take domestic abuse into account. There would still be a requirement for both parties to be present and a risk that domestic abuse may not be disclosed at that hearing, meaning that no protections would be provided and the abuse would not be investigated/considered in the outcome.

Need for a Standardised Approach

- 10.3.8 Some organisations suggested that the proposed wording was not bold enough and would not provide a consistent response to vulnerable parties/children. One individual also felt that the wording ‘that the court can, if it sees fit’ was too vague and inappropriate, potentially creating a ‘loop-hole’ and allowing judges to be less accountable:

“...the provision of this protection will be entirely at the discretion of the court. Discretion will not ensure a consistent response and protection for vulnerable witnesses and women experiencing domestic abuse. It is predicated on the court understanding the dynamics of domestic abuse and, being aware that this is an issue in the case before them.” (Domestic Abuse Support Organisation)

“...it is a loop-hole for an abuse of process, removes parity and constructs discrimination as proxy procedure and makes Sheriffs more unaccountable.”
(Individual)

- 10.3.9 Similarly, the knowledge and understanding of the judge regarding the dynamics within domestic abuse was felt to vary currently. It was suggested that some Sheriffs can be dismissive of allegations of domestic abuse, and that some victims of domestic abuse have had requests for special measures refused. It was also suggested that some victims are frightened not to attend hearings in case they are seen to be trying to manipulate the outcome or they miss and cannot challenge information provided to the court by the perpetrator:

“We have been told by victims of domestic abuse that Sheriffs have also been dismissive of allegations of domestic abuse when they have tried to disclose in court... We also have experience of clients who have requested screens. When refused, the reasons given seem to be about the court process being civil rather than criminal rather than about gaining best evidence to ensure the best interests of the child are served or indeed the safety of the participants.”
(Domestic Abuse Support Organisation)

- 10.3.10 Therefore, it was suggested by organisations that the court should have a duty to both enquire about the need for special measures and for protection of children and victims of domestic abuse to be an automatic right (rather than for it to be at their discretion). This was considered to be more in line with the changes to the criminal setting:

“We would similarly urge this consultation to go further and propose a mandatory duty on family courts to consider special measures in all cases involving domestic abuse, in line with the direction of wider reform.” (Children’s Organisation)

- 10.3.11 Again, it was highlighted that judges would be required to be live to the possibility of a male victim and it was stressed that this was not just an issue for women.

Concerns about the Court Issuing Directions

- 10.3.12 One individual suggested that the proposal would still require the party or their solicitor to disclose domestic abuse and request protections be put in place. They felt this represented an additional barrier for victims who could be influenced by the advice of their solicitor. Indeed, domestic abuse support organisations identified that some solicitors would not disclose domestic abuse evidence or would advise clients against such disclosure, and one individual outlined personal experience of being advised by their own solicitors not to disclose domestic abuse:

“...it will be up to the parties (or their representatives) to request protection of domestic abuse victims. This represents an additional hurdle for litigants as they are dependent on having a legal representative who is both alive to, and proactive in respect of, a history of domestic abuse.” (Individual)

“My solicitor has advised me not to disclose these matters as ‘they will likely be used against me’.” (Individual)

10.3.13 Therefore, it was suggested that a better solution may be to provide separate waiting areas (with facilities) and stagger leaving times as standard in all family actions. Further guidance/direction and better training for solicitors and judges in domestic abuse, coercive control and trauma was again cited as necessary.

10.3.14 Those individuals who were against such a change typically felt that there were too many false and malicious allegations of domestic abuse and that the ‘alleged perpetrator’ should be treated as innocent until proven guilty. Such a change was perceived to allow ‘alleged victims’ to control the situation and influence the outcome/how the judge perceives both parties.

10.3.15 Likewise, some individuals who were generally supportive of such protections, caveated their support by highlighting that some parties may falsely accuse the other person in order to strengthen their case/weaken the other party’s case, and delay/stop contact. It was felt that courts needed to be mindful of this possibility, with some suggesting that such adaptations/protections should only be put in place where the abuse has been proven/a criminal conviction is in place:

“Domestic abuse should not be mentioned unless there is a proven charge. Alleged domestic abuse should not be given any weight as it is often used as ploy to break or disrupt contact or “win” residency by fleeing the alleged perpetrator.” (Individual)

10.3.16 Some organisations and a few individuals also felt that the current arrangements worked well and that suitable protections were already available. Five organisations suggested that if additional protections were required then this should be dealt with via court rules, guidance, or a practice note and that changes to primary legislation were unnecessary/inappropriate. A few also felt that the number of cases where special measures/non-attendance at welfare hearings are sought was not high enough to warrant a change to the Act. Again, however, domestic abuse support organisations were concerned at the low number of requests not to attend hearings and suggested this may be because solicitors are not aware of the provision or are not making their clients aware of this, or due to a fear of how this may be interpreted by the court and the inability to then challenge information provided by the other party.

10.3.17 One individual who was generally supportive of the measures also suggested that section 11 probably enabled such actions already, however, they felt that adding an express statement to highlight this and direct judges would still be helpful.

Additional Concerns/Suggestions

10.3.18 One domestic abuse support organisation felt that the proposed change did not go far enough, but rather the protections afforded to vulnerable witnesses in criminal proceedings should be transposed fully to the civil court setting. Indeed, they

highlighted that both criminal cases and residence/contact cases could be running in parallel but that the victim of domestic abuse would have differing levels of protection in each setting.

10.3.19 They also highlighted that access to justice and securing protection as vulnerable witnesses can be a particular issue for black and minority ethnic women and children. Specific issues in relation to child contact proceedings seen to include:

- A lack of information around rights and the process, as well as a desire for more information to be available for people representing themselves (and their children), and information about how historical court orders can be challenged;
- A feeling that they have “slipped through the cracks” and concerns about having to go to court with no support, and not having a safe place to wait;
- A lack of confidence in the process and feeling “bullied”, that statutory agencies had a lot of power and that the interplay between immigration law in the family court system was negative - there was a need for greater opportunities to provide their opinions to the Sheriff, it was suggested;
- The necessity of an adequate interpreter service and a lack of confidentiality around interpreters;
- Language was a barrier - reports are all written in English and translation was considered to be of poor quality; and
- More support was needed for women where there is an absence of settled immigration status since they are especially vulnerable to misuse of the court process by abusive partners.

10.4 List of Matters that a Court shall have Regard to

10.4.1 Sub-sections (7A) to (7E) of section 11 of the 1995 Act provides a list of matters that a court shall have regard to when considering the welfare of a child, which includes the need to protect the child from any abuse or risk of abuse. The Scottish Government sought views, therefore, on whether to keep, amend or remove sub-sections (7A) to (7E) of section 11 of the 1995 Act.

Q34. 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?

	Number	Percentage
Yes - retain as currently	78	31%
Yes - but amend	33	13%
No - remove these provisions	34	13%
No response	109	43%
Total	254	100%

- 10.4.2 Almost a third of respondents (31%) suggested that sub-sections (7A) to (7E) should be retained as they are currently, 13% felt they should be amended, and 13% felt the provisions should be removed. The remaining 43% did not provide a response.

Retaining the Provisions

- 10.4.3 It was suggested that the provisions were appropriate and have proved effective where they have been implemented. Further, several respondents felt that the frequency with which domestic abuse featured in residency and contact cases (whether declared or not) meant that they were necessary. A few individuals and organisations suggested it was helpful to retain the sub-sections as this provided a prompt to the court and drew attention to a potential difficulty for the child, with others indicating it was an important step in considering the safety of a child and protecting them from abusers. Several organisations suggested that the rationale for removing the sub-sections was unclear or felt that removal was unnecessary:

“The subsections are considered to be a powerful tool to protect victims of domestic abuse therefore should be retained.” (Local Authority)

- 10.4.4 Again, it was suggested that training may not currently be sufficient enough to ensure that all practitioners understand the potential for continued abuse/coercive control through hearings/contact, or to understand the distress caused to a child by witnessing, hearing, and living with, domestic abuse. Three domestic abuse support services and one children’s organisation again highlighted that some of their clients had been unhappy with advice from solicitors not to disclose domestic abuse in court. Therefore, it was felt that the current provisions needed to be highlighted as a crucial part of the decision-making process:

“We have also known solicitors advise women not to raise any issues about domestic abuse in the court process as the solicitor’s view is that the court will hold this against the woman. We also have experience of solicitors not providing information on a long history of domestic abuse as they did not see the relevance of this to the child’s wellbeing.” (Children’s Organisation)

“...we are regularly told by domestic abuse victims that their solicitors say not to mention domestic abuse as ‘the sheriff won’t like it’ or ‘this action is about the child not you’. We have been told by victims of domestic abuse that sheriffs have also been dismissive of allegations of domestic abuse. It was hoped the additions to the 1995 Act would stop that practice, but we have seen no evidence of this. Therefore these provisions should be highlighted as a crucial part of the decision-making process.” (Domestic Abuse Support Service)

- 10.4.5 One individual and two domestic abuse support organisations also suggested that the lack of evidence regarding their impacts may be due to courts not implementing the provisions when required, with some organisations (largely domestic abuse support organisations and local authorities) suggesting that sub-sections (7A) to (7E) were positive and could be a powerful tool in protecting

women and children at risk of domestic abuse if properly implemented. Rather, it was suggested the sub-sections needed to be strengthened and used more frequently rather than removed.

- 10.4.6 It was also suggested by one individual and one domestic abuse support organisation that the removal of sub-sections (7A) to (7E) would be a regressive step and could be interpreted that domestic abuse is no longer a priority:

“To remove these provisions would risk sending out a message that domestic abuse is no longer a priority, or that it is not of primary relevance to the present and future wellbeing of a child.” (Individual)

Amended Provisions

- 10.4.7 While 34 respondents indicated that there was a need for amended provisions, very few detailed any specific amendments they considered necessary/helpful. Some respondents stressed the need to retain the provisions (in general) due to their importance in residence and contact cases.
- 10.4.8 The main areas highlighted for further consideration by more than one respondent were in respect to sub-sections (7D) and (7E), and to clarify that the checklist is not an exhaustive/comprehensive list of all welfare issues to be considered.
- 10.4.9 Two respondents felt that sub-sections (7D) and (7E) should be removed (or at least given further consideration), while another felt that sub-section (7D) alone should be removed. It was felt these sub-sections were ill-conceived. One respondent suggested that section (7D) could be interpreted to reward a person who refuses to co-operate and it was felt that non-co-operation should be dealt with by other means. Another suggested it could create a link between (a) domestic abuse cases, where there are genuine fears about safety, and (b) those cases in which residential parents decided not to co-operate in order to frustrate either a contact order being made or contact taking place. One respondent felt that further consideration needed to be given to sub-sections (7D) and (7E) in light of provisions discussed elsewhere in the consultation, and that the growing understanding and impact of coercive control should be defined within the legislation. Conversely, however, one respondent felt that sub-section (7D) was the most helpful because the practicalities of contact have to be considered along with the principles.
- 10.4.10 Four respondents also discussed the need to ensure that it was clear that the checklist did not intend to provide a comprehensive list. One respondent suggested that a complete checklist should perhaps be included, while another suggested that further discussion, consideration and presentation of evidence may be required around whether it is beneficial to provide a non-hierarchical ‘list of matters’ to be considered in assessing a child’s best interests. It was suggested that such a list could include the child’s view; care protection and safety of the child; the child’s right to health/education, etc.

10.4.11 Other specific suggestions that were provided by one respondent each included:

- Amend to deter incentive for conflict in order to reduce parents taking advantage for their own gain;
- Make it compulsory not considered - it was felt that when parties introduce evidence of domestic abuse at a later point in the case that judges do not always consider the evidence;
- Be more explicit in relation to how a child could be made safer;
- To cover and include Getting it Right for Every Child (GIRFEC), the SHANARRI factors⁶, and Adverse Childhood Experiences (ACEs);
- Inclusion of any ongoing need to provide further protections to an adult party in the proceedings (in certain specified circumstances); and
- Consider specialist risk assessments being undertaken to determine safety issues and to enable a fully informed parenting plan to be decided.

10.4.12 Several individuals also, again, outlined the need to be cognisant of the risk of false allegations, with a few suggesting this should reflect the need for domestic abuse to have been corroborated, proven and/or for criminal convictions to be in place. One individual also suggested an amendment that if allegations regarding domestic abuse are found to be false that this will harm the integrity of the witness and their fitness to bring up children will be questioned. Two domestic abuse support services and one LGBT organisation, however, indicated that such false allegations occur infrequently and should not, therefore, be used as a reason to remove safeguards:

“such references [to false allegations] perpetuate a dangerous culture of disbelief that discourages victims from disclosing their experiences, that punishes women for trying to protect themselves and their children, and that privileges the interests of perpetrators.” (Domestic Abuse Support Service)

Reasons for Removal

10.4.13 Again, some individuals highlighted the risk of false allegations and one parent using this to control the situation or contact, or as a tool in parental alienation.

10.4.14 One individual suggested that, given the lack of evidence around the impact, these provisions should be removed and consideration should be given to other ways to provide guidance. A few individuals felt that such a ‘checklist’ should not be provided (or if retained then full welfare checklist was required), but rather the court/judge should have the discretion take full account of any/all welfare issues, without elevating the importance of one issue over another. It was felt that having such a list may mean that it is more likely that domestic abuse will be alleged as parties know it will have to be specifically considered, while the scope for other issues to be investigated may be limited due to not appearing on the list:

⁶ The SHANARRI factors consists of eight wellbeing indicators, including Safe, Healthy, Achieving, Nurtured, Active, Respected, Responsible and Included.

“Any domestic abuse would have to be considered in determining what is in the best interests of the child, and it should not be afforded an elevated status as against other important factors.” (Individual)

10.4.15 Similarly, organisations agreed that the current provisions may lead to increased conflict and the risk of false allegations being made, while adding little in relation to the child’s welfare or best interests. They also felt that the court would always consider allegations of abuse, along with any other welfare issue that may be of relevance in a case, and agreed that making specific provisions may elevate domestic abuse ahead of other legitimate welfare concerns/factors. It may also risk the court missing an essential factor, and risks deflection from the paramountcy of the child’s best interests. Rather it was felt that each case should be dealt with on its own merits.

10.5 Requiring Court Permission to Bring Further Applications

10.5.1 Views were sought as to whether similar provisions should be made in Scotland as is currently the case in England and Wales, where section 91(14) of the Children Act 1989 provides that: “On disposing of any application for an order under this Act, the court may (whether or not it makes any other order in response to the application) order that no application for an order under this Act of any specified kind may be made with respect to the child concerned by any person named in the order without leave of the court.”

Q35. 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?

	Number	Percentage
Yes	72	28%
No	55	22%
No response	127	50%
Total	254	100%

10.5.2 Half (50%) of the respondents did not provide a response to this question, while 28% were in favour of such an amendment and 22% were against it. Both those who were supportive and non-supportive contained a mix of individuals and organisations.

Support for the Amendment

10.5.3 Individuals and organisations who were in support of the need for further applications felt this would support the court in proactive case management. It would give them the opportunity to decide if there has been a change in circumstances (with any behaviour addressed) and whether to allow the case to

be returned to court, thus reducing the levels of unnecessary litigation. Similarly, organisations suggested the change would assist courts in ‘weeding out’ inappropriate cases and those where an abusive partner is using repeated litigation as a means of perpetuating abuse. As such, it was felt that this may help to protect both adult victims of domestic abuse and children from repeated litigation (and the uncertainty it brings) and the risk of prolonged abuse through court actions:

“This would go to minimise cases of various family members making section 11 applications and children being subjected to numerous legal proceedings and would minimise unnecessary use of court time, reduce the uncertainty for the child and restrict the use of the legal process as a tool by an abuser to cause unease, distress or psychological harm to the other party to the relationship.”
(Local Authority)

- 10.5.4 Two respondents (one individual and one organisation) felt that leave should be required if an application is brought within a fixed time period following a final order (the suggestion from one respondent was within 18 months).
- 10.5.5 One individual felt that greater training was required in the paramouncy principle, and felt that both parents should be present in court to allow for further evidence. Two others stressed the importance of the child’s voice being heard where they are driving the requests to change arrangements.

Do Not Require Leave of the Court

- 10.5.6 For those who did not support the proposed amendment, individuals and organisations highlighted that circumstances could change, thus providing genuine justification for further court applications. It was suggested that such a change could make it difficult to enforce orders and to seek special orders for holidays, etc. and that it may introduce delays into the system:

“Children's lives do change, sometimes very quickly, which genuinely does justify a further section 11 application. A requirement to seek leave adds an extra level of complexity in a situation where the better policy is to keep things as simple as possible.” (Individual)

“[We] are concerned with the delay that may be caused if a party has to seek leave of the court before making a further application under section 11. Such delay may not be in the best interests of the child in certain cases.” (Legal Profession)

- 10.5.7 Several organisations and a few individuals also felt there was a lack of evidence highlighting any problems in this respect, and suggested that the current system was sufficient. A number of existing measures were considered to tackle this issue already, including the need for there to be a material change in circumstance following a final order and the use of the ‘No Order’ principle. Similarly, the use of interlocutors so that parties cannot revert to court about a particular issue and the

Scottish Legal Aid Board's tests for 'chances of success' both helped. The courts' ability to award expenses to a single party, and that the law already allows courts to determine someone a vexatious litigant were also cited.

- 10.5.8 One family support organisation and one individual suggested that such an amendment may be appropriate in cases involving domestic abuse, but that wider application should be avoided. However, three domestic abuse support services also highlighted that while the current wording could mean that victims of domestic abuse could be protected against repeatedly being taken to court by the perpetrator, it could also prevent victims from challenging harmful contact orders. Indeed, it was highlighted that often the impetus to challenge orders comes from the children who do not want contact. As such, it was felt that a more nuanced approach may be required.
- 10.5.9 While generally against the concept of requiring leave of the court, (as it was considered disproportionate and burdensome) several respondents did outline alternative suggestions which were considered more appropriate. These included:
- Further investigation behind repeated applications;
 - Better records of previous behaviours and time wasting/repetitiveness;
 - Full and proper information at the outset to reduce repeated applications.
 - Providing the judiciary with discretion to order in a particular case that leave is required for any future application;
 - Proactive case management to deal with continual changes being sought to interim orders during a series of Child Welfare Hearings;
 - The court considering whether the Children's Hearings System is a better forum for discussing the child's needs and involving local authority social work departments in developing a plan;
 - A possible sanction in expenses for unmeritorious applications to act as a deterrent;
 - Introducing terms similar to section 91 of the Children Act 1989, or section 159 of the Children's Hearings (Scotland) Act 2011 which deals with vexatious and frivolous litigation (such suggestions were made by several respondents both in favour and against the proposed change); and
 - Trialling Parenting Co-ordinators which was considered to have potential to prevent repeated litigation, particularly in connection with ongoing arrangements such as pick-up times and holidays.

10.6 Access to Relevant Criminal Convictions for Civil Courts

- 10.6.1 The consultation sought views on what more, if anything, should be done to ensure the civil courts have information on domestic abuse when considering a case under section 11 of the 1995 Act.

Q36. 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?

	Number	Percentage
Yes	127	50%
No	17	7%
No response	110	43%
Total	254	100%

10.6.2 Half of all respondents felt that action should be taken, while only 7% did not. The remaining 43% did not provide a response. Both those who agreed and those who disagreed comprised a mix of individuals and organisations.

Reasons No Action Necessary

10.6.3 Those who disagreed with the need for additional actions typically felt that the current system already allows for domestic abuse to be raised as an issue, and that it was unnecessary/unhelpful to raise the spectre of domestic abuse in every case. A few also suggested that no one welfare issue should be singled out, rather the court should take a holistic view.

10.6.4 Again, several individuals suggested that such actions could support false accusers and lead to the investigation of innocent parties. Rather, it was felt that domestic abuse was a crime that should be proven in criminal courts.

10.6.5 A range of other reasons (outlined by just one respondent each) included: that there is inadequate evidence to show there is a problem with the current system; that it was important for the court to be able to distinguish between allegations and evidence due to the level of false allegations made in section 11 cases; and that issues of domestic abuse should only be raised if it has been proven and was against the child.

Support for Possible Actions

10.6.6 Respondents were also asked to identify support for a range of possible actions that could be taken (with the results detailed in the table below). Similar levels of support were provided for each option, with only 11 percentage points separating the specified actions, i.e. ranging from 59% who supported the introduction of a duty in legislation on the civil courts to establish if there has been domestic abuse, and 48% who supported discussing with the Law Society of Scotland and the Family Law Association whether guidance for practitioners would be helpful.

	Number	Percentage
Introducing a duty in legislation on the civil courts to establish if there has been domestic abuse	85	59%
Placing a duty in legislation on child welfare reporters that they must consider in each case whether there is evidence of domestic abuse and, if so, report on it accordingly	79	55%
Including domestic abuse in any welfare checklist for the courts to consider in section 11 cases	79	55%
Discussing with the Law Society of Scotland and the Family Law Association whether guidance for practitioners would be helpful	69	48%
Other	19	13%
Total Respondents	143*	

* Note: Multiple responses were possible at this question.

Note: 16 respondents who stated 'no' or gave 'no response' at the first part of the question went on to identify at least one option above.

Reasons for Support

- 10.6.7 Those who supported the need for further actions to be taken felt that it was important to identify if domestic abuse was an issue due to the serious impact this has on a child's welfare, and to identify whether suitable protections are required for the victim/child during any hearings. Implementing duties and a checklist were considered to assist in providing consistency in approach across the country. It was considered important by some to ensure that domestic abuse is considered, even where there are no criminal proceedings/convictions.
- 10.6.8 Domestic abuse support services suggested that domestic abuse is a factor in most child protection referrals to social work, while one children's organisation indicated that domestic abuse is one of the most common welfare concerns in disputed residence and contact cases in Scotland.
- 10.6.9 It was also suggested by eight respondents (including two individuals, two domestic abuse support services, two children's organisation, one legal professional, and one local authority) that placing a duty on the court or compelling them to be more pro-active in considering domestic abuse would assist victims who may otherwise face barriers or pressure not to disclose. It was felt this would address a current gap in the system and would assist the court in ensuring it obtained as much information as possible to inform decision making:

“Although it is reasonable to expect that the woman’s solicitor should, as a matter of course, provide all the relevant information, given the problems women encounter in having domestic abuse raised and discussed, there is considerable merit in having the court ensure that it has all the information required.” (Domestic Abuse Support Service)

“Parties and agents will normally make the court aware of any domestic abuse issues. However, the difficulties which often occur in respect of disclosure of such issues, (such as fear of further abuse), or lack of awareness by victims or agents that certain behaviours are domestic abuse, mean that some instances may not be brought to the court’s attention.” (Legal Profession)

10.6.10 It was also suggested by a few organisations that work was required to address the ‘patriarchal’ nature of the legal system and challenge the perceived scepticism among some professionals about the existence of abuse and victim-blaming mentalities.

10.6.11 For those in favour of some additional actions being taken, but who were against the introduction of a specific duty being imposed on the court, it was generally felt that the existing structure (i.e. solicitors/party litigants raising issues of abuse and the court investigating the allegations) was sufficient, and/or it was feared that introducing a duty for one specific welfare concern could create a hierarchy for risk factors. A few also felt that duties (for the civil court) in relation to establishing domestic abuse may be onerous and could detract from the focus on a child and their best interest.

10.6.12 A few respondents, who were either largely in favour of additional actions being taken or who were undecided, felt that greater clarity was required in several key areas, including:

- Whether routine enquiries would be introduced and what might these entail?
- What would be accepted as evidence of domestic abuse? It was felt that ‘evidence’ may be particularly challenging in cases where abuse is not physical and/or is historical, or where no charges have been made or services have been involved; and
- What processes would be in place to support survivors if enquiry by the court resulted in an initial disclosure of abuse?

Other Actions

10.6.13 Many respondents highlighted that guidance and/or training would be necessary for all professionals involved, both in relation to identifying domestic abuse (and considering the wide range of actions this may entail) and in dealing with this effectively. Should a duty be imposed on child welfare reporters, it was considered particularly important that they receive robust training in this area. Other suggestions (offered by more than one respondent each) included:

- Conduct a specialist risk assessment in cases where domestic abuse is alleged/being investigated;
- Conduct a criminal record check/check for criminal domestic abuse charges;
- Information should be sought from other support agencies/reliable sources involved with the child and/or family, including (but not restricted to) social work and the Children’s Hearing System; and

- Provide equality guidance which develops understanding that both sexes can be and are victims.

10.7 Promoting Domestic Abuse Risk Assessments

10.7.1 The consultation sought views on whether the Scottish Government should do more to promote domestic abuse risk assessments once a contact and residence case is in court.

Q37. Should the Scottish Government do more to promote domestic abuse risk assessments?

	Number	Percentage
Yes	126	49%
No	22	9%
No response	106	42%
Total	254	100%

10.7.2 Nearly half (49%) of all respondents agreed that more needed to be done to promote domestic abuse risk assessments, while just 9% disagreed. The remaining 42% did not provide a response.

Reasons to Promote Domestic Abuse Risk Assessments

10.7.3 Individuals and organisations who were supportive of the promotion/use of risk assessments felt this would help to protect victims and children. It was also suggested that these may allow for greater investigation of allegations where there are no criminal convictions in place:

“Risk assessments help to provide a safe environment for children and victims of abuse.” (Individual)

“...there is evidence that when used they provide further protection for victims.” (Children’s Organisation)

10.7.4 A number of respondents outlined necessary/possible steps for the promotion/implementation of domestic abuse risk assessments. Most commonly, respondents felt that guidance and training (and the promotion of a deeper level of understanding of domestic abuse) was necessary for professionals, both for legal professionals generally, and more specifically for any professional tasked with conducting such an assessment. Some also called for the development and implementation of the Safe and Together model in this respect, although again, it was stressed that additional training for professionals would be required.

10.7.5 Other suggestions offered by more than one respondent each included:

- Funding and/or other resources being made available to support this;
- To develop an assessment tool suitable for both sexes, i.e. to recognise that males can be victims too;
- Any assessment tool to consider all types of abuse, including emotional and psychological abuse, and not focus solely on physical abuse;
- Those with expertise in supporting those who have lived with abuse to be involved in the design and implementation of any risk assessment tool;
- That child welfare officers could include a risk assessment within their reporting duties (again, subject to intensive training), however, others felt such assessments would be more appropriately conducted by others, such as social workers or agencies with more specialist understanding/experience of domestic abuse;
- Liaison with other agencies involved with the family and/or who may have previously assessed such risks, including schools, social workers, Multi-Agency Risk Assessment Conference (MARAC) and Multi-Agency Tasking and Co-ordination (MATAC) checks, domestic abuse support services and other third sector organisations involved with both/either party, and Independent Advocacy Workers;
- Clear consequences for those found to be perpetrating domestic abuse (suggestions included regular checks on the offender, a zero tolerance approach, and clear prosecution outcomes);
- The introduction of a nationally recognised accredited risk assessment; and
- A pilot project to test and evaluate such risk assessments.

Reasons for Not Supporting Domestic Abuse Risk Assessments

10.7.6 Those who were unsupportive of the promotion of risk assessments provided various reasons. Several individuals again felt that any risk assessment should only be used when there are actual criminal charges/convictions. One individual and one organisation also felt that residency and contact hearings were not the forum to deal with domestic abuse, rather this should be dealt with by the criminal justice system. It was felt that the focus of section 11 cases needed to remain the welfare and best interests of the child. Several organisations also felt that sufficient options were already available to judges to both call for further information, make referrals to the Children’s Reporter, and to adequately deal with domestic abuse in section 11 cases.

Caveats and Areas for Further Consideration

10.7.7 Several individuals and organisations (who supported the proposal) suggested that more needed to be done to recognise and protect male victims of domestic abuse. It was felt that the current system involved an inherent bias. One individual who was unsupportive of the proposal also raised this as an issue. They suggested that male victims are often not supported, and indeed they are likely to be doubly victimised due to counter-allegations by the perpetrator.

10.7.8 Other respondents, both for and against the proposal highlighted the risk (and perceived prevalence) of false allegations being made in an attempt by one party to cease the child’s contact with the other. Many of those who were supportive of risk assessments felt that it would be important to establish the truth, some considering that this needed to happen first, while others thought the risk assessment may help to truly understand the situation and identify false allegations. Meanwhile, those against the use of risk assessments were concerned about the impact such assessments may have on innocent parties:

“Many people are scared to say they are victims and others say that they are if they think it will further their cases. A domestic abuse risk assessment would perhaps help get to the truth.” (Individuals)

“These may assist in identifying false claims at an early stage.” (Individual)

10.7.9 Several respondents (again, both for and against the proposal) also noted current issues around the accuracy and scope of existing risk assessments. Individuals who were against the proposal suggested this meant the risks outweighed the benefits, while a few organisations (who were generally in favour of the proposal) felt that these assessments would only identify high risk victims (typically in cases of physical abuse) and would not identify contact issues.

10.8 Improving Interaction between Criminal and Civil Courts

10.8.1 The consultation sought views on whether the Scottish Government should explore the possibility of improving the interaction between the criminal and civil courts where there has been an allegation of domestic abuse.

Q38. Should the Scottish Government explore ways to improve interaction between criminal and civil courts where there has been an allegation of domestic abuse?

	Number	Percentage
Yes	126	50%
No	23	9%
No response	105	41%
Total	254	100%

10.8.2 Half (50%) of all respondents were in favour of the proposal, while only 9% were unsupportive. The remaining 41% did not provide a quantitative response. Both individuals and organisations were found across all response options, however, those organisations who were unsupportive of such exploration/interaction were largely from the legal profession (six of the nine organisations who said ‘no’).

Support for Exploring Greater Interaction

- 10.8.3 Those who supported such interaction felt that it was important for the court to have all the facts in order to inform decision making, and that placing the onus on the civil court to check with the criminal system for any information regarding domestic abuse could relieve some of the burden from victims:

“It is important for the civil court to have all information before them when making a decision regarding a child.” (Individual)

“This may ensure greater protection for children and vulnerable adults and give Sheriffs more information on which to base their decisions.” (Local Authority)

- 10.8.4 It was also suggested that the lack of current interaction was detrimental to some cases and meant that safety was not always properly considered/prioritised:

“At this time there is very little interaction and child contact cases do not take into consideration a person’s convictions but rather their PRRs seem to override all safety concerns. This is something that is fundamentally needed to ensure victims both adult and children’s safety.” (Individual)

- 10.8.5 It was also considered that the current system to deal with domestic abuse was too complex:

“DA [domestic abuse] is described as life on 3 legal planets, the civil, the criminal and the child. Whatever can be done to improve connectivity would be welcome.” (Individual)

“In the context of domestic abuse, the distinction between civil and criminal is wholly unhelpful. The current separation of civil and criminal requires women to split their experiences of abuse in unrealistic ways. Doing so reinforces many aspects of the abuse including powerlessness and fragmentation.” (Domestic Abuse Support Service)

- 10.8.6 Both those who were concerned about a lack of convictions for domestic abuse and those who were concerned about weight being given to false allegations felt that the court needed the ability to consider police reports/involvement. Other forums that were considered important for civil courts to interact with included the Children’s Hearing System and social work services.

- 10.8.7 Several individuals and one family support organisation suggested that greater integration/information sharing may help to protect parties against false accusations in civil proceedings, while others felt that this would allow more robust investigation of disclosure and reduce instances of civil orders conflicting with criminal orders:

“The civil courts need to have that proof and cannot make decisions without support, guidance or conferring with criminal courts.” (Individual)

“We are aware... that previously in Scotland, there have been cases where protective orders made in criminal cases, to cover adult victims and their children, have been undermined by civil court orders.” (Children’s Organisation)

- 10.8.8 Two individuals suggested that only criminal convictions for domestic abuse where this had direct consequences on the wellbeing of the child should hold any merit in the civil process. However, several organisations suggested that interaction between criminal and civil courts should not require a criminal charge as a prerequisite. It was also suggested that civil courts should take account of bail conditions and non-harassment orders during hearings and when considering making a contact order.
- 10.8.9 Again, training for all professionals involved (including the police) was highlighted as a key issue for consideration. Several respondents also mentioned the need for criminal proceedings to be dealt with more quickly so that delays did not impact on the civil court process/decision, and concerns were raised that an integrated system would only be beneficial if this did not introduce delays into the system.
- 10.8.10 Some were against the prospect of an integrated court, but were supportive of greater interaction and communication between civil and criminal forums. Others however, thought there was considerable merit in exploring the potential for integrated courts which could deal with both criminal and civil matters related to domestic abuse.

Lack of Support for Integrated Courts

- 10.8.11 Those who responded ‘no’ to the quantitative element of the question, often indicated that they did so as they were not in favour of integrated courts rather than being opposed to information sharing or improved communication *per se*. It was suggested that civil and criminal matters should remain separate, with several highlighting the differing levels of proof required in each setting, and outlining a concern that the focus on the wellbeing of the child may become overshadowed in integrated proceedings:

“There are fundamentally different functions and standards of proof in criminal and civil proceedings, respectively, and a shared focus on the criminal dimension of a case is likely to diminish the standing of the child’s welfare as the paramount consideration.” (Individual)

- 10.8.12 Several organisations (typically representing the legal profession) felt that the practical and administrative considerations, possible complications and difficulties involved in setting up integrated courts outweighed the potential benefits:

“On a practical level, there would be a huge amount of bureaucracy and time and cost involved in implementing such a system (for example, in drafting new rules of procedure, new appeals process, new body to regulate proceedings due to it being unlikely to fall within the remit of the SCJC or Criminal Court Rules Council, considering new legal aid rules, etc.).” (Legal Profession)

10.8.13 Several respondents also suggested that more detailed research/consideration was required and that greater clarity was needed around how such increased information sharing and/or integrated court process may work in practice.

11 Court Procedure

11.1.1 Three questions were included in the consultation that related to court procedure: the timing of cases, the type of court for Section 11 cases, and the factors relating to section 11 for the courts to consider.

11.2 Provision that Any Delay is Likely to Affect the Welfare of the Child

11.2.1 It has been noted in previous research that contact cases can take a long time to conclude, some taking as long as five years. Because of this, the consultation sought views on whether there should be primary legislation within section 11 of the 1995 Act to require the court to avoid undue delay in family cases which may prejudice the welfare of the child.

Q39. 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?

	Number	Percentage
Yes	136	54%
No	34	13%
No response	84	33%
Total	254	100%

11.2.2 Over half of all respondents (54%) agreed that the Scottish Government should make such provision in primary legislation, while 13% felt they should not. The remaining 33% did not provide a response.

Need for Primary Legislation

11.2.3 The main reasons given for supporting the proposed legislation were that delay is not in the child's best interests and that the longer a case continues, the more stress for the child and family, not least in terms of denying contact until the case is concluded:

"[Delay] can result in a parent having no contact with a child for a long period of time while a decision on contact is made... These cases should be given priority to ensure they are not drawn out to the detriment of the child." (Individual)

"1 year... of lawyers letters going back and forward re contact for the child, up to 3 months waiting time to see if legal aid is granted... up to three years to gain at least 2 hours contact per week." (Individual)

11.2.4 Several respondents perceived that such delay can be tactical, or even financially motivated, and tends to affect the absent parent most:

“[Delay] provides the ‘resident’ parent, the person in possession of the children, usually the mother, to establish a fait accompli - an established regime of the children hardly ever seeing the other parent.” (Individual)

“... the current system discriminates against the non-resident parent given that the length of time separated from children can then become a factor in contact cases.” (Individual)

11.2.5 However, several respondents suggested that delay was often inevitable or justifiable and that *“delay is not necessarily a bad thing” (Individual)*. If delay was because of inefficiencies in the system itself, then a few suggested that additional resources would be needed:

“... any such statutory statement would need to be supported by appropriate resources. There is no point in a statutory statement to that effect, if there is no available court time, or the necessary reports cannot be produced in time.” (Individual)

11.2.6 In this regard, it was pointed out that the emphasis should be on ‘undue’ or ‘unnecessary’ delay, and that speeding up the process should not mean that ‘shortcuts’ undermine good practice.

11.2.7 Several organisations commented on the fact that such legislative provision would ‘focus minds’:

“Delays are inevitable, however legislation will help focus the court timescales and alleviate some of the time constraints and impact on children.” (Local Authority)

“Whilst... the introduction of [primary] legislation is not likely to have any practical impact, we do feel that it will help focus minds. It will also require the recording of clear evidential reasons for delays in cases, which currently does not exist.” (Local Authority)

11.2.8 It was also suggested by one individual that there should be a dedicated team within the court (of social workers, psychologists, mental health professionals, etc.) to provide information, assessments and interventions in a timely and time-limited way. One children’s organisation also suggested extending a ‘welfare principle’ to all court proceedings relating to children and young people.

Primary Legislation Unnecessary

11.2.9 Of those who disagreed that primary legislation was needed, many highlighted the effect of delays on children’s welfare, and this was because either that the courts were already aware of the need to avoid delay in a child’s best interests and that it was unclear what further legislation would achieve:

“It is difficult to see what making such a statement in legislation would achieve. There can be few people involved in such cases who are unaware of the negative impact on children of unjustified delay. Nor would a bold statement do anything to address the causes of delay.” (Individual)

“Such rules as to speed of process... typically are honoured more in the breach than in the observance.” (Individual)

11.2.10 Other comments against the proposal included that delay is not necessarily a bad thing, and may indeed be in the child’s best interests. It was suggested that cases are often ‘organic’ and can require time for resolution methods to be tried:

“... enable full investigation, bedding down of relationships, a trial period for contact, mediation or the like... there may on occasions be very good reasons for final resolution to take some time.” (Other Organisation)

11.2.11 Finally, a suggestion by one public body was that the currently ongoing SCJC consultation should be completed before any movement is made on this specific proposal, as that SCJC consultation *“may be better placed to address the issue of delay effectively.” (Public Body).*

11.2.12 Of those respondents who did not answer the quantitative question, but gave a comment nonetheless, most were generally in favour of the proposal but with certain provisos. Several suggested that the key stakeholders were already aware of the ramifications of delay, and that better court resources and better case management would help reduce delay. However, one respondent suggested that guidance/practice directions, rather than legislation *per se*, would be able to highlight the links between undue delay and detrimental impacts on children and families.

11.3 Section 11 Cases Heard Exclusively by the Sheriff Court

11.3.1 Although not used in many PRR cases currently, provision is there for applications to be heard in the Court of Session rather than the Sheriff Court, but this can lead to additional costs and complications in respect of legal aid applications.

Q40. Should cases under section 11 of the 1995 Act be heard exclusively by the Sheriff Court?

	Number	Percentage
Yes	58	23%
No	81	32%
No response	115	45%
Total	254	100%

11.3.2 Around a third of respondents were against this proposal (32%), whilst 23% were in favour. The remaining 45% did not provide a response.

11.3.3 Among those who were against the proposal, there was a strong belief that the current situation was satisfactory:

“There doesn’t appear to be a real issue here. If 99% of cases go through the Sheriff Court anyway, there would need to be compelling reason to ‘reduce’ access to justice by shutting off the Court of Session as a route for the remaining 1% who appear to need it.” (Individual)

11.3.4 The vast majority of comments in this regard related to the fact that the Court of Session was the more appropriate forum for certain, often complex and diverse, cases relating, for example, to divorce proceedings involving significant financial settlements:

“There are divorce cases running quite properly in the Court of Session where it would be contrary to the best interests of the child to have s.11 issues heard in a different court.” (Individual)

11.3.5 Indeed, it was pointed out by several respondents that the Court of Session can remit a case back to the Sheriff Court if necessary and appropriate, *“ex proprio motu (under the Courts Reform (Scotland) Act 2014, section 93)” (Legal Profession)*.

11.3.6 However, several respondents who disagreed with the proposal suggested that there were flaws in the system currently which may make the Court of Session an attractive option for some litigants. For example, a few respondents suggested the Court of Session was a speedier process and therefore any criticism of higher costs in that court may be unfounded, as one respondent noted:

“Costs are actually not that different in practice as Court of Session cases tend not to drag on.” (Local Authority)

11.3.7 Also, some noted that the Sheriff Court is not always family-oriented and that more specialist family courts or Sheriffs were needed:

“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.” (Family Support Organisation)

11.3.8 Finally, one public body highlighted the issue of legal aid in Courts of Session, where such an application *“... would be refused as not meeting the reasonableness test given it could be dealt with at a lesser cost in the Sheriff Court” (Public Body)*.

11.3.9 Of those respondents who agreed with the proposal, several suggested that the Court of Session was too expensive and that having all cases heard in the Sheriff

Court would not only reduce costs but also speed up the process. Several also commented that cases could be referred to the Court of Session if need be at a future date. The main caveat, however, in having all cases heard in the Sheriff Court was that, despite being more ‘family-oriented’, professionals involved in the Sheriff Court would need to have an improved knowledge base about child development, engaging with children and young people, etc. One respondent said that ideally there needed to be the consistency of one Sheriff dealing with a case throughout.

11.4 Checklist for Courts to Consider

- 11.4.1 The final question in this part of the consultation sought views on whether a ‘welfare checklist’ of factors relating to cases under section 11 should be created for consideration by the courts, factors including, for example, domestic abuse, criminal prosecutions/convictions or unreasonable parental influence of the child.

Q41. Should a checklist of factors for courts to consider when dealing with a case be added to section 11 of the 1995 Act?

	Number	Percentage
Yes	103	40%
No	50	20%
No response	101	40%
Total	255	100%

- 11.4.2 A checklist was considered a positive step by 40% of all respondents, while 20% felt this should not be implemented. The remaining 40% did not provide a response.

Support for a Checklist

- 11.4.3 The main reasons given for supporting such a checklist was that it would ensure consistency of practice, ensure due regard has been paid to all the important factors of a case and/or any elements of risk, it would aid decision making, and it would be in keeping with the UNCRC General Comment No 14:

“... the UNCRC indicated support for the use of checklists, with the Committee indicating that it ‘considers it useful to draw up a non-exhaustive and non-hierarchical list of elements that could be included in a best-interests assessment by any decision-maker having to determine a child’s best interests’... CRC/C/GC/14 (2013), para 50.” (Individual)

- 11.4.4 A few individuals suggested that good examples of checklists could be found in the USA and in Northern Ireland (used in the Children’s Order), while others suggested that subsections 7A to 7E of S11 of the 1995 Act would be a good

starting point for developing a checklist. Suggestions for specific issues to be included on such a checklist included:

- Hearing the child's voice and focusing on their best interests;
- Whether a children's support worker should be assigned;
- Domestic abuse;
- Any relevant criminal convictions or prosecutions;
- Whether there are any substance misuse issues;
- Whether there is any evidence of one parent unreasonably trying to influence the child against another parent;
- Whether there is any evidence of coercive and/or aggressive behaviour in either party;
- Whether one party is unnecessarily delaying a case and does this contribute to alienation;
- Is contact safe, and are there any measures needed to ensure safety;
- Consideration of parents (and extended family's) involvement/relationship with the child;
- Consideration of shared/equal parenting;
- Whether a Proof hearing is likely to be needed; and
- Characteristics of the child or either party, such as the child's developmental stage, whether there are any additional support needs (ASNs), mental health issues, general health concerns, and educational needs.

11.4.5 It was also suggested by several individuals that such a checklist would allow allegations to be investigated and either substantiated or shown to be false.

11.4.6 The only provisos raised by several respondents was that any checklist needed to be non-hierarchical and non-exhaustive. It was considered that cases would contain their own unique issues, and therefore parties/the court must be able to add or consider additional factors as appropriate:

"A checklist of factors would help the court, standardise practice and continuity of decision making... However, we need to be mindful that any checklist is flexible and non-exhaustive, allowing for other factors to be included and the ability to be more responsive to children and young people." (Local Authority)

Reasons against a Checklist

11.4.7 Of those who were against the proposal, the most common reason was that having a checklist may both present unnecessary factors in an individual case and also potentially undermine the presence or validity of factors *not* listed in that checklist:

"Going through a checklist will require time to be spent on issues that are not relevant in an individual case. Having a checklist runs the risk of the specified factors being considered more important than other, unspecified, factors which may, in the particular circumstances, be crucial." (Individual)

11.4.8 In this respect, one respondent again argued for the removal of subsections 7A-7E, to prevent an undue focus on any one factor, and several respondents commented that no list can be exhaustive and is thus open to criticism and review:

“The list could never be exhaustive but runs the risk of being seen as definitive.” (Local Authority)

“A welfare checklist will never be exhaustive/comprehensive; and any hierarchy of listing is controversial and unhelpful. Inserting a welfare checklist would make the legislation more complex and lengthy, without strengthening the underlying principles. Checklists have a tendency to skew the welfare analysis, apparently prioritising some aspects of welfare over others, or risking the omission of certain considerations from the overall analysis.” (Individual)

11.4.9 Several respondents reiterated the fact that the child’s welfare is paramount and that the court should decide on which factors are important to consider in that regard, given the discretion of the Sheriff:

“Sheriffs experienced in dealing with family cases know what factors should be considered... Not all of the factors within a checklist are live issues in every case. The Sheriff or judge is obliged to provide a written decision explaining the factors which were taken into consideration and to explain why they were significant. There is no reason to depart from this approach.” (Other Organisation)

11.4.10 Some agreed with the consultation document that a checklist could result in a ‘tick-box exercise’ and could also create more disagreement between parties:

“Codifying a list of factors may lead to other relevant matters pertinent to the child’s welfare being overlooked [or] prompt technical dispute between parties if it appears that a particular issue has not been properly canvassed.” (Local Authority)

11.4.11 Several respondents suggested that more training and awareness-raising was needed amongst key stakeholders, and one respondent (who did not answer the quantitative question), suggested that current practice is inadequate if a checklist is being considered.

12 Alternatives to Court

12.1.1 This section of the consultation sought views on:

- Whether the Scottish Government should do more to encourage Alternative Dispute Resolution (ADR);
- Mediation and international child abduction cases; and
- Guidance for children and litigants.

12.2 Encouraging Alternative Dispute Resolution

12.2.1 The main consultation document outlined the main types of ADR approaches currently available for use in family law cases, including mediation, arbitration, collaborative law, family group conferencing and family group therapy.

Q42. Should the Scottish Government do more to encourage Alternative Dispute Resolution in family cases?

	Number	Percentage
Yes - introduce Mediation Information and Assessment Meetings in Scotland	104	41%
Yes - better signposting and guidance	88	35%
Yes - other	41	16%
No - no further action required	21	8%
No response	79	31%
Total Respondents	254*	

* Note: Multiple responses were allowed at this question.

12.2.2 The most popular option was for the Scottish Government to introduce Mediation Information and Assessment Meetings (MIAMs), with 41% of all respondents in favour of this. This was closely followed by better signposting and guidance (preferred by 35% of respondents), while 16% favoured other options and 31% gave no response.

Support for Encouraging ADR in Family Cases

12.2.3 It was generally felt that any steps that could be taken to encourage the use of ADR options and keep cases out of court was a good thing. It was suggested that the use of ADR could provide a quicker, less intimidating process, which helped parents to focus on the needs of the child, reduce the need for solicitor input, and may also help to reduce costs. It was also suggested by a few respondents that automatic/mandatory ADR may also help to reduce parental alienation after the break-down of a relationship:

“Anything that lessens the “winner takes all” mentality of court proceedings can only help all of those involved.” (Individual)

“Court should be a last resort wherever possible other avenues to resolution should be explored.” (Family Support Organisation)

“Doing more to encourage ADR will mean that quicker, cheaper and less stressful options can be used as alternatives to court.” (Local Authority)

- 12.2.4 In relation to mediation, any promotion of this was felt helpful. One respondent suggested that many people still do not know what this is or understand what is involved. Others felt that it would be helpful (and cost effective) for parties to have shown an attempt at mediation prior to attending court (subject to exclusions for domestic abuse). Others still suggested that mediation should be made compulsory (with a few suggesting mediation required increased/more secure funding):

“Mediation is a great way to help both parties understand and help towards their differences putting the adult disputes aside and try to do best for the child/children.” (Individual)

“This could assist in preventing people becoming too entrenched in their position at an early stage and would hopefully result in less lengthy protracted court disputes.” (Individual)

- 12.2.5 In relation to signposting, it was felt that it would be beneficial for multiple channels to be used in order to maximise awareness. It was also highlighted that information would need to be made available in alternative and accessible formats, as well as via non-legal channels in order for it to be accessible to party litigants. Those who favoured signposting over MIAMs generally did so because it was felt that mediation (or other forms of ADR) should not become compulsory:

“Make people aware of the options before going through court and then let them make an informed decision.” (Individual)

“There will always be litigants for whom alternative dispute resolution is inappropriate. Helping people choose what is right for them by way of signposting and guidance is preferable to compulsion.” (Other Organisation)

Other Options

- 12.2.6 Three respondents suggested that non-court methods/initiatives (such as child/family tribunals) should be the primary way of resolving family cases. Many others, however, suggested that family therapy, or Family Group Conferencing/Family Group Decision Making may be useful ADR options, while a few also suggested that collaborative law should be offered as an ADR option:

“There is little or no scientific evidence that family courts provide a net benefit to children and their families, while there is much evidence that they exacerbate

conflict, stress and trauma and, albeit inadvertently, contribute significantly to harm to children.” (Children’s Organisation)

12.2.7 A few respondents suggested that better education regarding the harmful effects of parental conflict and the benefits of ADR was required (including for both parties and solicitors), as well as promotion of all forms of ADR (not just mediation). It was also suggested that legal aid funding needed to cover the full range of ADR options. Two respondents also suggested there should be automatic/presumption of 50/50 custody.

12.2.8 Other options (suggested by one respondent each) included:

- Introducing a Parenting Co-ordinator pilot scheme;
- Introducing a Family Dispute Resolution pilot;
- Risk assessments forming part of the package of measures;
- Psychological testing/treatment for parents exhibiting signs of mental health issues;
- Limiting the need for the use of private solicitors by creating greater access to legal information for all, simplification of process, and clarity of outcomes;
- Preventing solicitors creating friction/animosity and a competitive scenario;
- That a central body should be identified with appropriate funding and training to enable the issues of contact and residence to be agreed and supported;
- Requirement for a Sheriff to give permission for a case to proceed to court based on evidence that this is in the child’s best interests; and
- Providing information and guidance to those going through divorce, and simplifying the divorce process.

12.2.9 It was suggested that legal aid funding may not be the best method for ensuring access to MIAMs as this would likely fall under the limitations of the Advice and Assistance system, resulting in ‘haphazard’ funding arrangements within cases. Rather, it was suggested that MIAMs would be better funded by the Scottish Government either directly or via the creation of a central body set up for the purpose of co-ordinating and meeting the costs of such sessions across Scotland.

Reasons for a Lack of Support/Caveats to Support

12.2.10 Many respondents highlighted that mediation (although a few discussed this with more general reference to ADR) would not always be appropriate in every case, and was not appropriate for cases where one party had learning disabilities or where there had been domestic abuse. It was felt that ADR and mediation would allow the perpetrator of domestic abuse to continue to exert control/power, manipulate the situation, and continue to intimidate/abuse the victim (although two family support organisations suggested that mediation could be adapted to accommodate cases involving domestic abuse). It was also highlighted that mediation would only work where both parties were prepared to engage, and were equal parties in terms of being able to advocate for themselves and negotiate. It was felt that compulsory mediation/MIAMs (or other ADR options) should be avoided:

“This has to be on a case-by-case basis; for mediation to work you have to have two willing, honest and reasonable parents committed to working it out.”
(Individual)

12.2.11 It was also suggested by some respondents that there was a need for consequences for those who do not engage appropriately in mediation, while several also felt that mediation required greater powers so that any recommendations are adhered to:

“Mediation needs consequences if not followed or time is wasted at meetings. The mediator should be able to report back to the court. The current system in place is not working and toothless.” (Individual)

“Mediation is by far the best way to make parents understand what is best for a child. It should also have the power to enforce the agreements and decisions made.” (Individual)

12.2.12 It was also suggested by a few respondents that there are currently not sufficient avenues for views of children and young people to be considered/involved in ADR processes, and that this needed to be addressed (although one family support organisation suggested that opportunities are available in the mediation process):

“In the context of child law, I think there is also a very significant concern as to the role which children can or do play in ADR and any moves to increase its use must address that concern.” (Individual)

12.2.13 Finally, several respondents suggested that the current arrangements worked well, and that opportunities already existed for parties to try mediation and other ADR approaches.

12.3 Confidentiality of Mediation and Cross Border Abduction of Children

12.3.1 The main consultation document also sought views as to whether the Scottish Government should make regulations to clarify that confidentiality of mediation extends to cases involving cross border abduction of children. It was proposed that the regulations would clarify that mediation in such cases would benefit from the same level of confidentiality as mediation in other types of family cases.

Q43. Should Scottish Government make regulations to clarify that confidentiality of mediation extends to cases involving cross border abduction of children?

	Number	Percentage
Yes	99	39%
No	30	12%
No response	125	49%
Total	254	100%

12.3.2 Overall, 39% of respondents agreed that such clarification should be made, while 12% said it should not. Nearly half (49%) of all respondents did not provide a response. Of those who were non-supportive, only four were organisations.

Support for Clarifying Regulations

12.3.3 Both individuals and organisations who supported the proposal generally considered it important to stress that anything discussed in mediation should remain confidential, and therefore the regulations should extend to cross border abduction to ensure that loop-holes cannot be found to breach confidentiality:

“All forms of mediation should be confidential therefore this should extend to cases involving cross border abduction of children.” (Individual)

“Confidentiality is a core tenet of mediation and should extend to any and all uses of the process.” (Local Authority)

“Confidentiality is a cornerstone of mediation and we would welcome the Scottish Government clarifying that it extends to cross border cases and that nothing discussed or disclosed within the mediation process can be referred to in legal proceedings. The only time confidentiality should be waived is where the law imposes an overriding obligation of disclosure, including reporting a child in need of protection, or when the information discloses an actual or potential threat to human life or safety.” (Family Support Organisation)

12.3.4 A few individuals also suggested that anything which could provide clarity would be welcomed. In addition, several organisations felt that clarity was required as a result of M v M 2015 SLT 682 and the case of FJM Petitioner (2015) CSOH 130 where it was determined that confidentiality provisions did not apply in cases of child abduction. It was felt this now meant that the situation was unclear/confused and that the proposed regulations could provide certainty:

“To avoid a situation similar to what happened in M v M 2015 SLT 682 we consider that the Scottish Government should make regulations as proposed.” (Legal Profession)

- 12.3.5 Several respondents (both individuals and organisations) suggested that it would be necessary to ensure that any regulations take account of the Hague Conference Guide to Good Practice mediation and child abduction and is consistent with European Directive 2008/52/EC Art 7a.
- 12.3.6 There appeared to be some confusion over the interpretation of this question among some individuals, and while they indicated they supported the proposal they gave reasons which suggested they did not believe that confidentiality should be provided where there was a threat/execution of child abduction.

Reasons for Non-Support

- 12.3.7 It was felt that cases where there was a threat/execution of abduction should result in full disclosure, and the matter should be brought to the attention of the court. A few also felt that information from mediation more generally should be shared with the court (with participants' permission) so that the court has all the information with which to make decisions. Importantly, others disagreed as it was felt that general disclosure would deter parties from engaging:

*“Confidentiality should be over-ruled when the safety of a child is in question.”
(Individual)*

- 12.3.8 One respondent also suggested that Directive 2008/52/EC of the European Parliament, Article 7 allows for the disclosure of information shared in mediation when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person.
- 12.3.9 The nature of cross border abductions were also considered significant as this would involve the rules of more than one legal system. Questions as to governing law would prevail, thus making the regulations difficult to enforce. Another respondent suggested that this regulation was unnecessary as mediators would already clarify confidentiality of the process, which could be reinforced by solicitors and the court.

12.4 Guidance for Litigants and Children

- 12.4.1 The main consultation document also sought views on whether further guidance for children and litigants in relation to family cases should be produced and published.

Q44. Should Scottish Government produce guidance for litigants and children in relation to contact and residence?

	Number	Percentage
Yes	152	60%
No	13	5%
No response	89	35%
Total	254	100%

12.4.2 Most respondents (60%) agreed that additional guidance should be produced, while only 5% felt this was not necessary. The remaining 35% did not provide a response. Of those who were unsupportive of additional guidance, only two were organisations, both from the legal profession.

Reasons for Support

12.4.3 It was felt that information and guidance in general was positive and helpful, and that information for party litigants and children in particular would be welcomed:

“Any guidance provided for litigants and children in contact and residence cases would be useful. Many people go through the legal system with little or no knowledge of what to expect...” (Individual)

“We agree that such guidance could improve litigants’ and children’s experience of the court process. Further guidance might also be helpful to party litigants.” (Legal Profession)

12.4.4 Several organisations suggested that information for potential litigants, while outlining the court process (and perhaps the downsides of litigation), should also include information about ADR options. It was also suggested by both individuals and organisations that information for children needed to promote their rights and outline the ways in which they can contribute their views:

“Clear, child friendly guidance in mediums best suited to children and young people, is critical, not only to help alleviate fears about process but to help facilitate children’s engagement with giving their views.” (Children’s Organisation)

12.4.5 It was suggested by several respondents that there appears to be a general lack of understanding among both litigants and children regarding the court process, and therefore the provision of clear, standardised information would be beneficial. A few also felt that clear guidance around the court process may also lead to fewer cases going to court:

“The evidence that we have suggests that there is a huge amount of misinformation amongst members of the public regarding the law in relation to contact and residence. Given this, it would seem entirely appropriate for the government to produce understandable guidance to seek to correct misapprehensions and clarify the legal regime.” (Individual)

- 12.4.6 It was suggested, however, that such information and guidance would need to avoid using legal jargon, be tailored to a range of different adult and child audiences (taking account of their age, different developmental stages and communication needs), be available in a range of languages and alternative/accessible formats, and would need to be maintained and updated regularly. Indeed, in relation to information for children, several organisations suggested that utilising co-design and co-production approaches with children and young people would help to ensure it reflected the needs and views of those who would use it. Suitable avenues suggested for the provision of such information included from solicitors, Citizen's Advice, government websites and other online sources, local authority buildings (e.g. libraries) and community centres, and for information to be included with the initial Writ sent to parties when court action is raised:

“This should be free, accessible and available in various formats so that people of all ages, abilities and geographic locations can have equal access.” (Children’s Organisation)

- 12.4.7 It was also highlighted that the information would need to outline a range of scenarios and lived experiences rather than implying that contact with both parents is always in the child’s best interests. The range of protections that can be implemented for domestic abuse victims throughout the court process should also be outlined, it was suggested.

Reasons for a Lack of Support

- 12.4.8 Mixed reasons were given for not supporting the provision of additional guidance. Some felt that there was a risk this could be seen as an alternative to legal advice, and so a disclaimer to state that this was not the case would be required. A few also felt that the guidance would be unhelpful as it would likely reinforce the message that litigation was difficult, but for many in this situation it was considered to be the only avenue left open to them:

“I do not think that more information on how litigation is bad would be helpful in the situation. This is already the message that is out there, and it is often very discouraging for those that seek a meaningful relationship with their children and who cannot pursue this through mediation.” (Individual)

“Every situation is different. Guidance risks being so general that it does not address the issues, or misleading because it does not apply in the circumstances of the case. There is no substitute for proper advice relating to the individual case.” (Legal Profession)

12.4.9 It was also considered by a few respondents that sufficient information already exists across a range of different platforms, and therefore, producing more was not cost effective and indeed the resources could be better utilised elsewhere.

12.5 Young People's Views on Information for Children

12.5.1 The young persons' survey also asked respondents to consider whether the Scottish Government should provide information to children and, if so, what information would be helpful and how it should be provided.

YP11. Should we give information to children on what it is like to go to court about who they live with or have contact with?

	Number	Percentage
Yes	160	54%
No	9	3%
Don't know	30	10%
No response	96	33%
Total	295	100%

12.5.2 Over half (54%) of the respondents to the young persons' survey agreed that information should be given to children on what it is like to go to court about who they live with or have contact with, while only 3% disagreed. A further 10% said they did not know, and 33% did not provide a response.

YP12. What information should we give?

12.5.3 Young people were also asked what information should be given. It should be noted, however, that there appeared to be some confusion around the meaning of these questions; respondents were either unsure if this meant when the case in general went to court or if the child themselves had to attend court, while others responded from one perspective or the other.

12.5.4 Some suggested that only basic information should be given while others felt that it was better to provide as much information as possible. Some also felt that information should only be given to those children who have to attend court/speak to the judge, while others felt it important that all children were given some information so that they could understand the situation/what was happening.

12.5.5 Generally, respondents felt it was important to inform children about what happens at court, and what will be expected of them (if they need to appear). Specific information that was considered to be important included:

- What a Sheriff is and what they do;
- Why things like this happen and how to cope with it;
- What the court building/room will be like;
- Job description of every adult involved;
- Outline the different stages of the process and their level of involvement at each stage;
- What the court experience is like and how to deal with this;
- Who will be there;
- Who will speak (in general and specifically who will the child speak with);
- The types of questions they might be asked;
- Will anyone neutral/court appointed help them work out what they want to say;
- What will happen and/or be talked about and why;
- What is expected of the child;
- What times have they to be there;
- How long the process takes;
- Who they can speak to if they are scared/unsure of anything;
- The child's rights;
- How to think about what's best for them in the long run;
- Not to be fearful that parents might punish them for what they say;
- What will happen immediately afterwards;
- How decisions are made;
- What the possible outcomes might be and how this will affect them;
- What support will be available and what to do/who to speak with if they don't agree with the outcome; and
- Who to speak to if they are being abused (including emotionally), and definitions of abuse.

12.5.6 Several also indicated that children should be provided with information upon the outcome of the case to help them understand the verdict and why this decision has been reached.

YP13. How should the information be made available?

	Number	Percentage
Online	40	14%
Booklet to be given to children	87	29%
App	30	10%
Comic	27	9%
No response	111	38%
Total	295	100%

- 12.5.7 Young people were also asked about their preferences regarding how such information should be made available. A booklet was the most popular option, preferred by 29% of respondents, while 14% thought the information should be available online, 10% thought via an app, and 9% preferred a comic. The remaining 38% of respondents did not provide a response.
- 12.5.8 Some respondents indicated that they would prefer a mix of sources to be available to meet the range of preferences and stages of development for children. Others also suggested that some form of school based resource should be available, with suggestions including lessons, talks or workshops, computer based education games, posters and booklets. Other suggestions included:
- Audio booklets;
 - Video or interactive games whereby a child can see the setup of a court and judges, and where they will be, which gives them opportunities to come up with questions and 'experience' it (virtually) beforehand;
 - A key adult that follows a child through the process, knows the details of the case and can answer relevant questions; and
 - A visit to the court (at a suitable time/date before the actual hearing).

13 Birth Registrations

13.1.1 Both the main consultation document and the young persons' survey sought views in relation to:

- Allowing children to apply for a change of name on birth certificates; and
- Seeking the child's views on changes of name on a birth certificate.

13.1.2 The main consultation also asked respondents to consider registration of births by unmarried fathers.

13.2 Change of Name in the Birth Register by Under 16s

13.2.1 The Scottish Government invited views on whether young people under 16 with capacity should be able to apply to record a change of name themselves. Respondents to the main consultation were asked whether a person under 16 with capacity should be able to apply to record a change of their name in the birth register, while the young persons' survey asked whether children should be able to ask to change their name on their birth certificate themselves.

Q45. Should a person under 16 with capacity be able to apply to record a change of their name in the birth register?

	Number	Percentage
Yes	82	32%
No	76	30%
No response	96	38%
Total	254	100%

13.2.2 Respondents to the main consultation were split in their opinions, with 32% agreeing this should be possible and 30% indicating that it should not. The remaining 38% did not give a response.

YP14. Should children be able to ask to change their name on their birth certificate themselves?

	Number	Percentage
Yes, at any age	23	8%
Yes, but only if they understand what this means	133	45%
No	32	11%
Don't know	6	2%
No response	101	34%
Total	295	100%

- 13.2.3 Over half (53%) of respondents to the young persons' survey, however, felt that children should be able to change their name on their birth certificate, although most of these respondents felt this should only be possible if they understood what this means (45% compared to 8% who felt that those of any age should). One in ten (11%) felt that children should not be able to do this, while 2% did not know and 34% did not give a response.

Increasing Personal Choice/Autonomy for Young People

- 13.2.4 Several individuals and organisations to the main consultation suggested that allowing children with capacity to change their name on their birth certificate would provide greater choice and autonomy for young people, as well as promoting the rights of the child. Indeed, several individuals and organisations noted that the current system allows a child's name to be changed by a parent without the child being consulted. As such, the proposed change was considered to minimise the risk of parents misrepresenting the wishes of children, and more accurately reflect the child's position:

"I see this proposal as one that expands the autonomy of older children, and also one that reduces the tendency of parents to believe that their decisions in relation to the child are more important than those of the child him- or herself."
(Individual)

"This will keep the young person at the centre and give that young person more autonomy." (Local Authority)

- 13.2.5 It was noted by a few individuals and several organisations that young people under the age of 16 can withhold consent for adoption, make wills, instruct a solicitor, and consent to medical treatment. Therefore, allowing children to apply to change the name on their birth certificate was considered to provide consistency with these other issues of civil law. Some organisations also

suggested that the change was required to align with children's rights in terms of the UNCRC, and with existing Scots law on legal capacity.

- 13.2.6 It was also suggested by young people that a child should have some say/make the decision if they don't like their name/want to change it as they have to live with it. Two noted that they had known as young as 8 years old that they wanted to change their name.

Removing Links to Absent or Abusive Parents

- 13.2.7 Young people who felt a child of any age should be able to change their name on their birth certificate typically suggested that they should not be forced to keep the name of an absent or abusive parent (or a name they do not like).
- 13.2.8 This was also an important factor for individuals and organisations in the main consultation. It was felt that children who no longer wanted to be linked to, or identify with abusive and/or absent parents should be permitted to change their name on their birth certificate. Indeed a few suggested this can be helpful in improving the child's safety and was part of the 'healing process' for some.
- 13.2.9 Similarly, several respondents (generally organisations) suggested this would be a positive step for children in care who wish to distance themselves from their birth family and/or who wish to change their name to match that of their long term carers (although it was suggested that advocacy support may be required to support young people in such situations).
- 13.2.10 Also, where a child had been living with a different name for some years, or had made repeated requests over a significant time period, several individuals felt they should be afforded the right to legally change their name.

Requires Capacity to Make the Decision

- 13.2.11 Some young people who were supportive of children being allowed to change their names when they understand what this means suggested it was important that the child understands the consequences and to ensure that they have good reasons for seeking the change, and are not simply changing it because they can/for fun:

“Too young and they would change it to something silly without understanding the 'severity' of their actions. However, it should be assessed how strongly the child feels and how much thought has been put into the decision as some young children are wise beyond their years for a variety of reasons.” (Young Person, Age 13-16)

- 13.2.12 Although a child's capacity was incorporated into the proposal given to respondents in the main consultation document (i.e. they were not asked to decide whether capacity was required or not), some specifically mentioned the need for capacity in their response. Some felt that young people could be supported to

ensure they understood the decision and consequences, but where a child showed such capacity, it was generally felt that an application should be allowed:

*“If a child has capacity, then they should be able to make this decision for themselves, ensuring that their view is the view truly being heard and held.”
(Individual)*

Identity and Transgender Reasons for Allowing Children to Apply

13.2.13 A few young people, individuals and organisations also noted that there may good reasons for a child wishing to change their name, for example if they identified as transgender and had adopted a new name in line with their gender identity. In particular, it was highlighted that transgender children/young people can already change other documentation, but not their birth certificate, meaning that official documents will conflict. However, it was also considered important to allow changes to their sex on the birth certificate to ensure both match a young persons’ identity, otherwise, it was felt there may not be much uptake from trans young people:

“Currently, with parental consent, transgender children and young people can already change their name and gender identity on school records, medical records and for their passports. However... their birth certificates still remain unchanged, conflicting not only with the child or young person’s own identity but also with any of their other identifying documentation. This can cause significant distress for children and young people.” (LGBT Organisation)

Need for Greater Clarity/Detail

13.2.14 A few respondents, who were generally supportive of the proposal, suggested that greater detail was required around how the proposals would operate in practice. For example, what would the definition of capacity entail; who would be responsible for judging whether a child had the capacity, and what skills and training would they require; what would happen in a situation where a child doesn’t want to change their name but a parent does, can the parent still proceed with an application or do they lose this right once the child has capacity; what if one parent agrees and the other does not, or both parents disagree with the child’s choice, who decides?

Children Should Not Change Their Name on a Birth Certificate

13.2.15 Across both the main consultation and the young persons’ survey, several respondents suggested that children were not mature or responsible enough to make such a decision. It was felt that parents should retain responsibility for this or the child should wait until they are an adult:

“Children are very malleable and changeable, so they shouldn’t have the option until they are a lot older.” (Young Person, Age 17-18)

13.2.16 Similarly, individuals and organisations in the main consultation also suggested that children younger than 16 may have been influenced, encouraged or pressured into the change by an adult, or that it may be used as a tactic for parental alienation:

“I believe that children could be too easily influenced by others to change their name and that having autonomy might put further pressure on a child.”
(Individual)

13.2.17 Several also felt that there was no need to change the current arrangements as it was already possible to be known as/use another name, and then if a person wished they could then legally change this at age 16.

13.2.18 Other issues mentioned by a few individuals and/or organisations each included:

- that 16 seemed an acceptable/reasonable age to confer such responsibilities (although a few also suggested this needed to be raised to 18);
- that the proposed changes risked the children making decisions and changing their name without discussing this with their parents/those with PRRs; and
- that it should not be possible to change a name on a birth certificate at all.

13.3 Seeking the Views of a Young Person when Applying for a Change of Name

13.3.1 It was suggested in the main consultation document that, the applicant would only need to obtain the views of the child when the child lacks capacity to apply on their own behalf, provided that young people under 16 with capacity are allowed to apply to record a change of name themselves.

Q46. 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?

	Number	Percentage
Yes	150	59%
No	11	4%
No response	93	37%
Total	254	100%

13.3.2 Over half (59%) of the respondents to the main consultation document indicated that an adult applicant should be required to seek the views of the child, compared to only 4% who felt this was not necessary. A further 37% did not provide a response. Of those that felt such a change was not necessary, only one was an organisation, with the rest being individuals.

13.3.3 Respondents to the young persons’ survey were also asked whether parents applying to change a child’s name should ask the child’s views.

YP15. When a parent applies to change a child's name should they ask the child's views?

	Number	Percentage
Yes, a child of any age should be asked	82	28%
Yes, but only if they understand what the change of name means	106	36%
No	1	0%
Don't know	4	1%
No response	102	35%
Total	295	100%

13.3.4 Nearly two thirds (64%) of the respondents to the young persons’ survey felt that parents applying to change a child's name should have to ask the child's views. Over a third (36%) felt they should ask but only if the child understands what the change of name means, while 28% felt that a child of any age should be asked. Only one respondent felt that a child should not be asked, while 1% said they did not know, and 35% did not give a response.

Respecting Children’s Rights

13.3.5 Many organisations and several individuals (including young people) suggested it was important to seek the child’s views because a name was considered to be a significant part of a person’s identity. They should, therefore, have some input to the decision. As before, it was suggested that the child was central to the issue, and that their rights and views should be respected and protected:

“It is their identity which will be affected. A child's name is something they understand from a very young age therefore the subject should be discussed before anything is finalised.” (Young People, Age 13-16)

“...it is the child's name and therefore their views ought to be sought as it will have an effect upon them practically and emotionally.” (Individual)

“Our names are major components of our identities... Regardless of age, any person should be consulted if a change of name is being considered.” (LGBT Organisation)

13.3.6 A few individuals, however, thought that both parents and the child should have to agree before any change could be made. Similarly, one organisation felt that the reasons for the change of name needed to be understood with any differences of

opinion explored before final decisions were made. These steps were considered important to ensure that the change is what the child wants, that the child is not being coerced by one parent, and to identify/limit this as a tool for parental alienation.

- 13.3.7 It was suggested by young people and individuals that some children may not want to change their name while others may not like the new name picked for them, and so it would be advantageous to discuss this with the child in advance to understand their views and wishes. Some respondents (including young people, individuals and organisations) also felt that the child should make the final decision, and that (where a child is deemed to have understanding of the situation) no change of name should be approved without the agreement of the child. Where a child is deemed to lack capacity it was still considered important to seek the views of the child, but any decision must be made (and documented) in the best interests of the child.
- 13.3.8 A number of respondents (both individuals and organisations) also highlighted the need to comply with the UNCRC in respecting children's rights to express their views in matters that affect them.

Only Seek Views When Children Understand

- 13.3.9 Those young people who felt that children should be asked only where they understand what the change of name means either suggested that there was no point in discussing the issue with those who were too young to understand, or that those old enough to understand the situation and implications of a name change should be consulted as it was an important and lasting decision:

"You can't reason with a child who cannot speak, but if it's going to affect them i.e. school, friends, then they need to have a say." (Young Person, Age 17-18)

"Because it will probably be the child's name until they die or if they change it again." (Young Person, Age 8-12)

- 13.3.10 Again, while respondents to the main consultation were not prompted to consider whether a child needed to understand the situation, a few individuals and organisations (typically from the legal profession) did suggest that a presumption should be made that those aged 12 and over have the capacity to hold views on potential name changes and their identity and, therefore, their views should always be sought. Others specified that sufficient age, maturity and capacity were all required for views to be sought/considered:

"...provision would have to be made for taking into account the age and level of understanding of the child." (Legal Profession)

Need for Greater Clarity/Detail

13.3.11 Again, a few respondents (who were generally in favour of the change) identified a need for greater clarity or detail in relation to the proposals. For example, how are children's views to be evidenced; who would assess the capacity of the child or determine sufficient age and maturity; what would happen if a child did not want to have their name changed, and who would be responsible for making the final decision if there was a disagreement; and how does this proposal sit with the possibility of children making their own applications where they have capacity and/or where they are deemed not to have capacity.

No Legislative Changes Needed

13.3.12 The one organisation who indicated that seeking a child's view was unnecessary, and one in support of this requirement questioned the sense in seeking children's views within the current system. It was highlighted that the Registrar has no power to refuse to register the name change based on the views of the child, and therefore, there would be little point in seeking their views and making them known to the Registrar. Rather, they suggested that parents should be encouraged/prompted to seek the views of the child prior to making an application, and perhaps to confirm to the Registrar that view have been sought but not disclose what these views are, but that little more would be possible within the Registrar's current role.

13.3.13 Similarly, a few individuals and organisations noted that no change was required to legislation, as Section 6 of the 1995 Act notes that anyone with PRRs making a major decision (which they considered a name change to be) is required to give the child the opportunity to express views and to take account of those views in the light of the child's age and maturity. However, it was suggested that perhaps parents are unaware of these requirements and therefore an express requirement may reinforce the need to seek the child's views.

No Requirement to Seek a Child's Views

13.3.14 The one young person who indicated that it should not be necessary to seek a child's views did not provide an explanation for their answer. However, several individuals in the main consultation felt there was a risk of coercion of the child's views and/or that this could be used as a tactic in parental alienation. A few also felt that those under the age of 16 were too young to understand/provide informed views.

13.3.15 A few respondents also acknowledged and identified some, limited, situations where it may be necessary to change a child's name without their views/permission being sought. This was where it was in the best interests of the child, and largely due to safety and protection issues. However, even in such circumstances, some felt it was important to ensure children understood the reasons it was happening.

13.4 Re-Registering Births to Add the Father

- 13.4.1 The main consultation document also outlined the current practices that allow fathers (including unmarried fathers) to be added to the birth certificate of their child retrospectively.

Q47. 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?

	Number	Percentage
Yes	130	51%
No	14	6%
No response	110	43%
Total	254	100%

- 13.4.2 Half (51%) of the respondents agreed that S.I. 1965/1838 should be amended, while only 6% disagreed. The remaining 43% did not provide a response. It should be noted that only two organisations (one from the legal profession and one local authority) disagreed with the amendment, with all others who disagreed being individuals.

Child's and Father's Right

- 13.4.3 Of those who felt that it was important that a father's name appeared on the birth certificate and that there was a process to allow this to be added retrospectively, many suggested that it was a legal/factual document, and that it could benefit the child in the future by clarifying parentage and providing information about the child's identity. It was also suggested that, sometimes, fathers are not included on the birth certificate at the original point of registration due to the personal difficulties between the mother and father, therefore it was used as a tool/weapon in disputes:

"A birth certificate is a factual document that holds legal significance for the child. The content of the certificate should not be determined by the emotions of the mother and her personal feelings towards the father." (Individual)

"A birth certificate is the best evidence of genetic identity. It should be full and accurate." (Other Organisation)

- 13.4.4 Some organisations considered that allowing re-registration to show a father's name was in the best interests of the child and supported the child's rights, particularly where PRRs had been granted by a court:

“It is generally in the child’s best interest to have both parents registered on their birth certificate.” (Family Support Organisation)

“...it should be in the interests of the child for that to be so [for a father’s name to be added], if such a declaratory and imposition of PRRs is in place.” (Legal Profession)

13.4.5 Several individuals also felt that a father had a right to be on the child’s birth certificate:

“If he is the genuine father he has a right to be on the birth certificate.” (Individual)

13.4.6 Several felt that the process should be automatic, and should not require the mother to be responsible for the paperwork/to provide a signature. The requirement for the mother to be involved in the process was considered, in some circumstances at least, to provide a further barrier - a few cited instances where courts had granted fathers PRRs and declarator, but the mother still refused to have the birth certificate amended:

“...it is not unheard of that an unmarried father has PRRs and declarator and the mother still refuses to re-register the birth to reflect he is the father on the birth certificate.” (Individual)

13.4.7 Several (including both individuals and organisations) also felt this was an equality issue, both in relation to gender and marital status. A few organisations suggested that the current use of the Register of Corrections may be against the Equalities Act and risks contravening Article 8 of the EHRC, while one individual felt that the proposed change would not accord with the UNCRC. It was also suggested that the rules needed to be amended further to accommodate same sex couples on a child’s birth certificate:

“A father who has declarator of parentage and PRRs should be named on the birth certificate. It would be discriminatory not to do so.” (Legal Profession)

Conditions/Exclusions

13.4.8 A few respondents suggested that the child’s view should be sought and that births should be re-registered only where it is considered to be in the best interests of the child. Other conditions and exclusions were also identified by individual respondents, including:

- In rape cases it was felt there should be no parental rights following conviction;
- No PRRs or rights should be conferred on fathers with serious criminal convictions (such as serious domestic or sexual abuse);
- Births should be re-registered only where they were considered to be a fit father/have the best interests of the child at heart; and

- Births should be re-registered only with the consent of any child with capacity.

Reasons not to Amend S.I. 1965/1838

13.4.9 Those who felt that S.I. 1965/1838 should not be amended gave varying reasons. A few respondents felt that there was little/nothing to be gained by re-registering the birth, that there was no consideration of the child's rights/welfare in the decision; and that a father would be able to change the birth certificate without the mother's consent.

13.4.10 A range of other reasons were given by individual respondents, including:

- The father's name could be added later with the child's consent;
- The father could then apply for a passport and abduct the child;
- May impact negatively on immigration rules;
- Raises complex issues around parentage and legal parental status, the purpose of the birth certificate, and more detail would be needed;
- Should only happen if they are the parent with most residency; and
- Would be complicated given that someone else has existing rights on the birth certificate.

14 Children’s Hearings

14.1.1 As part of the consultation, four questions were asked about the processes involved in Children’s Hearings. These covered appeals by the Principal Reporter in respect of deemed relevant person status, modernising the system through enhanced technologies, giving local authorities the right to receive reports in advance, and the banning of personal cross examination of vulnerable witnesses and children.

14.2 Appeals by the Principal Reporter

14.2.1 ‘Deemed relevant person’ status is decided at a pre-hearing panel or Children’s Hearing. Such status is granted if the person has or recently had ‘a significant involvement in the upbringing of a child’, and allows that person to be involved in proceedings and to receive relevant information and reports.

14.2.2 Currently, Section 160 of the Children’s Hearings (Scotland) Act 2011 allows for the individual requesting deemed relevant person status, the child, a relevant person in relation to the child, or a combination of these persons to appeal a decision relating to deemed relevant person status. The Principal Reporter is not currently allowed to appeal the decision of a sheriff in an appeal against deemed relevant person status.

Q48. 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?

	Number	Percentage
Yes	112	44%
No	34	13%
No response	108	43%
Total	254	100%

14.2.3 Over two fifths (44%) of respondents agreed that the Principal Reporter should be given the right to appeal in these circumstances, while 13% disagreed. The remaining 43% did not provide a quantitative response.

Support for Principal Reporter to have Right of Appeal

14.2.4 A third of those who commented in favour of allowing Principal Reporters to appeal a Sheriff’s decision on relevant person status stated that it was in the interests of the child for this to be allowed:

“In the interest of justice we feel that the Principal Reporter should be given right to appeal particularly if they feel there has been error in law. To allow this to go unchallenged is detrimental to the interests of the child”. (Local Authority)

- 14.2.5 Indeed, several organisations felt that reporters were likely to hold more information than the Sheriff in respect of the issues surrounding deemed relevant person status:

“The Sheriff is only adjudicating, the Principal Reporter is aware of the characteristics and nuances of all parties.” (Family Support Organisation)

- 14.2.6 Several organisations noted, however, that whilst supportive of the proposal, they were aware that appeals by Principal Reporters could create further stress for the family and create further delays in decision making.

- 14.2.7 Four respondents commented that giving this power of appeal to the Principal Reporter would take the onus off other parties to question a Sheriff’s decision on deemed relevant status, not least if those other parties are unsure of their right to appeal:

“... other relevant persons, i.e. parents or the child, may not be aware that they can do this, or how to do this, therefore giving this right to the Principal Reporter provides an extra safeguard.” (Legal Profession)

- 14.2.8 From a legal standpoint, a few respondents questioned why, when the original legislation was drawn up, Principal Reporters were not included as having the right to appeal this decision when they had the right to appeal other decisions.

- 14.2.9 Although not directly related to the consultation question, a few respondents (two individuals and two organisations) suggested that the test for ‘relevant person’ status was ambiguous/subjective. It allowed scope for inconsistency in decision making, and was too restrictive in terms of allowing input from others who were close to the child/family and could input relevant information to cases. One family support organisation felt the definition of ‘relevant person’ needed to be clarified, while one children’s organisation suggested the legal test regarding ‘significant involvement’ should be reviewed.

No Right of Appeal for Principal Reporters

- 14.2.10 Of those who disagreed with the proposal to allow Principal Reporters to appeal a Sheriff’s decision on relevant person status, several individuals and one legal organisation commented that powers were already in place to question relevant person status:

“The Principal Reporter already has the right to convene a Pre-Hearing Panel at any time to consider a person’s relevant person status (where they consider the person may no longer meet the test). The 2011 Act also provides for constant review of deemed relevant person status. All relevant persons have a right to

appeal such a decision, as does the child. This gives a number of checks and balances on such decisions.” (Legal Profession)

14.2.11 A few respondents commented that Principal Reporters have no locus to appeal such a decision, since their role is an administrative and impartial one:

“I struggle to see what locus the reporter has to appeal the decision. The decision is part of the process and this distinguishes it from most other decisions the reporter can appeal against, which are substantive decisions.” (Individual)

“That is not the job of the Principal Reporter. This would result in them being brought into the decision-making process, which would result in the removal of the all-important impartiality of the Reporter’s position.” (Individual)

14.2.12 Two respondents also suggested that the Principal Reporter may be biased and may not necessarily protect the child’s best interests. Two others noted that further delays that would result from such a proposal.

14.3 Modernising the Children’s Hearing System

14.3.1 The consultation document noted that the Children’s Hearings System Digital Strategy aims to improve meaningful participation in children’s hearings through, for example, remote-link, pre-recorded views and other digital tools. The main consultation document sought views on the appropriateness of further modernisation.

Q49. Should changes be made which will allow further modernisation of the Children’s Hearings System through enhanced use of available technology?

	Number	Percentage
Yes	146	57%
No	14	6%
No response	94	37%
Total	254	100%

14.3.2 Over half (57%) of the respondents were in favour of changes being made in relation to the use of technology in the Children’s Hearing System, while only 6% were unsupportive. The remaining 37% did not provide a response.

Support for Further Modernisation

14.3.3 Of those in favour of further modernisation, it was generally acknowledged that children and young people today are technologically advanced and would probably be able and willing to adapt to such changes with ease:

“The digital world is central to most activities, communication, information etc. for children and young people. Such developments would support choice, access and participation and promote safety and wellbeing... [and] would offer a real opportunity to genuinely listen to the concerns many children and young people have about attendance in person at Hearings and help perhaps to alleviate the anxiety, stress and distress this can cause.” (Local Authority)

- 14.3.4 However, despite the endorsement of the proposals for modernisation, several respondents raised a note of caution about technology undermining the basic tenets of the Children’s Hearings system:

“... this would need to be managed very carefully for example to ensure that children are being given the opportunity to continue to attend in person should they wish... Essentially the hearing in person should remain the ‘norm’ with these other facilities being available where appropriate.” (Individual)

“... the fundamental position [is] that the Children’s Hearing makes the ‘best’ decisions if everyone can be involved in the same discussion, in the same place and at the same time.” (Public Body)

- 14.3.5 In this regard, a few respondents raised the question of modernisation being a means to a more expedient end:

“... it needs to be properly resourced and alternatives to appearing in person should only be used when it is the child’s choice and not for expediency or cost reasons.” (Children’s Organisation)

“Any modernisation... should be undertaken for the primary purpose of improving its support to children and not simply to reduce costs, or improve efficiency for staff.” (Children’s Organisation)

- 14.3.6 One of the key provisos of modernisation through technology was the issue around confidentiality and data protection: *“... security would be of paramount importance in terms of the technology being used.” (Legal Profession)*

- 14.3.7 The main reason for supporting the proposal was because of the potential benefits to children and their families (including those with learning or other disabilities). These benefits can be separated out into ‘offering opportunities’ and ‘avoiding difficulties’.

Offering Opportunities

- 14.3.8 Being able to participate remotely (both for children and families) in a hearing offered several advantages, pending - as some respondents mentioned - any

implementation of the Barnahus⁷ system in Scotland. In particular, the child would feel safer in more relaxed surroundings:

“Often children are not brought to hearings as there is a fear they may be distressed or upset by the hearing process itself. Participation by remote link may therefore be a very good way to ensure that the panel members and hearing participants can see the child and speak to the child but without the child having to be in the hearing room itself.” (Legal Profession)

14.3.9 Many respondents felt that this would enable better involvement and engagement for all concerned, and that children and young people could be better prepared and would be better able to express their views. A few respondents also highlighted the importance of video links for people with learning disabilities or those with additional support needs, but on the understanding that advocates could be present with those individuals at the time of the remote hearing, and that documents be provided to them in advance to reduce potential stress on the day. It was also suggested that the ability to participate remotely would be of benefit to those who perhaps live or work remotely to the location of the court proceedings, or for those only required to attend part(s) of the hearing.

Avoiding Difficulties

14.3.10 One of the most commonly cited reasons for further modernisation through remote-link technology was the fact that children (and indeed related persons) would be able to avoid the stress of meeting a potential ‘adversary’ or ‘abuser’, either by participating from a remote site, or having another party participate from a remote site:

“Such technology would also facilitate other participants to attend via video link... for example an abusive parent... allowing the child to feel safer attending in person.” (Children’s Organisation)

14.3.11 Children and their families would also avoid potentially long journeys to attend in person at a Hearing, and thereby reduce the travel costs involved. Several people also mentioned the loss of schooling for children, since most hearings are held during school hours.

14.3.12 In addition to the benefits for the child and family, improved technology could be used to aid training and review of practice within the Children’s Hearings system. Technology could also be used to prepare children in advance of a hearing, for

⁷ See, for example, <https://childhub.org/en/promising-child-protection-practices/what-barnahus-and-how-it-works>

example, through the use of Apps (e.g., MOMO⁸), VR headsets⁹, and SMART boards. More generally, a few people suggested that papers for hearings could also be sent electronically and that greater use could be made of e-mail.

14.3.13 However, it was also mentioned by one organisation that, despite technological improvement, current practice within the Children’s Hearings system needed to change as well:

“[T]he greater use of technology... should not detract from efforts to improve practice, which we are advised at times can be poor and inconsistent. It would be naïve to assume that the implementation of new technology will be a catalyst for improved practice.” (Children’s Organisation)

Concerns with the Proposal

14.3.14 Only 8 respondents disagreed with the proposed modernisation of the system and a further two respondents who did not answer the quantitative question commented that the proposal would ‘remove’ the child from the centre and from the decision makers.

14.3.15 Three of those who disagreed with the proposal commented that the technology might fail or be vulnerable to ‘attack’. Two others thought the costs would be prohibitive. Other concerns included that research would have to be done first on the potential of technology, that traditional methods of meeting together ensure the ‘bigger picture’ is seen and that it helps to see the child/parent in person. One final respondent suggested that such technology (i.e. remote links) should only be used in certain circumstances, such as in domestic abuse cases.

14.4 Providing Reports to Local Authorities in Advance

14.4.1 Current legislation provides for parties to the proceedings to be given relevant reports in advance of a Children’s Hearing, for example Sheriffs, SCRA Reporters, solicitors and panel members, but social workers are not party to the proceedings under the Children’s Hearing’s (Scotland) Act 2011. As such, the main consultation sought views on whether reports should be provided to local authorities in advance of Children’s Hearings in line with other participants.

⁸ MOMO (Mind Of My Own) - <https://mindofmyown.org.uk/>

⁹ VR headsets are used to familiarise children with court settings currently in England – <https://www.salford.ac.uk/news/articles/2018/pioneering-vr-project-to-help-demystify-court-process-wins-government-backing>

Q50. Should safeguarder reports and other independent reports be provided to local authorities in advance of Children’s Hearings in line with other participants?

	Number	Percentage
Yes	127	50%
No	24	9%
No response	103	41%
Total	254	100%

14.4.2 Half (50%) of all respondents agreed that reports should be provided to local authorities in advance of Children’s Hearings, while 9% disagreed. The remaining 41% did not provide a quantitative response.

14.4.3 The majority of supportive responses could be categorised under two main reasons: for procedural efficiency and for enhanced decision making.

Procedural Efficiency

14.4.4 More than half of the comments supporting this consultation question related to the need for a clear and transparent process, and one which avoids conflict or delay within hearings. The most common reason given for allowing local authorities to have sight of the full report before the hearing was to enable social workers to prepare the child’s plan in advance. Fifteen respondents highlighted this rationale, as per the consultation document:

“There are clear benefits to the local authority being in receipt of all information in advance, in order to put plans in place.” (Children’s Organisation)

“The local authority... the ‘implementation authority’... should be provided with safeguarder and other reports in advance of Children’s Hearings in order that it can consider in furtherance of its duties to the relevant child how in advance of Hearings it might implement any recommendations that might be made and contribute to discussions about such recommendations from a position of knowledge.” (Legal Profession)

14.4.5 Many respondents commented on the need for transparency, fairness and consistency in approach, which would result from local authorities being provided with reports in advance:

“We favour an approach that promotes openness in advance of hearings... to produce better outcomes for children. It engenders trust between professionals and minimises the element of surprise at a hearing.” (Legal Profession)

14.4.6 This 'element of surprise' is one which can be inferred to put social workers at a disadvantage in respect of future planning in the interests of the child, as one respondent highlighted:

"As far as possible, the hearing should not be the place to hear about new or different information but should be the forum by which there is co-production in the examining of the issues." (Public Body)

14.4.7 One other respondent pointed out that, although not legally stipulated that reports can be shared with, for example, social workers, safeguarders "*in practice currently have discretion' to do so*" (Individual), and evidence from the recent report on the Role of the Safeguarder¹⁰ suggests that other relevant persons (e.g. solicitors or parents) may give the safeguarder's report to the social worker concerned. Certainly, several respondents (primarily organisations) agreed that allowing local authorities to see reports in advance would help avoid conflict or disagreements at hearings - especially in front of the child, and would also help avoid deferments or delays:

"... matters which are perhaps more contentious could be discussed or ironed out before the hearing and don't need to be dealt with in front of the child... It would also likely have the effect of minimising delay in that matters won't have to be continued for consideration of the report [by the local authority]." (Local Authority)

14.4.8 Finally, although one children's organisation cited the concerns of looked after children and young people that safeguarder reports should not be shared unnecessarily with local authorities, a few respondents agreed that reports should be shared with local authorities if the child in person is informed and gives permission. Two other respondents suggested that such reports would also be lodged in the child's Social Work file, which would be useful for future reference.

Enhanced Decision Making

14.4.9 The second key point to emerge from responses supporting the sharing of safeguarder and other reports was that decisions would be better informed, that information sharing is important to producing a balanced decision, that time would be saved, and that outcomes would be in the better interests of the child:

"There have been occasions where Social Workers have learned of new information discussed at a children's hearing that have had a bearing on their report and recommendation. It is frustrating that Social Workers are putting significant energies into work that is being undermined due to the lack of sharing of information." (Local Authority)

¹⁰ McDiarmid, C., Barry, M., Donnelly, M. and Corson, S. (2017) *The Role of the Safeguarder in the Children's Hearings System*, Edinburgh: Scottish Government.

14.4.10 Of the 24 respondents who disagreed with the consultation question, 13 gave a qualitative response. The vast majority of these responses related to the question of whether sharing full information with local authorities would be necessary, given how sensitive that information might be. Most respondents who disagreed with sharing full reports suggested that only the recommendation of safeguarder and other reports was essential for social workers:

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

14.4.11 Two individuals suggested that sharing full reports would only alienate parties further, notably parents, and potentially create additional conflict. One further individual commented that the independence of safeguarders would be undermined or diluted by sharing their reports, not least if such reports were shared with social workers ahead of parents and other relevant persons.

14.4.12 Finally, one respondent could see both sides of the argument in respect of the proposal:

“We can see the practical value of this. It would certainly save time and lead to quicker determinations... However, the safeguarder and other persons who provide independent reports do so to assist the children’s hearing, not to assist the local authority... [which] is not a ‘party’ to the decisions made by the children’s hearing.” (Children’s Organisation)

14.5 Banning Personal Cross Examination of Vulnerable Witnesses

14.5.1 The final question in this part of the consultation related to the possible banning of the personal cross examination of vulnerable witnesses (including children) in applications to the Sheriff to determine grounds of referral to a Children’s Hearing or in appeals to the Sheriff against decisions made at hearings. For example, a party to the proceedings can seek to personally question a child or other vulnerable witness in circumstances where, for example, that party is alleged to have committed a sexual or violent offence against the witness.

Q51. Should personal cross examination of vulnerable witnesses, including children, be banned in certain 2011 Act proceedings?

	Number	Percentage
Yes	106	42%
No	39	15%
No response	109	43%
Total	254	100%

14.5.2 Two in five (42%) respondents were in favour of banning personal cross examination of vulnerable witnesses, while 15% of respondents were not. The remaining 43% provided no response.

Support for Banning Personal Cross Examination

14.5.3 Of those who agreed with this proposal, many felt that banning personal cross examination would reduce the trauma for the child/vulnerable adult, not least if that child/vulnerable adult was scared by, and/or a victim of, the person doing the cross examining:

“It seems to be odd that a person alleged to have neglected a child or to have abused them should have the opportunity to personally cross examine them given that this could be extremely traumatic and inappropriate for the child or indeed another vulnerable person.” (Individual)

14.5.4 Many respondents suggested that vulnerable witnesses needed to be protected, irrespective of whether in criminal courts or children’s hearings, and that it was in the child’s best interests that personal cross examination be banned, as it is in criminal proceedings:

“A lot of work has happened in recent years in relation to the evidence of vulnerable witnesses... this work is all helping to shift the culture and practice in criminal trials, but Children’s Hearings proofs involve some of the most vulnerable children (and adults) in our society... [Organisation name] is asking for the same or similar provisions to be introduced into proof proceedings... and civil proceedings.” (Public Body)

“It is abhorrent that children recognised as vulnerable witnesses, taking part in a hearing which [claims] to hold their interests central, should have fewer rights than child witnesses in criminal cases.” (Domestic Abuse Support Service)

14.5.5 Several respondents suggested that the same arguments applied to those given in response to the earlier section on vulnerable witnesses within the consultation, including mention by one children’s organisation that SCRA and the Scottish Government recommended in a joint paper in 2016 that:

“the Rules be amended to prohibit (unless exceptional circumstances apply) personal examination of child and vulnerable witnesses in proceedings under parts 10 and 15 of the Children’s Hearings (Scotland) Act 2011.” (Children’s Organisation).

- 14.5.6 Finally, many respondents who favoured the proposal noted that legal representation would need to be available for those banned from such cross examination. This issue was also raised by a few respondents who disagreed with the proposed ban on personal cross examination, noting that those banned would need the provision of legal aid and a lawyer.

Support to Retain Personal Cross Examination

- 14.5.7 Those who were against the proposed ban felt that it could further alienate children or one of the parents, that cross examination was an important arm of justice and that there were ways to deal with sensitivity or vulnerability through the use of pre-recorded evidence or having hearings conducted in a therapeutic environment.
- 14.5.8 Respondents who did not answer the quantitative question, but made a comment, suggested that, as above, legal aid and/or legal representation would need to be available to the person seeking to cross examine a vulnerable witness/child, that evidence needs to be adequately tested in the interests of justice and that:

“a distinction should be drawn between cases where there should be a mandatory prohibition of personal examination and cases where this should be discretionary.” (Legal Profession).

15 Domicile of Persons Under 16

15.1.1 The final substantive question in the consultation sought views on whether there was a need to clarify section 22 of the Family Law (Scotland) Act 2006 (2006 Act) which relates to domicile of persons under 16.

15.2 Where a child is deemed to be domiciled

15.2.1 Specifically, the consultation asked whether respondents felt that there was a need for the Act to be amended including, for example, making reference to “domicile of origin” and “domicile of choice”. This was set against a backdrop of no known problems with the existing Act but the prospect that this change may add clarity, in some cases.

Q52. Should section 22 of the 2006 Act which prescribes where a child is deemed to be domiciled be amended?

	Number	Percentage
Yes	54	21%
No	57	23%
No response	143	56%
Total	254	100%

15.2.2 Over half (56%) of respondents did not answer this question, and among those who did, there was an equal split in opinion as to whether the 2006 Act should be amended or not.

Support to Amend the Prescription of where a Child is Deemed to be Domiciled

15.2.3 Among those who supported an amendment, the general reasons given were that it would make the law more current, would remove any ambiguity (for parents and legal professionals), and that improved clarity may be in the best interests of the child:

“Clarity and simplification is always better, it provides expectation and allows for clearer follow through if a child is removed from their domicile.” (Family Support Organisation)

15.2.4 More nuanced views expressed by individuals included that the temporal scope and transitional provisions of the 2006 Act could be clarified and that there would be benefit in considering how domicile would be defined in the case of recent movements:

“The Act does not make plain the time at which the section 22 rule is to take effect. Does it take effect from its date of commencement (4 May 2006) forward, to regulate the domiciles of those who, at the date of coming into force of the Act, were under 16 and those at that date not yet born? Or does the ultimate domicile of an octogenarian who dies after commencement of the Act fall to be determined according to the rules contained in the Act? The point is untested, and opportunity should be taken to clarify the matter if the provision is to be reviewed.” (Individual)

“I believe the child is domicile with the parent who has custody. Therefore, if that person moves then so does the domicile.” (Individual)

- 15.2.5 A small number of respondents also felt that clarification was required around the precedence of domicile of origin or choice, with some suggesting that choice (of the child and both parents) be given more prominence:

“It should clarify that a child should be domicile in a place to which both parents agree - i.e. have equal access/opportunity to contact - until a time when the child is capable of making a decision on their own [re] being domicile.” (Individual)

- 15.2.6 Some individuals and organisations who supported change perceived that the absence of the provisions ever having been tested in court did not justify a need for the Act to remain unchanged:

“If it is the best interest of child and even although no cases have been tested in court there may come a time when it is, so up-to-date clear rules should apply.” (Individual)

- 15.2.7 One individual suggested that there was scope for provisions of section 22 to become unclear if the UK left the EU. Another noted that an increase in relationships between people who are from or live in different countries was a good reason for reviewing and clarifying the position by legislating in advance of any issues emerging. One individual also commented that the opportunity should be taken to improve and clarify the meaning of section 22, specifically since the 2006 Act makes no reference to the terms ‘domicile of origin’ and ‘domicile of choice’:

“It is regrettable that full consideration was not given to the implications of this ad hoc statutory incursion into the framework of the domicile rules. Silence about the name of the under-16 domicile, and its place in the general scheme, is damaging to the coherence of the domicile rules, and opportunity should be taken to review it.” (Individual)

No Change Required

- 15.2.8 Among those who felt there was no need for change, some individuals seem to have misunderstood the question and other individuals simply commented that

they perceived the current Act to be adequate, sensible and workable. Several organisations and individuals also described the change as “premature”.

- 15.2.9 Several organisations and some individuals who responded also commented that the absence of any testing in court to date was an indication that change was not required (unlike those who agreed and who felt that the absence of previous challenges should not block the change):

“Currently given the existing provisions have not been tested there does not seem to be a problem; if there is no problem then there is no need to amend existing legislation.” (Family Support Organisation)

“There has been no reported case law of which I am aware on s.22, and I am not aware of any difficulties currently concerning the above provision.” (Individual)

“There are no reported cases indicating difficulty on this point and in the absence of evidence the case cannot be made for change.” (Legal Profession)

- 15.2.10 One individual commented that they perceived that amending the law of domicile would not resolve the wider problems which have historically been identified with the changes introduced by the 2006 Act and proposed that a better approach would be to implement all of the recommendations previously made by the Scottish Law Commission in this regard. Another individual suggested that there was no sound basis for reviewing the Act on the basis of ‘time’ since they perceived that this was already well understood and unambiguous in the provisions:

“A child's domicile is determined according to the facts that exist when the issue becomes important...If the crucial date is before the coming into force of the 2006 Act then the previous rules determine the child's domicile... In sum, I see no ambiguity needing statutory amendment for its resolution.” (Individual)

- 15.2.11 Overall, those who did not agree did so on the basis that there did not appear to be an evidence base to support any amendment and that further consideration and rationale was required before any amendments were made.

Need for Clarity Regarding Proposed Changes

- 15.2.12 A small number of respondents (who did not provide a response to the closed question) commented that it was unclear what changes were being proposed and that no formal proposal had been put forward regarding the amended wording. They also felt that it was not clear whether this was an issue that needed to be addressed and that more information/further detail was needed around why the change was needed.

16 Impact Assessment

- 16.1.1 The main consultation outlined the various impact assessments that had been conducted in relation to the development of policy in this area and sought comments and/or any evidence related to these.

Q53. Do you have any comments about, or evidence relevant to:

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

	Number	Percentage
The partial Business and Regulatory Impact Assessment	10	4%
The partial Child Rights and Wellbeing Impact Assessment	27	11%
The partial Data Protection Impact Assessment	6	2%
The partial Equality Impact Assessment	18	7%
No response	216	85%
Total Respondents	255	

Note: Multiple responses were possible at this question.

- 16.1.2 While most respondents (85%) provided no response to this question, 11% indicated they had comments related to the Child Rights and Wellbeing Impact Assessment, 7% had comments on the Equality Impact Assessment, 4% had comments on the Business and Regulatory Impact Assessment, and 2% had comments on the Data Protection Impact Assessment.
- 16.1.3 Respondents were provided with the opportunity to outline their comments and evidence in relation to each of the impact assessments. Two provided more general comments. One individual felt that awareness raising was required for the issues raised in the assessments, and that the needs of the child needed to be more fully considered. Similarly, one local authority stressed the need for any changes to place the child at the centre, and said that caution was required to ensure that others' interests were not inadvertently put ahead of those of the child.
- 16.1.4 While six respondents indicated at the closed element to this question that they had comments or evidence in relation to the Data Protection Impact Assessment, none went on to provide any qualitative comments in this respect.
- 16.1.5 Comments related to each of the other impact assessments are outlined in the sections below.

16.2 Child Rights and Wellbeing Impact Assessment

- 16.2.1 Many who provided comments in relation to the Child Rights and Wellbeing Impact Assessment focused on the need for any changes to have the child's best interests as the main focus:

“Any changes should continue to have the welfare and best interests of the child as the focus.” (Legal Profession)

“Child rights are important as the adults can often make decisions in their own best interest, rather than that of the child. This needs to be addressed.” (Family Support Organisation)

- 16.2.2 Similarly, it was considered important to hear the child's voice and respect their wishes:

“A child should be heard in court if they are able to speak and know what they want, they should not be made to do things that makes them unhappy and causes complications in their lives and development.” (Individual)

- 16.2.3 One public body, however, also highlighted that it was important that decisions could be revisited and arrangements changed as circumstances are likely to change over time.
- 16.2.4 A few individuals also took the opportunity to highlight elements of their own experiences which they felt needed to be addressed. These issues included: courts being perceived as not serving the best interests of the child or failing to protect children; the interests of one parent or another being put above the welfare/interests of the child; courts being 'complicit' in one party's abusive behaviour against the other (by allowing the case to be brought back to court many times); social workers' views being given too much weight; a lack of understanding of parental alienation; a lack of rights for non-resident parents; and a lack of 'reasonable' contact time for non-resident parents and the child.
- 16.2.5 One family support organisation noted that the assessment lacked data concerning family court cases.
- 16.2.6 Further, one individual discussed the rationale for making the rebuttable presumption of 50/50 shared care of the child the default starting position in any dispute. They argued that this was necessary due to the content of Article 2 and Article 9 of the UNCRC. They also felt that the evidence base supported the assumption that shared care was typically favourable for a child's wellbeing, and cited several sources to reinforce this view.
- 16.2.7 Finally, one children's organisation expressed disappointment that the Child Rights and Wellbeing Impact Assessment was not more fully complete and felt this needed to be addressed as a matter of urgency. They noted concerns about the positioning of children's rights in some of the

consultation questions and, therefore, felt it was vital that fuller assessment was undertaken in order to inform the process going forward.

16.3 Equality Impact Assessment (EQIA)

16.3.1 The two key equality impacts discussed were gender and LGBT issues.

Gender

16.3.2 One family support organisation felt that female gender bias had been built into the design of some of the consultation questions, but that this had been rectified slightly by inviting male support organisations to provide their views.

16.3.3 Others suggested that family law itself was more biased towards one gender or another. For individuals, this was typically seen as a bias in favour of mothers, with fathers not afforded the same rights and status as mothers:

“There is without doubt a gender based bias favouring mothers this should be re-examined due to the damage it causes children and the torturous process many good fathers have to go through to see their children again.” (Individual)

16.3.4 However, one domestic abuse support service considered that evidence shows that family law practice typically favours fathers. They suggested that domestic violence is often not fully considered in family cases and that the civil court process is often misused by perpetrators of domestic abuse:

“The evidence demonstrates that men’s violence in the family is frequently rendered invisible in family law practice, driven in large part by gendered assumptions within law and culture. Indeed, empirical studies have identified a trend toward favouring fathers, in contrast to widespread assumptions that mothers are favoured in custody litigation.” (Domestic Abuse Support Service)

16.3.5 This organisation also felt that more consideration was necessary on how other forms of gender-based violence are considered in family courts, including ‘honour’-based violence and forced marriage. In addition, they felt that greater consideration was needed on the impacts for women without settled immigration status, and suggested that research indicates perpetrators will use child contact and the threat of child abduction to create additional difficulties and prevent both disclosure and access to support by the woman.

16.3.6 One family support organisation felt that single parents would be affected by many of the consultation proposals, but were disappointed that the EQIA did not consider them as a separate category. They considered this important as there would likely be a gender dimension to this:

“As single parents are mainly women there is a significant gender dimension to how the law deals with the already existing power imbalance between mothers and fathers.” (Family Support Organisation)

LGBT

16.3.7 Two LGBT organisations provided comments in respect of the impacts on LGBT groups. One noted the inappropriate terminology used within the EQIA. In particular, the references to “trans women who father children” and “trans men giving birth” were seen as being inappropriate and insensitive, and it was suggested that transgender people would prefer to be referred to in-line with their gender identity, or simply as parents (without the inclusion of any gendered reference). They also noted that these descriptions failed to recognise that non-binary people with the protected characteristic of gender reassignment can also be parents.

16.3.8 The second LGBT organisation also felt that the EQIA failed to sufficiently consider the experiences and needs of the range of LGBT communities:

“...the current EQIA does not take into account the experiences of non-binary parents, as well as not fully assessing the needs of trans parents. We also feel the partial EQIA does not take into account the potential of these reforms to benefit same-sex parents, particularly female couples, or the impact of sharing information on LGBT young people...” (LGBT Organisation)

16.3.9 Both LGBT organisations suggested that further analysis in this respect was needed, with one suggesting that LGBT organisations should be included in future EQIA exercises to ensure that they are done in a robust manner.

16.3.10 Similarly, one individual felt that little to no consultation had taken place with LGBT family groups.

16.3.11 One representative from the legal profession also highlighted that same sex and transgender cases were likely to become more prevalent in the future and so provision for this should be built in to any changes.

16.3.12 With reference to a specific consultation question, one local authority felt that Q14 (Should the presumption that the husband of a mother is the father of her child be retained in Scots law?) did not take into account same sex couples or the implications of the change on them.

Other Impacts

16.3.13 Similar to comments in relation to the Child Rights and Wellbeing Impact Assessment, the issues for and against the presumption of 50/50 shared care of a child was discussed.

16.3.14 Again, one individual argued that a rebuttable presumption of 50/50 care of children after parental separation was the most sensible option. They

indicated that this was the only way to comply with both the UNCRC and the Equality Act, and that this position was supported by evidence:

“The only solution in law compatible with the Equality Act and UNCRC is a rebuttable presumption of 50/50 care of children after parental separation. The only reason to deviate from this is if it were not in the overall best interests of children. The available evidence overwhelmingly supports 50/50 care as the care arrangement associated with the best outcomes for children.” (Individual)

16.3.15 One domestic abuse support service disagreed, however, suggesting that the evidence shows that children’s best interests and wellbeing are served by the quality of the parenting they receive rather than the amount of time spent with a parent. They felt that the EQIA did not take into account research which showed shared care can be harmful to children, for example, where there is abuse, coercion or parental conflict:

“The EQIA’s data and evidence gathering does not sufficiently take into account research which shows that shared care is harmful for children where there is abuse, coercion or parental conflict. There is evidence to show that shared care in such cases is a significant source of psychological strain on children [and] that children who are forced into contact with fathers against their will are less likely to have positive relationships with them in later life.” (Domestic Abuse Support Service)

16.3.16 Finally, one legal professional outlined age related impacts of the legal aid system, both for children and older people (i.e. grandparents). They suggested that the legal aid process for children is *“unduly onerous and burdensome” (Legal Profession)*, and that it requires information from the parents, who they may be in conflict with. Also, they noted that grandparents with care of a child can be reluctant to formalise arrangements via a court order due to the complexities of the legal aid process and therefore continue to be involved in the Children’s Hearing System.

16.4 Business and Regulatory Impact Assessment

16.4.1 One legal professional felt that over regulation should be avoided as they felt it was unnecessary and costly. They also felt that increased use of modern technology should be encouraged as this would be more efficient and provide cost savings.

16.4.2 Two public bodies identified additional necessary elements which they felt had not been included/considered within the costings, these being:

- advocacy service provision;
- an intermediary service provision;
- additional required training in respect of vulnerable witnesses; and
- increased costs that would be incurred by other agencies, such as SCTS.

- 16.4.3 One of these public bodies, while supportive of the proposals to modernise family law, felt the changes may have profound consequences for the legislation currently operating to support vulnerable children and families through the Children's Hearings System. They urged that consideration was needed from the outset of how the changes to family law could be similarly implemented in Children's Hearing legislation "*so that Children's Hearing legislation does not fall behind*" (Public Body).
- 16.4.4 One family support organisation outlined alternatives to the creation/use of child support workers and the regulation of child welfare reporters and curators *ad litem*. They suggested that a pilot could be conducted to test Parenting Co-ordinators, which could replace some or all of the work undertaken by support workers and child welfare reporters. While they acknowledged this would also have start-up and ongoing costs, they considered this could also provide an overall cost saving (when taking into account the costs to SCTS and SLAB as well as the Scottish Government) due to a reduction in court actions.
- 16.4.5 This respondent also discussed the introduction of family Sheriffs who would conduct all hearings on an inquisitorial basis, which they anticipated would reduce the length of time cases spend in court. They felt that this approach, alongside existing case management proposals, had potential to generate cost savings. It was suggested that Australia and various jurisdictions in the USA may offer examples where litigants have been offered a choice in procedure types.
- 16.4.6 Finally, one individual felt that the proposals were promising and felt that changes should be implemented as soon as possible. They suggested however, that case management and training for Sheriffs, solicitors, curators, etc. were required as priorities.

17 Other Comments

- 17.1.1 Respondents to both the main consultation document and the young persons' survey were asked to detail any other comments they had.
- 17.1.2 Additional comments were provided by 100 respondents to the main consultation document, and 32 respondents to the young persons' survey. A few respondents to the main consultation also provided comments throughout their responses that did not answer the specific consultation questions. These have also been summarised here.

17.2 Overview of Main Sentiments

- 17.2.1 Many comments reiterated responses made throughout the consultation. Commonly respondents either sought to emphasise those aspects they felt were most important or should be at the heart of any changes, or they discussed personal circumstances and experiences, or aspects of the current system which they felt needed to be addressed.
- 17.2.2 Those areas considered to be key for any future changes focused on ensuring that the child's best interest is paramount; that the child's voice can be heard and listened to throughout the process (including those of younger children); that a child should not be forced to see anyone they do not wish to; and that the child's rights, welfare and protection/safety should be at the heart of the system.
- 17.2.3 Meanwhile those areas which respondents felt needed to be addressed included the ability for one party to control or manipulate the situation or to use the system to perpetuate abuse; unequal treatment of mothers and fathers (or between resident and non-resident parents); children's views being manipulated; alienation; the inherent delays in the system; inability to adequately tackle non-compliance with contact orders; and a perceived lack of legal rights/avenues for grandparents to gain contact with their grandchildren.
- 17.2.4 Issues that were discussed by more than one respondent are outlined across the following sections.

17.3 The Child's Voice

- 17.3.1 Most of the young people who provided additional comments to the young persons' survey focused on the need to ensure that the child has a voice throughout any contact dispute or name change process, that their views and wishes are listened to, and that ultimately they should have the final say. It was stressed by several young people that children should never be forced to see somebody they don't want to:

"We are human beings not pieces of luggage with no feelings. We don't want to be forced to live in lots of houses with lots of people we want a

home and a childhood. The courts need to think of us children first and ask us what we want to do as it is our lives.” (Young Person, Age 8-12)

- 17.3.2 While some stressed that, in their own situation they either wanted to see a non-resident parent or did not want contact, they highlighted that very often the child has no say in the outcome. Often they felt their views were not considered by their parents or the courts:

“I was never allowed to give my opinion. I was never given a choice of what was happening, and I was put in very difficult situations either that the courts didn't know about, or as a result of what the courts had agreed on. The child deserves a say, because it will affect them massively if they don't. In my experience, parents often think about themselves and how to limit their communications with their ex-partner, rather than working together to help the child have the best life possible.” (Young Person, Age 17-18)

- 17.3.3 One organisation suggested that it may be helpful for courts to record how the child's views were heard, the impact this had on the case, and to record any reasons why the child's views were not considered. It was felt that this would help provide formal recognition of the value of the child's voice and could provide crucial information should enforcement of a contact order be required. Analysis of such information could also help identify any key issues, such as gaps in availability of child advocacy workers.

- 17.3.4 One individual noted anomalies within the consultation document with regards to obtaining the child's view in relation to contact and residence. It was noted that the consultation focused upon those cases that were dealt with by legal professionals, however, there was no provision for ensuring that the child's view was taken into account by parents who reach agreement without the need for legal intervention. They felt that greater awareness raising among the public regarding this statutory obligation was required, and further attention was needed around non-compliance in such situations.

17.4 Need for a Modern Perspective

- 17.4.1 A few individuals and several organisations suggested that the consultation and proposed changes to the 1995 Act provided an opportunity for family law to modernise its views on family life, to move away from traditional stereotypes of family circumstances, and to accommodate and respect transgender, non-binary, and same-sex parents:

“Increasingly the nature of family ties is changing and those ties are not always or exclusively biological. Any change to family law needs to acknowledge and reflect this protecting the rights and responsibilities of both biological and non-biological parents, and ensuring that children's best interests are upheld.” (Family Support Organisation)

“The core tenets of the Act assume ‘traditional’ models of parenthood and who should or should not be involved in a child’s life. There are so many variations of ‘family’ now that the concept of two parents, these being a male and a female and this being the paradigm that runs through legislation is out of date. Surrogacy, same sex partners, single parents etc. are not really represented in the act or consulted on in the suggested changes.” (Local Authority)

17.4.2 In relation to respecting the privacy and gender identity of transgender and non-binary parents, it was also suggested that the terminology used on birth certificates needed to be updated/be more gender neutral.

17.4.3 Similar to the comments made throughout the consultation, many individuals again stressed that there was a greater need for equality between parents, both in terms of their rights and ability to be a parent, and in how they are treated in court and by professional services:

“It does not only become a question of why a mother can put herself on the birth certificate and a dad cannot, why she has automatic PRRs and a dad does not, or why dad has to fight for every day and holiday to spend with his kids. There are deeper questions: why do dads often have to prove that they are capable of being a dad through contact centres, when step dads can be introduced to children at any time based on mum's better judgement, why is it that half-siblings on dad's side only see their brother or sister sparsely which affects their ability to properly bond, why is that grandparents on dad's side cannot have a sleepover with their grandchildren unless there is a specific court order in place? Etc. etc.” (Individual)

“...it's vital that the whole legal process around children is moved away from being mother-centric. In our modern world, we must realise the equal importance of both parents and stop giving mothers more rights and acts, simply because of their gender.” (Individual)

17.4.4 Again, some respondents (largely individuals) felt that 50/50 shared care/residence should be the presumed default (or rebuttal) position. Many also took the opportunity (again) to suggest that the process was inherently bias towards one party or the other (typically towards the mother, although a few did suggest it was bias towards the father) and indicated that this was a key area that needed to be addressed.

17.4.5 One family support organisation also indicated they would prefer that the practice of writing ‘father unknown’ on birth certificates be replaced with ‘father unregistered’:

“The Victorian connotations of the phrase ‘father unknown’ have no place in a modern world and ‘unregistered’ offers no stigma.” (Family Support Organisation)

17.5 PRRs

- 17.5.1 One individual suggested that PRRs should automatically be removed from absent parents after a certain timescale, without the need to go to court. It was felt this was necessary to allow the present parent to achieve certain things that would be beneficial for the child. This sentiment was echoed by one respondent to the young persons' survey, who had personal experience of an absent father having PRRs and making life more challenging for them:

"I hated that my dad had rights even though I haven't seen him for years and he had refused to sign the papers for us to get passports and change our names..." (Young Person, Age 13-16)

- 17.5.2 Similarly, one legal professional suggested that PRRs can create situations where court orders have to be sought, for example to take a child on holiday abroad, where someone with PRRs is withholding consent. They felt this created largely unnecessary litigation and was an area that needed to be addressed.
- 17.5.3 One children's organisation and one young person also felt that PRRs can create specific difficulties for children in care, for example, if the current carer is not the person with PRRs there can be difficulties in getting approval for school trips, etc. It was felt that, for children in care, PRRs should automatically move with the child, so that the person providing the care at any given time would be granted PRRs.

17.6 Alternative Approaches

Dedicated Sheriffs and an Inquisitorial Approach

- 17.6.1 Several respondents suggested that contact cases should be dealt with by the same Sheriff throughout (wherever possible) and/or that hearings should take a more inquisitorial (and less adversarial) approach.
- 17.6.2 Another respondent also discussed a lack of consistency in the Sheriffs involved in hearing cases. They suggested that continuity provides more efficient and improved results as the Sheriff is familiar with the case:

"It would not be considered good practice in any business to change the decision maker every time a decision is made." (Individual)

- 17.6.3 One family support organisation suggested the introduction of a new, non-court based system for contact disputes. This would consist of parenting co-ordinators who would take a more problem solving (rather than adversarial) approach to the dispute:

"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... Parenting Co-ordinators would recognise the parents and their children as individuals who should be supported rather than contestants in a damaging game.” (Family Support Organisation)

Other Suggestions for Alternative Approaches

- 17.6.4 One individual suggested that, in contact dispute cases, Sheriffs should spend a week with each parent while they are in charge of the child before making any decisions.
- 17.6.5 Another individual suggested that one solicitor should deal with the case and represent the entire family, rather than having solicitors on opposing sides. They also suggested that cases should be publicly funded to ensure parity on both sides:
- “We should have one solicitor dealing with the family and not a solicitor representative for each parent costing thousands and the government should cover all costs to make sure this is fair and unbiased no parent should be allowed to get themselves into debt trying everything they can to get access to their own children.” (Individual)*
- 17.6.6 One children’s organisation suggested that a pilot scheme, called ‘Contactfamily’ be considered for facilitating contact arrangements in cases where there has been domestic abuse. They outlined that a third party provider passes on messages about contact arrangements, meaning no direct contact is required between a perpetrator and victim of abuse.

17.7 Comments Related to the Consultation Itself

- 17.7.1 A few young people expressed their appreciation at being given the opportunity to have their say and contribute to the consultation via the young persons’ survey. One young person, however, felt that that younger children were unlikely to have been able to understand the questionnaire.
- 17.7.2 One individual and several organisations suggested that some topics included within the consultation would merit further consideration, research, development, and discussion/consultation. It was felt that some of the proposals were not very detailed and therefore more thought would be required to assess the impact on children’s rights and any potential unintended consequences (with a few organisations suggesting that a review of the system by the Scottish Law Commission may be appropriate). A few also felt that the scope of the consultation was very ambitious, and suggested that some of the sections would have warranted a consultation in their own right. Similarly, a few considered that the consultation proposed piecemeal changes to the legislation, and that the scope was wider than just the 1995 Act and, as such, there was concern that other key stakeholders (including those representing health and education) may not have responded. Several respondents were, therefore, keen that further

consultation took place before changes were made and/or before moving to a Bill.

17.7.3 A few organisations also suggested that the consultation often seemed to prioritise the rights of various adults over the rights of/best interests of the child. Others suggested that, at times the consultation questions focused too much on systems and processes without taking full account of the impact that these changes will have on children and families. These were views that had also been highlighted throughout the consultation.

17.7.4 One individual also noted that several of the consultation questions did not appear to relate to issues directly dealt with by the 1995 Act. Again, this was a sentiment also expressed by a few respondents throughout the consultation.

17.7.5 A few individuals also felt that the consultation missed the opportunity to place the issues in a wider context and provide overarching solutions, and to debate the necessary and supporting philosophical questions:

“If this consultation is really about shaping the future for children and families in Scotland then we need to be having the big debates - who is a child, who is a parent, who decides on the identity of the child to be registered and how do we manage the sometimes competing interests and rights of the children and the adults before we try to fix some of the relatively minor issues of implementation.” (Individual)

17.7.6 Similar to one of the comments in relation to the EQIA, a few respondents (both organisations and individuals) commented on what was perceived to be an unfair bias by disproportionately advancing the views and issues of one group:

“I am also concerned to find throughout this consultation that a leading role and undue influence seems to have been afforded to a single (gendered) adult special interest group (Women's Aid). That organisation and the important issue with which it partially deals appears to disproportionately dominate this consultation, when the act itself properly claims the paramount consideration to be the best interests of children... It is simply not useful or appropriate to consider every aspect of (family) life in Scotland first and mainly through the lens of violence against women.” (Individual)

17.7.7 A few organisations also noted disappointment that the consultation document did not link the proposed changes to the 1995 Act to GIRFEC:

“Whilst the context of the consultation reflects this welcome focus on the UNCRC, it is disappointing that there is limited alignment with significant related policy areas, most critically Scotland’s national approach to improving outcomes and supporting children’s wellbeing Getting It Right For Every Child (GIRFEC), which is not mentioned at all in the consultation document.” (Children’s Organisation)

17.8 Other Comments

ADR Options

- 17.8.1 One individual noted that, while parenting classes are suggested as a sanction for breaching a contact order, there was no mention of these at other points in the consultation. It was felt these had much to offer if used earlier in the process, and perhaps consideration was needed of whether all parents who are in dispute over contact or residence should be required to attend a short course of parenting classes.
- 17.8.2 One family support organisation also expressed disappointment that this topic had only been allocated one question within the consultation.

Issues for Prisoners

- 17.8.3 In several areas of the consultation, one family support organisation stressed the importance and/or difficulties of issues for prisoners. In particular, it was felt that, for some of the proposals, additional support would be required for prisoners to exercise their rights, (e.g. to take part in joint registrations of birth, to engage with and exercise their PRRs, and to be involved with their children).

Implications for Other Agencies

- 17.8.4 Throughout the consultation, a few public sector bodies (particularly SCTS and SLAB) highlighted where proposals may have an impact (both cost and/or resource based) on their services. The extent of such impacts were however, difficult to determine at this stage, and would require greater information regarding how the proposals would be implemented and who would take responsibility for specific elements.

No Change

- 17.8.5 A few respondents suggested that the 1995 Act was working well and that change for change sake should not to be encouraged. One also felt that the consultation questions suggested that any future changes could make the Act more complex and confusing.

Other Issues Directly Related to the Consultation

- 17.8.6 Several organisations stressed the need for any changes made to family law, or in how children are able to engage with the civil court process, to be reflected in similar reforms in the Children's Hearing system. Indeed, a few highlighted that any changes made to the 1995 Act had implications for both the Adoption and Children (Scotland) Act 2007 and the Children's Hearings (Scotland) Act 2011.
- 17.8.7 Similar to comments made throughout the consultation, a few respondents called for greater training for all professionals who work with families and

children. Specific areas highlighted for training included domestic abuse, coercive control, and to develop trauma informed processes.

- 17.8.8 A few individuals suggested that more support was required for vulnerable parents, including those with mental health issues, when engaged in child contact disputes.

Other Comments Less Directly Related to the Consultation

- 17.8.9 Other comments, with less direct relevance to the consultation and child based cases, were also made.

- 17.8.10 Several individuals suggested that the current calculations used by the Child Maintenance system created a risk that contact and care arrangements would be manipulated for financial gain - as payments are based on the proportion of time a child spends with each parent and does not take into account the resident parent's income. This was considered as an area which required review/reform:

"I have fought for 50% care but sole reason not agreed is that my ex would lose my CMS [Child Maintenance System] payment." (Individual)

- 17.8.11 A few respondents (both individuals and organisations) highlighted perceived issues with the Legal Aid system, in particular where funding is issued to one party but not the other. This was considered to provide the legally aided party with an advantage and create a barrier to decisions being made in the best interests of the child:

"Cost is a barrier to ensuring that a decision is made in the best interests of the children. Where one party can access legal aid or can afford to pay privately and the other cannot access legal aid but has limited resources, the latter will often have no option but to represent themselves or give up and accept what the other party wants." (Domestic Abuse Support Service)

- 17.8.12 Finally, several respondents also indicated they would welcome/prefer an interview process to provide their views, and/or that they would be willing to speak to the Scottish Government directly regarding the content of the consultation. A few also sought help or advice regarding their specific issues/difficulties in their case.

Appendix A: Additional Information at Q10

Q10. 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?

The following specific amendments to the Children (Scotland) Act 1995, the Children's Hearings (Scotland) Act 2011, and the Adoption and Children (Scotland) Act 2007 were suggested by a range of different organisations.

1. Add a new section 17(1)(ba) and amend section 17(1)(c) of the Children (Scotland) Act 1995 as follows:

“(1) Where a child is looked after by a local authority they shall, in such manner as the Secretary of State may prescribe - (ba) consider placing siblings together; and (c) take such steps to (i) promote, on a regular basis, personal relations and direct contact between the child and any person with parental responsibilities in relation to him (ii) promote and facilitate, on a regular basis, personal relations and direct contact between the child and any siblings of the child, as appear to them to be, having regard to their duty to him under paragraph (a) above, both practicable and appropriate.”

2. Add a new section 17(8) as follows:

“(8) Any reference in this section to a sibling includes any full sibling, half sibling, step sibling by virtue of marriage or civil partnership, sibling by virtue of adoption, and any other person the child regards as their sibling and with whom they have an established family life.”

3. Amend the Children's Hearings (Scotland) Act 2011 to:

- place a duty on the children's hearing to consider sibling contact at each hearing, whether representations are made on behalf of the sibling or not;
- give siblings the right:
 - to be notified of hearings;
 - to make representations as to sibling contact;
 - to seek measures of sibling contact; and
 - to appeal against decision of hearing or court in respect of sibling contact.
-

4. Amend the Adoption and Children (Scotland) Act 2007 to:

- introduce explicit rights for siblings:
 - to be notified of permanence proceedings;
 - to make representations;
 - to make application for contact with their sibling; and
 - to appeal against any decision;
- place a duty on the court to consider sibling contact.

The following changes/additions were also suggested by several organisations and one individual. Respondents considered they should be included in statutory and practice guidance to embed a rights-based culture and achieve practice change:

1. Recognition of the immense importance of life-long sibling relationships and supporting children to maintain this consistency in their lives. Preserving relationships that are important to a child is as important as building attachments with new carers and family and is key to equipping a child to grow up with the necessary skills to develop and maintain healthy adult relationships.
2. Including protecting sibling relationships in corporate parenting plans and activities.
3. Including protecting sibling relationships in Care Inspectorate assessments.
4. Recording of children's sibling relationships in social work and SCRA systems to help enable cross-referencing and ensure that records of siblings accommodated are linked.
5. A requirement for consistent recording of children's views regarding sibling placements, direct contact and information exchange as part of the Children's Hearings, looked after reviews, and court processes. Children and young people must be supported to understand the decisions that are made.
6. Acknowledgement that the nature of sibling relationships change as children develop and mature and flexible support is needed to accommodate these changes.
7. Universal access to life-story work for children permanently separated from birth siblings throughout childhood and early adulthood, to promote emotional and relational wellbeing.
8. Balancing the best interests of all siblings when assessing whether contact is appropriate.
9. Ensuring risk assessment of sibling contact is separate from that of parental contact, to avoid conflation of risks.
10. Where there are emergency situations requiring children to be separated from their siblings, once safety is secured in the short term, the long-term needs of the child must be considered without undue delay, including the need to maintain relationships the child considers important and to reunite siblings at the first available opportunity.
11. Provision of developmental and age appropriate support to sibling relationships, to help maintain and restore these over the long term. This support should take account of both the normal ups and downs of sibling relationships and the need of children who have experienced trauma for particular support to address this and move forward. This will often require input from professionals in relation to how to communicate and sustain relationships with one another.
12. Facilitation of contact with siblings of all ages, including when one sibling is an adult, and irrespective of whether the siblings were known to each other before they became looked after.

13. A range of support, both practical and financial, should be available to carers and adoptive parents to allow them to facilitate sibling contact. Contact will often rely on the co-operation and support of parents or carers. Information, education, training and ongoing support for parents and carers may be required to enable them to understand the benefits of contact and respond to any emerging risks.
14. Removal or interruption of contact should never be a sanction, or method of punishment.
15. Emphasis should be given to the quality of children's experiences of sibling contact. This should as far as possible mirror typical family practices in terms of timing, location, activities and supporting risk. Brothers and sisters should not be expected to spend time together in unwelcoming office rooms. This is not a family-like environment, and does not allow brothers and sisters to relax, play, talk, re-connect, and spend quality time together. They should also have the opportunity to spend time together without a parent being present, and be provided with a setting where only one sibling group is present at a time. As far as possible venues should be neutral and away from previous negative experiences and association and supervised by staff able to promote positive relationships and assist children in developing such relationships. The facility for high quality direct sibling contact provided by Siblings Reunited (STAR) is unique in Scotland and we would like to see more children benefit from similar experiences across Scotland.
16. Recognition that contact between siblings can take many different forms, not just direct contact. For example, communication via social media or mediated information exchanges can be safer in certain circumstances and can meet particular needs. Simply receiving information about the existence and progress of a sibling may be sufficient in some cases to reassure a child or help with identity issues. Therefore, proper assessment of the purpose and appropriate form of contact is necessary as part of care planning.
17. A lack of information is highly distressing for children and young people. Effort is needed to support children to understand why decisions have been made, especially where contact is not able to happen.

Appendix B: Glossary of Terms

The 1995 Act - The Children (Scotland) Act 1995

The 1984 Act - The Child Abduction Act 1984

The 1986 Act - The Family Law Act 1986

The 2006 Act - The Family Law (Scotland) Act 2006

The 2011 Act - The Children's Hearings (Scotland) Act 2011

2011 Act Proceedings - The court proceedings that arise from Children's Hearings, mainly relating to proof of grounds of referral or appeals against Children's Hearings.

S.I. 1965/1838 - The Registration of Births, Deaths and Marriages (Scotland) Act 1965. S.I. 1965/1838 of the Act requires an informant as defined in section 14 of the 1965 Act to sign the re-registration entry. This excludes unmarried fathers.

Brussels IIA - Regulation 2201/2003 establishes rules on jurisdiction in matrimonial proceedings and provides for mutual recognition and enforcement of judgements from such proceedings. It also covers jurisdiction and recognition and enforcement of orders relating to parental responsibility (including residence and contact) and provides rules on the return of children abducted to, or wrongfully retained in, other Member States.

Barnahus model - Barnahus (which literally means Children's House) is a child-friendly, interdisciplinary and multi-agency centre for child victims and witnesses where children could be interviewed and medically examined for forensic purposes, comprehensively assessed and receive all relevant therapeutic services from appropriate professionals. The Barnahus model was adopted in order to create a specific legal system that responds to the special needs of children about whom there is suspicion that they have been subjected to violence or abuse. It also derives from the principle that the needs of children in these cases are totally different from those of adults in the same situation.

CAFCASS - The Children and Family Court Advisory and Support Service in England and Wales. CAFCASS' duty is to safeguard and promote the welfare of children through the family justice system.

Capacity - Being mature enough and of sound mind to develop an understanding of the situation and potential consequences of their actions, and to form their own views and opinions on a matter. Legal capacity is the age (typically age 12 and over) at which a child is deemed mature enough to instruct a solicitor, consent to or reject medical treatment, make a will, consent to adoption or permanence, etc.

Child - defined in section 1(2) of the 1995 Act as a person under the age of 16 years for the purposes of Parental Responsibilities and Rights, apart from in relation to parents providing guidance where a child covers a person under the age of 18 years.

Child support worker - (sometimes referred to as a child welfare worker, children's advocacy services or children rights officer). In relation to this consultation, Child Support

Workers could be created to advise the child about the court process, help the child provide views to the court (e.g. by sitting in on any interviews with a child welfare reporter), and outline court decisions to the child. They would be there to support the child and explain things to the child rather than be a party to the court case.

Child Welfare Hearing - When child contact disputes reach court they are usually heard in Child Welfare Hearings, which are civil proceedings.

Child Welfare Reporter - formerly called “bar reporters”. They are court appointed people who investigate and prepare reports on the best interests of the child. Child Welfare Reporters are usually independent solicitors, experienced in Family Law, although social workers also prepare such reports in some areas.

Children’s Hearing - This is a legal meeting (often just called a Hearing or a Panel), that children and young people are sometimes asked to go to with their families or carers if there are concerns about the child or young person.

Children’s Hearings System - The Children’s Hearings System deals with children and young people in Scotland under the age of eighteen who are in need of help. The Children’s Hearings System will typically help a child or young person when they are in need of care and protection or when they have got into trouble with the police.

Children’s Reporter - (sometimes just called a ‘Reporter’). This is the person who decides whether or not a child or young person who has been referred to the Scottish Children’s Reporter Administration should attend a Hearing.

Contact - A formal or informal agreement for a child to spend time with a non-resident parent or other family members/persons.

Curator *ad litem* - An officer of the court who is appointed to represent and protect the interests of a person lacking full capacity, including a child.

ECHR - European Convention on Human Rights. An international treaty which protects human rights and fundamental freedoms in Europe. Scottish Ministers are required to comply with the terms of the ECHR.

F9 Form - This is a form designed for a child in contact dispute cases to complete (with help from an independent adult) which allows them to tell the Sheriff in their case about their views for their future.

Family law - covers a wide range of areas including divorce and dissolution, parental responsibilities and rights, contact and permanence, and adoption cases.

GIRFEC - Getting it Right for Every Child (GIRFEC) is central to all Scottish Government policies which support children, young people and their families and is delivered through services and people who work with families. It aims to support families by making sure children and young people can receive the right help, at the right time, from the right people, and provides a way for families to work in partnership with people who can support them, such as teachers, doctors and nurses.

Grounds of referral - This is the name given to the statement of facts that set out the reasons for a child being referred to a Children's Hearing under the 2011 Act.

Hague Convention - The Hague Convention on the Civil Aspects of International Child Abduction provides a worldwide mechanism for the return of children abducted to, or wrongfully retained in participating countries.

Informal Domestic Relations Trials (IDRT) - These 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.

Judge - In relation to this consultation document this was the term used in the young persons' survey in reference to a Sheriff.

Legal Aid - Publicly funded legal assistance allowing people to pursue or defend their rights, or pay for their defence, when they could not otherwise afford to do so. When someone applies for legal aid, their application is subject to statutory tests which cover the merits of the case and the means available to the applicant.

Litigants - a person involved in a lawsuit. The term applies to both criminal and civil cases.

LGBT - Lesbian, Gay, Bisexual and Transgender

Lord President - the most senior judge in Scotland and the head of the court judiciary.

Non-resident parent - If a child stays with both parents after parental separation, the non-resident parent is the one who spends fewer nights with the children. If the children spend an equal number of nights with each parent, normally the non-resident parent is the one who is not getting child benefit for the children.

Mind Of My Own (MOMO) - This is an organisation who create digital participation tools (apps) to support and enable children and young people to have their voices heard and to participate in decisions about their lives.

Parenting Management Hearings (PMH) - These have been introduced in Australia to offer an alternative to traditional court hearings as a means of resolving family law disputes between party litigants. The scheme is proposed to be a 'fast, informal, non-adversarial dispute resolution mechanism'. Hearings 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.

Party litigant - An individual who appears in court action without a legal representative (such as a solicitor or advocate). Such an individual would conduct their case by themselves, including the research and expressions of the law, procedures, forms, delays, and submissions.

Permanence - Permanence orders were introduced by the Adoption and Children (Scotland) Act 2007. A permanence order provides a mechanism by which a Local Authority can apply to the Court to have the parental responsibilities and rights (PRRs) in respect of a child vested in the Local Authority or another person, such as kinship carers (relatives looking after a child), foster carers or prospective adopters. In the majority of cases this involves having the PRRs removed from the child's natural parent(s) when they are unable to satisfactorily exercise and discharge these responsibilities and rights and are likely to be unable to do so.

Principal Reporter - The Principal Reporter is an independent official within the Children's Hearings System with powers to delegate functions to other officers in particular Children's Reporters.

Primary legislation - Acts of Parliament.

Proof - Final stage of court proceedings at which a sheriff determines a case after hearing evidence.

PRRs - Parental Responsibilities and Rights as defined in section 1 of the 1995 Act.

Relevant Person - Someone who has the right to attend a Children's Hearing and get information about it. A Relevant Person can be the child or young person's parent, grandparent, carer, guardian or the person who looks after them, but they must be deemed to be relevant by a Children's Hearing if they are not the child or young person's biological or adoptive mother or father. A pre hearing panel can decide that someone should be treated as a Relevant Person because they have or recently have had, significant involvement in a child or young person's upbringing. This is called "deeming" someone to be a Relevant Person. Someone with deemed Relevant Person status can have this reviewed at a later date if they no longer have significant involvement with the child or young person.

Residence - Where a person lives. In the case of child residence cases, the court will determine which parent the child will live with for the majority of the time.

Resident parent - The parent a child lives with for the majority of the time, or the parent who receives child benefit for the children (where time is split equally between both parents).

Safeguarder - An independent person appointed by a Children's Hearing in relation to a child to prepare a report to assist the hearing to make a decision on what is in the welfare of the child.

SCJC - The Scottish Civil Justice Council prepares draft rules of procedure for the civil courts in Scotland and advises the Lord President on the development of the civil justice system in Scotland.

SCRA - The Scottish Children's Reporter Administration is a national body focused on children and young people most at risk. Its main responsibilities are to facilitate the work of Children's Reporters, to deploy and manage staff to carry out that work and to provide suitable accommodation for Children's Hearings.

SCTS - Scottish Courts and Tribunals Service. An independent public body providing administrative support to Scottish courts and tribunals and to the judiciary.

Secondary legislation - Forms of law that are not primary legislation. This includes statutory instruments.

Section 11 Order - An order made by either Court of Session or the Sheriff Court under section 11 of the 1995 Act in relation to parental responsibilities and rights, guardianship, the administration of a child's property, who a child lives with or who a child should maintain personal relations and direct contact with.

Sheriff - A judge in the Sheriff Court. Sheriffs deal with the majority of civil and criminal court cases in Scotland. Sheriffs hear almost all family cases including divorce, child welfare, adoptions and Children's Hearing's cases.

Sheriffdoms - Scotland's courts are geographically divided into six sheriffdoms for administrative purposes.

Sheriffs Principal - The Sheriffs Principal head each of Scotland's six Sheriffdoms. They have responsibility for ensuring the efficient disposal of court business within their area.

SLAB - Scottish Legal Aid Board. Manages and administers the legal aid system in Scotland.

UNCRC - The United Nations Convention on the Rights of the Child. An international treaty which covers all aspects of a child's life and sets out the civil, political, economic, social and cultural rights that all children are entitled to and how adults and governments must work together to make sure all children can enjoy their rights. The Scottish Ministers have duties under the Children and Young People (Scotland) Act 2014 to keep under consideration whether there are any steps which they could take to give better or further effect to the UNCRC requirements.



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